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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2016-CP-10-03455
Appellate Case No. 2020-001328

Six Fifty Six Owners Association, Inc. and Robert John Nutley, individually, and on behalf of others similarly situated, Plaintiffs,

v.

Winsor South, LLC and Jeffrey M. Thomas, individually, and on behalf of a class of construction defendants; Southeastern Recapitalization Group, LLC; WCM Construction, LLC; Jonathan J. Thomas; AC Heating and Air Conditioning Service, Inc.; ACME Doors, Inc.; Alpha Omega Construction Group, Inc.; Atlantic Construction Services, Inc.; Buck Lumber and Building Supply, Inc.; Builders FirstSource, Inc.; Builders FirstSource-Atlantic Group, LLC; Builders FirstSource - Florida a/k/a Builders FirstSource-Florida Design Center, LLC; Builders FirstSource-Southeast Group, LLC; Charlotte Flooring, Inc.; Dirla Tawl Painting, Inc.; East Coast Wall Systems, Inc.; Fogel Services, Inc.; G&S Home Remodeling, LLC; Guaranteed Framing, LLC; J. Mora Brick & Block Mason, LLC; Land/Site Services, Inc.; Landmark Construction Company, Inc.; Lutzen Construction, Inc.; New Horizon Shutters, Inc. a/k/a New Horizon Shutters International, LLC; PJ Sanchez Masonry, LLC; Screens Plus, Inc.; Simons Construction Company, LLC; Stucco by Design, LLC; Fine Builders, LLC; Speedtruss, Inc.; AS Construction; Javier Morales Merino; Novac Construction, Inc.; MJG Construction, Inc.; Advance Plumbing, Heating, and Air, Inc.; Ashley Steel, Inc.; Cahill Contracting, LLC; Cohen;s Drywall, Inc.; Bob Porter d/b/a Custom Interior Construction; RB's Trim, Inc.; Sharon's Painting and Construction a/k/a Sharon's Painting, LLC; Davis Tile; Timothy Mitchell; Electrical Design & Construction; Hurley Services, LLC; Charleston Exteriors LLC; Jorge Diaz aka Jorge Louis Paz; San Luis Construction, Inc. nka Roofing America Metal Fabrications, LLC; Rogerio Dos Santos dba Rogerio Santos Construction; Fabio Oliviera dba Four Season Siding; Sunrise Siding; Garcia Roofing, LLC; Espino Roofing, LLC; Migual Painting, LLC,

Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vazquez aka Alfonso Rodriguez, Sr.; and John Does 55-75, Defendants,

Of which Builders FirstSource-Southeast Group, LLC is the Appellant and Hurley Services, LLC and Charleston Exteriors, LLC are the Respondents.

RECORD ON APPEAL, VOLUME ONE

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THE STATE OF SOUTH CAROLINA
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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Six Fifty Six Owners Association, Inc., et al.,

Plaintiffs,

vs.

Winsor South, LLC, et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-10-3455

**ORDER GRANTING DEFENDANTS
HURLEY SERVICES, LLC AND
CHARLESTON EXTERIORS' MOTION
FOR SUMMARY JUDGMENT AGAINST
THE CLAIMS OF BUILDERS FIRST
SOURCE-SOUTHEAST GROUP, LLC**

This matter came before the Court on March 5, 2020 on Defendants Hurley Services, LLC and Charleston Exteriors' Motion for Summary Judgment against the claims of Builders First Source-Southeast Group, LLC.

FACTUAL BACKGROUND

This litigation arises out of alleged construction defects at Six Fifty Six Coleman Boulevard, a twelve-building townhome community in Mount Pleasant, SC ("the Project"). Builders First-Source is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. It is undisputed that Builders First-Source holds an unlimited commercial general contractor's license (License No. 112969) with the South Carolina Labor Licensing & Regulation ("SC-LLR"), and Terry Rosamond is Builders First-Source's representative that serves as the "qualifying party" for such licensure in this state. Defendant supplied and installed windows and doors as a subcontractor of the Ryland Group for only the "Ryland Phase" buildings at the Project, which consists of nine (9) buildings that were constructed in 2013 and 2014. It is undisputed that Builders First-Source furnished the windows, related flashings, and caulk and provided superintendents to oversee such installation for the Ryland Phase buildings at the Project.

Builders First-Source filed a third-party complaint in the present litigation on May 9, 2017 asserting third-party claims against Hurley for contractual indemnity, breach of express and implied

warranties, breach of contract, and negligence. Hurley was ultimately made a direct defendant by Plaintiffs and Builders First-Source then asserted cross-claims against Hurley in lieu of it previously asserted third-party claims, but on all the same causes of action and grounds. Builders First-Source's operative cross-claims are contained in Builders First-Source's Answer to Plaintiffs' Third Amended Complaint filed on January 24, 2019. Builders First-Source's cross-claims allege that they are entitled to be indemnified in the amount which Builders First-Source "may pay in satisfaction" of Plaintiffs' claim "plus Builders First-Source [sic] costs for defense, inclusive of attorneys' fees, without regard for the fault of either Hurley or Builders First-Source.

Defendant Hurley Services, LLC is now before the Court on their Motion for Summary Judgment against the claims of Builders First-Source. Charleston Exteriors joins the Motion.

STANDARD OF REVIEW

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). A party's "response to the motion must set forth specific facts, *admissible in evidence*, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him." *Moody v. McLellan*, 295 S.C. 157, 163, 367 S.E.2d 449, 453 (Ct. App. 1988) (emphasis added). Summary judgment "is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 388, 701 S.E.2d 776, 779 (2010).

DECISION

Based on the submitted Motions and Oral Arguments the Court hereby finds:

- (1) There exists no genuine issue as to any material fact and Hurley Services and Charleston Exteriors are entitled to judgment dismissing all cross-claims against it as a matter of law;
- (2) Builders First Source-Southeast Group, LLC's cross-claims are barred by the doctrine of collateral estoppel because of Judge Clifton Newman's order filed on February 3, 2020 in the case of Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al, Case No. 2018-CP-08-2547. Specifically, the Court references and adopts the court's analysis in Paragraphs B and C therein.
- (3) Builders First Source-Southeast Group, LLC's cross-claims for breach of contract, breach of express and implied warranty, and negligence are "merely disguised . . . claims for equitable indemnity" and fail as a matter of law. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 634, (Ct. App. 2015);
- (4) Builders First Source-Southeast Group, LLC's cross-claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law. *See Concord and Cumberland HPR v. Concord and Cumberland, LLC*, 2018 WL 3748616 (S.C. Ct. App. 2018).

CONCLUSION

Therefore, it is ordered that Defendants Hurley Services, LLC and Charleston Exterior's Motion for Summary Judgment against the claims of Builders First Source-Southeast Group, LLC is GRANTED.

And it is SO ORDERED.

Charleston, South Carolina



Charleston Common Pleas

Case Caption: Six Fifty Six Owners Association Inc , plaintiff, et al VS Winsor South Llc , defendant, et al

Case Number: 2016CP1003455

Type: Order/Summary Judgment

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

Electronically signed on 2020-04-29 11:33:10 page 5 of 5

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003455

Six Fifty Six Owners Association Inc et al
PLAINTIFF(S)

Jonathan J Thomas et al
DEFENDANT(S)

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
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **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:

Defendant Builders First-Source's Motion for Reconsideration of the Court's Order granting summary judgment on April 29, 2020 is denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/26/2020 .

Builders First Source Southeast Group
John 58 75 Doe
Doe, John 58 75
Sunrise Siding LLC
Davis Tile
Jonathan J Thomas
Acme Doors Inc
Garcia Roofing LLC

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

Case Caption: Six Fifty Six Owners Association Inc , plaintiff, et al VS Winsor South Llc , defendant, et al

Case Number: 2016CP1003455

Type: Order/Electronic Form 4

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Builders Firstsource-Southeast Group, LLC

Plaintiff,

V

MI Windows And Doors, INC.; ECC
Contracting, LLC; Hurley Services, LLC;
and Charleston Exteriors, LLC,

Defendant,

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL CASE NO. 2018-CP-08-02547

**AMENDED ORDER GRANTING
CHARLESTON EXTERIORS,
LLC'S AND ECC CONTRACTING,
LLC'S MOTION FOR SUMMARY
JUDGMENT**

This matter came before the Court on Friday, October 18th on the Motion for Summary Judgment of the Defendant Charleston Exteriors, LLC seeking dismissal of the Plaintiff's causes of action for breach of contract, negligence, breach of warranties, and indemnity. Present and participating in the argument were the movants counsel, C. Clay Olson, Esquire of Harper Little, PLLC and the Plaintiff was represented by Witt Cox, Esquire of Howell Gibson & Hughes.

ECC Contracting filed a similar, if not identical motion which was also heard. Counsel for ECC, Heyward Grimbail, Esquire of Richardson Plowden was in attendance to advocate and advance the arguments of ECC Contracting. The ECC Motion for Summary Judgment was heard concurrently with the Charleston Exteriors motion. The Court hereby rules on both Charleston Exteriors, LLC's Motion for Summary Judgment as well as ECC's Motion for Summary Judgment.

BACKGROUND

The Plaintiff, Builders First Source Southeast Group, Inc. ("BFS") is a supplier of building materials and components, as well as a provider of construction services for new construction and remodeling projects. BFS provided materials and services at a construction

project known as the “Abbey at Spring Grove” which is located in Moncks Corner, South Carolina.

The Abbey at Spring Grove (the “Abbey”) is a 69-home residential community situated in Berkeley County, South Carolina. The Abbey was developed by Lennar Carolinas¹. To be precise, the Abbey is a portion, or phase, of the larger Spring Grove Plantation development.

A lawsuit was filed in 2014 by Patricia Damico on behalf of herself and other owners within the Abbey at Spring Grove. *See Patricia Damico and Lenna Lucas, individually and behalf of all other similarly situated v. Lennar Carolinas, LLC, et al., Case No. 2014-CP-08-02424 (the “Underlying Class Action”)*. The underlying matter was amended on more than one occasion as the Plaintiff asserted exterior window claims on November 23rd, 2015.

On November 25th, 2015, Lennar Carolinas answered the Amended Complaint and asserted Third-Party claims against several of its contractors and suppliers. Among these Third-Party Defendants was Builders First Source who signed its responsive pleading on December 15th, 2015 and filed it on December 21st, 2015.

The case before the Court was filed on December 21st, 2018 in Berkeley County, South Carolina. The allegations made against Charleston Exteriors, LLC are derived from allegations made by the Plaintiff Damico and Lennar in the underlying lawsuit. Specifically, the Plaintiff and Lennar Carolinas have alleged that BFS was negligent in the installation of windows at the Abbey; that BFS breached its subcontract agreement with Lennar by virtue of the allegations made by the Plaintiff against Lennar; that BFS breached express and implied warranties as alleged in the underlying lawsuit; that Lennar is entitled to both contractual indemnification or, alternatively, equitable indemnification from BFS due to the claims made in the underlying

¹ Lennar Carolinas is not a party to this litigation. Lennar is a Defendant in the matter styled Damico v. Lennar Carolinas, LLC.

lawsuit. As a consequence of these claims made in the underlying lawsuit, BFS has brought this lawsuit alleging that Charleston Exteriors and ECC breached their subcontract with BFS, that Charleston Exteriors and ECC breached certain implied and/or express warranties with BFS; that BFS is entitled to contractual/equitable indemnification from Charleston Exteriors and ECC; and that Charleston Exteriors and ECC were negligent in the installation of the windows at the Project.

FINDINGS OF FACT

1. Builders First Source "BFS" was on actual notice of potential claims against Charleston Exteriors, LLC on December 15, 2015. There can be no other conclusion with regard to this issue upon reviewing the Answer of Builders First Source dated December 15th, 2015. See Exhibit "A"

2. BFS has not submitted a Memorandum of Law to rebut Charleston Exteriors argument that BFS was on notice of a potential claim against Charleston Exteriors on or before December 15th, 2015.

3. Uncontroverted testimony from the hearing, coupled with a review of the D'amico record shows that at no time did BFS attempt to amend its pleadings in the underlying suit against Charleston Exteriors, LLC.

4. BFS began defending the underlying lawsuit on or before December 15, 2015.

5. BFS began incurring costs and attorneys fees when it began to defend this case on or before December 15, 2015.

6. The Subcontract Agreements entered into by ECC and Charleston Exteriors with BFS contain language concerning indemnity and the prospect of these Defendants being forced to indemnify BFS for the negligence of BFS.

7. The contractual indemnification language referenced in Paragraph 6 is both confusing and contradictory at times. The language fails to clearly and unequivocally explain that these Defendants are obligated to indemnify BFS for BFS's negligence.

8. BFS failed to present any evidence suggesting that this lawsuit seeks damages for any acts or omissions which are separate or distinct from the underlying lawsuit. The Court concludes that the claims made in this lawsuit are wholly derivative of those brought in the Damico litigation.

9. BFS entered into a Master Subcontractor Agreement with Charleston Exteriors on October 17th, 2012.

LEGAL STANDARD APPLICABLE TO RULE 56 MOTIONS

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; see *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 487 S.E.2d 187 (1997)). "Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent may not simply rest on the mere allegations contained in the pleadings." *Grant v. Mount Vernon Mills*, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* at 151. Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984). "[W]hen plain, palpable, and

indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Hedgepath v. AT&T*, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

A. THE CLAIMS OF THE PLAINTIFF FOR NEGLIGENCE, BREACH OF CONTRACT, AND BREACH OF WARRANTIES ARE TIME BARRED

South Carolina recognizes the “discovery rule” when considering an action to be time barred. Under the discovery rule, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto. *Burgess v. American Cancer Society*, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989). Also, *Abba Equip., Inc. v. Thomason*, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999) The statute of limitations for negligence, breach of contract, and breach of warranties is three years. Compelling portions of the record in the underlying matter were presented by the Defendants which illustrates that the Plaintiff was on direct and actual notice of its potential claims against Charleston Exteriors and ECC on December 15th, 2015. Subsequently, more than three years went by before this lawsuit was filed on December 21st, 2018. These causes of action fail for being untimely.

B. DISGUISED INDEMNITY CLAIMS

Although the Court has already determined that claims of BFS for negligence, breach of contract, breach of warranties (“Non-Indemnity Claims) are each barred by the three-year statute of limitations, the Court will consider the Defendants’ additional argument. The Defendants have alleged that the Non-Indemnity claims must fail pursuant to the “Stoneledge Defense” which bars claims that are disguised indemnification claims cloaked within separate

causes of action.² Upon hearing the oral arguments and reviewing memoranda presented to the Court, it is evident that the Plaintiff's Non-Indemnity claims do not exist outside of the derivative Damico lawsuit. They must, therefore, fail.

The allegations in this case make no separate or unique contention(s) which are in addition to the allegations made by Lennar and the Plaintiff in the *Damico* matter. Builders First Source has failed to provide any admissible record evidence that it sustained any separate or independent damages outside the scope of the Damico lawsuit. *See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not "suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit," trial court "properly granted summary judgment on [general contractor's] breach of contract and breach of warranty cross-claims because they are not independent causes of action from [the general contractor's] equitable indemnity claim");

C. MASTER SUBCONTRACT AGREEMENT INDEMNITY PROVISIONS ARE NEITHER CLEAR NOR EQUIVOCAL

The Defendants seek Summary Judgment as to Builders First Source's contractual indemnification claim on the ground that it violates South Carolina rules of contract construction. Section 5 of the Master Subcontract Agreement is confusing at best and deceptive at worst.

Section 5 contains two Paragraphs. The first paragraph seems to suggest that BFS may only seek indemnification for damages.....

ONLY TO THE EXTENT CAUSED. IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR

² Counsel for ECC and Charleston Exteriors presented memoranda and oral arguments consistent with the reasoning in a recent S.C. appellate case which is known as "Stoneledge" and is specifically cited as *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 776 S.E.2d 434, 439 (S.C. Ct. App. 2015)

INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.

Below this lengthy paragraph is an almost identically constructed paragraph which is slightly altered to indicate that BFS may seek indemnification from Charleston Exteriors for damages caused by the negligence of any person or entity. Specifically, the second paragraph suggests a duty to indemnify BFS.....

REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES.

The Court can only conclude that the Master Subcontract Agreement is not what our courts had in mind when setting precedent regarding “anti-indemnity” clauses in contracts. Typically, courts will construe an indemnification contract *"in accordance with the rules for the construction of contracts generally."* *Campbell*, 313 S.C. at 453, 438 S.E.2d at 272. However, when an indemnity clause purports *"to relieve an indemnitee from the consequences of its own negligence,"* our case law requires strict construction of the clause. *Laurens*, 355 S.C. at 111, 584 S.E.2d at 378-79. *"Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms."* *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). See *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018) see also *Murray v. Texas Co.*, 172 S.C. 399, 402, 174 S.E.2d 231, 234 (1934)(finding “broad and comprehensive” language was insufficient to prove the contract relieved a party from its own negligence).

BFS has failed to persuade the Court that its indemnity clause(s) in either subcontract meet the elevated standard of being a clear and unequivocal statement which leaves no question

as to BFS seeking indemnification for its own negligent acts or omissions. BFS has failed to demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contractual indemnity claims.

As South Carolina precedent requires that the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal when seeking to be indemnified for its own negligence, the Court rules that the specific language from the Master Subcontractor Agreement is confusing, conflicting, and neither unclear or unequivocal. The Defendants' Motions for Summary Judgment as to the contractual indemnity claims is hereby granted.

D. BUILDERS FIRST SOURCE'S CONTRACTUAL INDEMNIFICATION CLAIM IS ALSO BARRED PURSUANT TO THE RELEVANT STATUTE OF LIMITATIONS

The contractual indemnity claim(s) made by Builders First Source against ECC and Charleston Exteriors have also been challenged pursuant to the statute of limitations. As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant. *Choate v. United States*, 233 F. Supp. 463 (D.C. Okla. 1964) *First Gen. Servs. v. Miller*, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). Our courts, however, have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *See Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330 (Ct. App. 2015). In this case, BFS has pled that it is "entitled to full

contractual and common law indemnification for and against Liability”. See *Complaint, Paragraph 34*.

The Court draws further distinction in this case because the relief prayed for in the BFS complaint seeks consequential damages for attorney’s fees. Specifically, the Complaint against ECC and Charleston Exteriors states that, “....BFS has been subjected to liability and has incurred consequential damages in having to expend attorney’s fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.” See *Complaint, Paragraph 33*; See also *Paragraph 34* (“...entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorney’s fees, costs, and other expenses incurred in defending the underlying action... ”)

BFS began to incur liability for attorney’s costs and fees – damages it seeks in this litigation when its Answer was drafted and served. BFS’s Answer was executed and served more than three years prior to the filing of the present action. Thus BFS’s claims for “contractual and common law indemnification against Liability” are barred by the three year statute of limitations. SC. Code § 15-3-530 et seq.

The facts before the Court are distinguishable from the *First General Services* case in that BFS is seeking indemnification for damages which have begun to accrue more than three years prior to filing and, as a result, the Court is inclined to agree with the Defendants that consequential damages, as defined by the Complaint, began to accrue prior to December 15th, 2015 and, therefore, these damages cannot be recovered as Builders First Source discovered them more than three years prior to the filing of its lawsuit against Charleston Exteriors and ECC.

IT IS ORDERED that the Defendants Charleston Exteriors, LLC and ECC Contracting,

LLC's Motion for Summary Judgment is granted as to the following causes of action only:

- a. Negligence
- b. Breach of Contract
- c. Breach of Warranties
- d. Contractual Indemnity

IT IS ORDERED that these causes of action are hereby dismissed with prejudice and this ruling should serve precedent in the Damico matter as well.

THIS COURT FINDS THAT two claims remains which are subject to the Motion to Consolidate brought simultaneously by Builders First Source. The claims are for equitable indemnification and contribution. The Court finds that these claims are subject to consolidation with the related D'Amico matter which remain stayed until further notice or order.

IT IS FURTHER ORDERED that the cause of action for equitable indemnification involves a question for the jury and the Motion for Summary judgment is, therefore, denied as to that cause of action. The Plaintiff's Contribution claim survives as it was not before me as part of this motion for summary judgment.

AND IT IS SO ORDERED this ____ day of __, 2020, at ____, South Carolina.

Clifton B. Newman Presiding Judge



Berkeley Common Pleas

Case Caption: Builders Firstsource-Southeast Group, Llc VS Mi Windows And
Doors, Inc. , defendant, et al
Case Number: 2018CP0802547
Type: Order/Summary Judgment

So Ordered

s/ Clifton B. Newman, 2127

Electronically signed on 2020-02-01 21:45:57 page 11 of 11

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

SIX FIFTY SIX OWNERS ASSOCIATION,
INC. and ROBERT JOHN NUTLEY,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

vs.

WINSOR SOUTH, LLC AND JEFFREY M.
THOMAS, individually, and on behalf of a class
of construction defendants; SOUTHEASTERN
RECAPITALIZATION GROUP, LLC; WCM
CONSTRUCTION, LLC; JONATHAN J.
THOMAS; AND JOHN DOE 1-50

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2016-CP-10- 3455

COMPLAINT
(Defective Construction)
(Class Action)
(Jury Trial Demanded)

FILED
2016 JUL -5 PM 4:15
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The Plaintiffs, Six Fifty Six Owners Association, Inc. and Robert John Nutley, 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 Six Fifty Six Owners Association, Inc. (hereinafter "Association") is a non-profit corporation organized and existing under the laws of the State of South Carolina.

2. The Association is the property owners association for Six Fifty Six Horizontal Property Regime.

3. The Six Fifty Six Horizontal Property Regime (hereinafter "656 Coleman Townhomes") is a Horizontal Property Regime which exists by virtue of a Master Deed dated

March 19, 2007 and recorded on March 20, 2007 in the RMC Office of Charleston County, SC in Book E619, Page 738.

4. 656 Coleman Townhomes consists of fifty-two (52) townhomes in twelve (12) buildings and related common elements. Construction began in 2006 or 2007; and the final Certificate of Occupancy was issued June 18, 2014. The Developers turned over control of the Association to the homeowners in March 2016.

5. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code § 27-31-10, *et. seq.*, The Association is charged with certain duties, powers, rights and authority in connection with 656 Coleman Townhomes.

6. By virtue of the Master Deed and/or Bylaws, The Association is charged with, *inter alia*, the management and administration of 656 Coleman Townhomes, the investigation, maintenance and repair of 656 Coleman Townhomes' Common Elements and Areas of Responsibility, and has the right and authority to bring this action on behalf of the Association and its members.

7. The Association duly noticed and convened a Meeting of the Association wherein members of the Association overwhelmingly approved the Associations' commencement of this litigation.

8. Plaintiff Robert John Nutley (hereinafter "Plaintiff Nutley") is a citizen of Charleston County, South Carolina and is an owner of a townhome within 656 Coleman, more particularly described as 656 Coleman Blvd., Unit 204, Mount Pleasant, South Carolina, 29464.

9. Plaintiff Nutley entered into a contract to purchase the above-described real property on or about March 14, 2014.

10. By virtue of his property ownership in 656 Coleman, Plaintiff Nutley brings this action on behalf of himself and a Proposed Class of other similarly situated property owners. In

addition to his common ownership interest, Plaintiff Nutley and the Proposed Class are also members of the Association. Consequently, Plaintiff Nutley fairly and adequately represents the interests of the entire Association membership - as a member of the Association, Plaintiff Nutley shares common interests with other Association members regarding the resolution of this matter and Plaintiff Nutley is able and committed to prosecuting these common interests.

11. Defendant Winsor South, LLC is a limited liability company organized under the laws of the State of South Carolina. At all times relevant to this action, Winsor South, LLC was engaged in the business of developing, designing, constructing, repairing and/or selling townhomes in Charleston County, South Carolina.

12. Upon information and belief, Defendant Jeffrey M. Thomas is an individual residing in Charleston, South Carolina. At all times relevant to this action, Jeffrey M. Thomas was engaged in the business of developing, designing, constructing, repairing and/or selling townhomes in Charleston County, South Carolina.

13. Defendants Winsor South, LLC and Jeffrey M. Thomas were the initial builders of the 656 Coleman Townhomes.

14. Defendant Southeastern Recapitalization Group, LLC is a limited liability companies organized and existing under the laws of the State of South Carolina.

15. Defendant Southeastern Recapitalization purchased one or more of the 656 Coleman Townhomes from the original Developer, WCB, LLC, pursuant to a Limited Warranty Deed executed on December 31, 2008 and filed with the Charleston County Register of Deeds on December 31, 2008 at Book 0027, Page 504.

16. Upon information and belief, Defendant Southeastern Recapitalization finished the design and construction of one or more of the original buildings and placed new townhouses

into the stream of commerce and began the design and construction of additional buildings at the 656 Coleman Townhomes.

17. Defendant WCM Construction, LLC is a limited liability company organized under the laws of the State of South Carolina. At all times relevant to this action, WCM Construction, LLC was engaged in the business of developing, designing, constructing, repairing and/or selling townhomes in Charleston County, South Carolina.

18. Upon information and belief, Defendant Jonathan J. Thomas is an individual residing in Charleston, South Carolina. At all times relevant to this action, Jonathan J. Thomas was engaged in the business of developing, designing, constructing, repairing, and/or selling townhomes in Charleston County, South Carolina

19. Defendants WCM Construction, LLC and Jonathan J. Thomas were the second builders of the 656 Coleman Townhomes.

20. Jeffrey M. Thomas and Jonathan J. Thomas owned and/or controlled Winsor South, LLC and WCM Construction, LLC. Additionally, Jeffrey M. Thomas and Jonathan J. Thomas owned and/or controlled the first two (2) developers of the 656 Coleman Townhouses.

21. John Doe Defendants are the designers, subcontractors, suppliers and/or other entities involved in the design, construction, material manufacturing and/or supplying and/or repair of the 656 Coleman Townhomes, whose identity and location are unknown at this time.

FACTUAL ALLEGATIONS

22. This matter arises out of the design, development, construction, repair and sale of the 656 Coleman Townhomes.

23. At the time the Certificates of Occupancy were issued, the 656 Coleman Townhomes contained latent building defects.

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

25. A preliminary inspection of 656 Coleman Townhomes 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. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting there from.

26. Defendants had a duty to design, develop, construct, and repair 656 Coleman Townhomes in a workmanlike manner with suitable materials and free from all defects.

27. The aforementioned deficiencies and consequential damages evidence that Defendants breached their duties to Plaintiff.

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

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

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

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

PLAINTIFFS CLASS ACTION ALLEGATIONS

32. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure (“SCRCP”), Plaintiff Nutley brings this action both individually and as a proposed class action against Defendants on behalf of himself and all other similarly situated persons and entities, who own, per the class definition, a townhome within 656 Coleman Townhomes (hereinafter collectively referred to as the “Class”). The Class is particularly defined as follows:

All persons and entities that own a condominium within 656 Coleman Townhomes 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.

33. *Numerosity:* The Class is composed of in excess of fifty (50) persons geographically dispersed throughout the State of South Carolina, the joinder of whom in one action is impractical.

34. *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 Defendants negligently designed, developed constructed and/or repaired 656 Coleman Townhomes;
- (b) Whether the construction and/or repair of 656 Coleman Townhomes was defective;
- (c) Whether Defendants knew or should have known of the original defects;
- (d) Whether Defendants know or should have known their repairs were defective;
- (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' 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;
 - (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 other members of the Class for repair of their townhomes as well as 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.

35. *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 656 Coleman Townhomes, Defendants' conduct in concealing the defective condition of 656 Coleman Townhomes, and Plaintiff's and Class Members' purchasing homes containing building defects.

36. *Adequate Representation*: Plaintiff Nutley will fairly and adequately protect the interests of the members of the Class and has no interests antagonistic to those of the Class. Plaintiff Nutley 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.

37. *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. Additionally, given potential overlapping ownership of some building elements, the class action is the superior mechanism for the presentation of this action.

38. Further, class certification is necessary because of the co-ownership of many of the building components require that Plaintiffs' claims be prosecuted together.

39. 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 656 Coleman Townhomes.

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

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

42. The relationship of the class claims with each other and with the Association claims makes piece meal litigation and individual claims difficult.

DEFENDANT CLASS ACTION ALLEGATIONS

43. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiffs bring this action against Winsor South, LLC and Jeffrey M. Thomas, both individually and on behalf of a proposed class of construction Defendants involved in the construction of the 656 Coleman Townhomes (hereinafter collectively referred to as "Defendant Class"). The Defendant Class is particularly defined as follows:

All persons and entities involved in the design, construction,

material manufacture and/or supply, and/or repair of the 656 Coleman Townhomes 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; and (b) Plaintiffs.

44. *Numerosity*: The Defendant Class is composed of an unknown number of persons and/or entities geographically dispersed throughout the State of South Carolina, the joinder of whom in one action is impractical.

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

- (a) Whether Defendant Class negligently designed, developed constructed and/or repaired 656 Coleman Townhomes;
- (b) Whether the construction and/or repair of 656 Coleman Townhomes was defective;
- (c) Whether Defendant Class knew or should have known of the original defects;
- (d) Whether Defendant Class knew or should have known their repairs were defective;
- (e) Whether Defendant Class failed to disclose to purchasers and/or homeowners the defects and/or unsuccessful repairs; and
- (f) Whether Defendant Class have acted or refused to act on grounds generally applicable to the Defendant Class.

46. *Typicality*: Plaintiff's claims against Defendant Winsor South, LLC are typical of the claims against the Defendant Class, as all such claims arise out of Defendant Class' wrongful conduct in designing, developing, constructing, and repairing 656 Coleman Townhomes, Defendants Class' conduct in concealing the defective condition of 656 Coleman Townhomes, and Plaintiff's and Plaintiff Class Members' purchasing homes containing building defects.

47. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Defendant 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 Defendant Class is impracticable. This class action presents few management difficulties while providing unitary adjudication, economies of scale, and comprehensive supervision by a single Court.

48. Class certification is appropriate under South Carolina law because Defendant Class engaged in a uniform and common practice.

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

49. Defendants are estopped from relying on any statutes of limitation or repose by virtue of their acts. Upon information and belief, Defendants should have known 656 Coleman Townhomes was defectively constructed and failed to alert the Plaintiffs of 656 Coleman Townhomes' defective condition.

50. Defendants had a duty to inform Plaintiffs of the defects described herein, which they should have known. Notwithstanding their duty, Defendants never disclosed the defects to Plaintiffs.

51. Despite exercising reasonable diligence, Plaintiffs could not have discovered the defective condition of 656 Coleman Townhomes due to their latency.

52. Given Defendants' failure to disclose this non-public information about the defective nature of 656 Coleman Townhomes – information over which they had exclusive control – and because Plaintiffs could not reasonably have known of 656 Coleman Townhomes' defective nature, Defendants are estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

ESTOPPEL FROM PLEADING WARRANTY OBLIGATION

53. Defendants are also estopped from relying on any warranty obligation as a

defense to Plaintiffs' claims.

54. By virtue of Defendants' acts, the work performed and/or materials supplied at 656 Coleman Townhomes have not lived up to Defendants' warranties and representations, and given the defective condition of 656 Coleman Townhomes and the premature deterioration of the life expectancy of 656 Coleman Townhomes' 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.

55. Defendants, in the exercise of required diligence, which negligently failed to occur, should have known that 656 Coleman Townhomes 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 Plaintiff and the Class. In fact, Defendants have previously seen other similar failures at other projects they have constructed.

56. Accordingly, any warranty provided by Defendants fails its essential purpose because its purports to warrant that 656 Coleman Townhomes and/or its building components will be free from defects for a limited period of time when in fact 656 Coleman Townhomes and/or its building components fail far short of the expected life cycle of the townhomes.

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

58. Moreover, given the comparative posture, resources, sophistication, and knowledge of the parties, the warranty limitations are procedurally unconscionable; and given

Defendants knew or should have known that the defects existed at the time they issued the warranty, the limitations are substantively unconscionable.

59. As a result, any 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

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

61. Upon information and belief, one or more of the Defendants were put on sufficient notice of 656 Coleman Townhomes' defective condition within any statutory period prescribed by the Act.

62. Therefore, the Defendants were provided an opportunity to cure 656 Coleman Townhomes' defective condition previously, but failed to adequately perform.

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

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

64. At all times relevant hereto, the Defendants, their 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 656 Coleman Townhomes 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.

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

- (a) In failing to construct 656 Coleman Townhomes in accordance with building code, the plans and specifications, and good workmanship;
- (b) In failing to properly supervise the work and construction of 656 Coleman Townhomes;
- (c) In failing to properly coordinate the subcontractors;
- (d) In failing to construct an adequate exterior building envelope;
- (e) In failing to act as a reasonable person would in the circumstances then and there prevailing;
- (f) In covering up their own defective work and the defective work of others;
- (g) In failing to make proper repairs; and
- (h) Such other failures to be proven at trial.

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

67. 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)

68. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

69. The design, construction, sale, and repair of 656 Coleman Townhomes came with express and implied warranties that the work would be performed in a careful, diligent and workmanlike manner and that 656 Coleman Townhomes would be constructed with suitable materials and components and free from all defects and be of superior quality befitting of an upscale condominium complex.

70. The design, construction, sale and/or repair of 656 Coleman Townhomes, and the components used therein, came with implied warranties of fitness, merchantability and workmanship and with a warranty of habitability.

71. Defendants have breached their warranties by constructing and/or repairing 656 Coleman Townhomes in a defective manner as set forth above.

72. 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 John Doe Defendants who manufactured and/or supplied components used in the construction of the 656 Coleman Townhomes)

73. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs if more fully set forth herein.

74. In manufacturing and supplying products for the construction of the 656 Coleman Townhomes, the manufacturer and supplier John Doe Defendants placed products into the stream of commerce.

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

76. In the manufacture and supply of products to the 656 Coleman Townhomes, the manufacturer and supplier John Doe Defendants anticipated and expected that their products would breach the public in substantially the same condition in which they were designed, developed, constructed, and sold.

77. The manufacturer and supplier John Doe Defendants have supplied and manufactured their products in a defective manner unreasonably dangerous to persons or property other than the products themselves, which has resulted in repeated water intrusion into and damage to the 656 Coleman townhomes and other building deficiencies.

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

79. The cost of altering the design, construction, and/or repair of the products supplied to the 656 Coleman Townhomes was substantially less than the resulting damage, cost, and injury suffered by the Plaintiffs.

80. The design and manufacture of the products supplied to the 656 Coleman Townhomes was inherently defective as sold was a direct and proximate cause of the damages suffered by Plaintiffs.

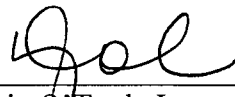
81. The manufacturer and supplier John Doe Defendants are therefore liable to Plaintiffs under the doctrine of strict liability in an amount to be determined by the trier of fact.

WHEREFORE, Plaintiffs demand a trial by jury and pray for actual and consequential damages; statutory or punitive damages; reasonable attorneys' fees; costs of suit; and prejudgment interest; treble damages; declaration/reformation of the Governing Documents; 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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Joshua F. Evans
James L. Floyd, III ("Lee")
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July 5, 2016
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

SIX FIFTY SIX OWNERS ASSOCIATION,
INC. and ROBERT JOHN NUTLEY,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

vs.

WINSOR SOUTH, LLC AND JEFFREY M.
THOMAS, individually, and on behalf of a class
of construction defendants; SOUTHEASTERN
RECAPITALIZATION GROUP, LLC; WCM
CONSTRUCTION, LLC; JONATHAN J.
THOMAS; AC HEATING AND AIR
CONDITIONING SERVICE, INC.; ACME
DOORS, INC.; ALPHA OMEGA
CONSTRUCTION GROUP, INC.;
ATLANTIC CONSTRUCTION SERVICES,
INC.; BUCK LUMBER AND BUILDING
SUPPLY, INC.; BUILDERS
FIRSTSOURCE, INC.; BUILDERS
FIRSTSOURCE-ATLANTIC GROUP, LLC;
BUILDERS FIRSTSOURCE-FLORIDA,
LLC A/K/A BUILDERS FIRSTSOURCE-
FLORIDA DESIGN CENTER, LLC;
BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP, LLC; CHARLOTTE FLOORING,
INC.; DIRIA TAWI PAINTING, INC.;
EAST COAST WALL SYSTEMS, INC.;
FOGEL SERVICES, INC.; G&S HOME
REMODELING, LLC; GUARANTEED
FRAMING, LLC; J. MORA BRICK &
BLOCK MASON, LLC; LAND/SITE
SERVICES, INC.; LANDMARK
CONSTRUCTION COMPANY, INC.;
LUTZEN CONSTRUCTION, INC.; NEW

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-10-3455

AMENDED COMPLAINT

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2017 JAN 13 PM 1:22

FILED

**HORIZON SHUTTERS, INC. A/K/A NEW)
HORIZON SHUTTERS INTERNATIONAL,)
LLC; PJ SANCHEZ MASONRY, LLC;)
SCREENS PLUS, INC.; SIMONS)
CONSTRUCTION COMPANY, LLC;)
STUCCO BY DESIGN, LLC; AND JOHN)
DOE 25-50)**

Defendants.)

The Plaintiffs, Six Fifty Six Owners Association, Inc. and Robert John Nutley, 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 Six Fifty Six Owners Association, Inc. (hereinafter "Association") is a non-profit corporation organized and existing under the laws of the State of South Carolina.

2. The Association is the property owners association for Six Fifty Six Horizontal Property Regime.

3. The Six Fifty Six Horizontal Property Regime (hereinafter "656 Coleman Townhomes") is a Horizontal Property Regime which exists by virtue of a Master Deed dated March 19, 2007 and recorded on March 20, 2007 in the RMC Office of Charleston County, SC in Book E619, Page 738.

4. 656 Coleman Townhomes consists of fifty-two (52) townhomes in twelve (12) buildings and related common elements. Construction began in 2006 or 2007; and the final Certificate of Occupancy was issued on June 18, 2014. The Developers turned over control of the Association to the homeowners in March 2016.

5. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code § 27-31-10, *et. seq.*, the Association is charged with certain duties, powers, rights and authority in connection with 656 Coleman Townhomes.

6. By virtue of the Master Deed and/or Bylaws, The Association is charged with, *inter alia*, the management and administration of 656 Coleman Townhomes, the investigation, maintenance and repair of 656 Coleman Townhomes' Common Elements and Areas of Responsibility, and has the right and authority to bring this action on behalf of the Association and its members.

7. The Association duly noticed and convened a Meeting of the Association wherein members of the Association overwhelmingly approved the Association's commencement of this litigation.

8. Plaintiff Robert John Nutley (hereinafter "Plaintiff Nutley") is a citizen of Charleston County, South Carolina, and is an owner of a townhome within 656 Coleman, more particularly described as 656 Coleman Blvd., Unit 204, Mount Pleasant, South Carolina, 29464.

9. Plaintiff Nutley entered into a contract to purchase the above-described real property on or about March 14, 2014.

10. By virtue of his property ownership in 656 Coleman, Plaintiff Nutley brings this action on behalf of himself and a Proposed Class of other similarly situated property owners. In addition to his common ownership interest, Plaintiff Nutley and the Proposed Class are also members of the Association. Consequently, Plaintiff Nutley fairly and adequately represents the interests of the entire Association membership - as a member of the Association, Plaintiff Nutley shares common interests with other Association members regarding the resolution of this matter and Plaintiff Nutley is able and committed to prosecuting these common interests.

11. Defendant Winsor South, LLC is a limited liability company organized under the laws of the State of South Carolina. At all times relevant to this action, Winsor South, LLC was engaged in the business of developing, designing, constructing, repairing and/or selling townhomes in Charleston County, South Carolina.

12. Upon information and belief, Defendant Jeffrey M. Thomas is an individual residing in Charleston, South Carolina. At all times relevant to this action, Jeffrey M. Thomas was engaged in the business of developing, designing, constructing, repairing and/or selling townhomes in Charleston County, South Carolina.

13. Defendants Winsor South, LLC and Jeffrey M. Thomas were the initial builders of the 656 Coleman Townhomes.

14. Defendant Southeastern Recapitalization Group, LLC is a limited liability company organized and existing under the laws of the State of South Carolina.

15. Defendant Southeastern Recapitalization purchased one or more of the 656 Coleman Townhomes from the original Developer, WCB, LLC, pursuant to a Limited Warranty Deed executed on December 31, 2008 and filed with the Charleston County Register of Deeds on December 31, 2008, at Book 0027, Page 504.

16. Upon information and belief, Defendant Southeastern Recapitalization finished the design and construction of one or more of the original buildings and placed new townhouses into the stream of commerce and began the design and construction of additional buildings at the 656 Coleman Townhomes.

17. Defendant WCM Construction, LLC is a limited liability company organized under the laws of the State of South Carolina. At all times relevant to this action, WCM Construction, LLC was engaged in the business of developing, designing, constructing, repairing and/or selling townhomes in Charleston County, South Carolina.

18. Upon information and belief, Defendant Jonathan J. Thomas is an individual residing in Charleston, South Carolina. At all times relevant to this action, Jonathan J. Thomas was engaged in the business of developing, designing, constructing, repairing, and/or selling townhomes in Charleston County, South Carolina

19. Defendants WCM Construction, LLC and Jonathan J. Thomas were the second builders of the 656 Coleman Townhomes.

20. Jeffrey M. Thomas and Jonathan J. Thomas owned and/or controlled Winsor South, LLC and WCM Construction, LLC. Additionally, Jeffrey M. Thomas and Jonathan J. Thomas owned and/or controlled the first two (2) developers of the 656 Coleman Townhouses.

21. Defendant AC Heating and Air Conditioning Service, Inc., formerly identified as John Doe #1, (hereinafter "AC Heating and Air") is a corporation organized and existing under the laws of the State of South Carolina. Upon information and belief, at all times relevant to this action, AC Heating and Air performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the HVAC systems and associated components in some or all of the homes.

22. Defendant Acme Doors, Inc., formerly identified as John Doe #2, (hereinafter "Acme Doors") is a corporation organized and existing under the laws of the State of South Carolina. Upon information and belief, at all times relevant to this action, Acme Doors performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the garage doors in some or all of the homes.

23. Defendant Alpha Omega Construction Group, Inc., formerly identified as John Doe #3, (hereinafter "Alpha Omega") is a corporation organized and existing under the laws of the

State of North Carolina. At all times relevant to this action, Alpha Omega performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the installation of the roofing and related waterproofing, flashing, and other associated components on some or all of the homes.

24. Defendant Atlantic Construction Services, Inc., formerly identified as John Doe #4, (hereinafter "Atlantic Construction") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Atlantic Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing members, windows, doors, and related components on some or all of the homes.

25. Defendant Buck Lumber and Building Supply, Inc., formerly identified as John Doe #5, (hereinafter "Buck Lumber") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Buck Lumber performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing members, windows, doors, and related components on some or all of the homes.

26. Defendant Builders FirstSource, Inc., formerly identified as John Doe #6, (hereinafter "Builders FirstSource") is a corporation organized and existing under the laws of the State of Delaware. At all times relevant to this action, Builders FirstSource performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to

the supply and installation of the windows and related waterproofing, flashing, and other associated components on some or all of the homes.

27. Defendant Builders FirstSource-Atlantic Group, LLC, formerly identified as John Doe #7, (hereinafter "Builders FirstSource-Atlantic") is a company organized and existing under the laws of the State of Delaware. At all times relevant to this action, Builders FirstSource-Atlantic performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the windows and related waterproofing, flashing, and other associated components on some or all of the homes.

28. Defendant Builders FirstSource-Florida, LLC a/k/a Builders FirstSource-Florida Design Center, LLC, formerly identified as John Doe #8, (hereinafter "Builders FirstSource-Florida") is a company organized and existing under the laws of a State other than South Carolina. At all times relevant to this action, Builders FirstSource-Florida performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the windows and related waterproofing, flashing, and other associated components on some or all of the homes.

29. Defendant Builders FirstSource-Southeast Group, LLC, formerly identified as John Doe #9, (hereinafter "Builders FirstSource-Southeast") is a company organized and existing under the laws of the State of Delaware. At all times relevant to this action, Builders FirstSource-Southeast performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the windows and related waterproofing, flashing, and other associated components on some or all of the homes.

30. Defendant Charlotte Flooring, Inc., formerly identified as John Doe #10, (hereinafter "Charlotte Flooring") is a company organized and existing under the laws of the State of North Carolina. At all times relevant to this action, Charlotte Flooring performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the ceramic tile and other associated components on some or all of the homes.

31. Defendant Diria Tawi Painting, Inc., formerly identified as John Doe #11, (hereinafter "Diria Tawi") is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Diria Tawi performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the paint, caulking, and related waterproofing, flashing, and other associated components on some or all of the homes.

32. Defendant East Coast Wall Systems, Inc., formerly identified as John Doe #12, (hereinafter "East Coast Wall Systems") is a company organized and existing under the laws of the State of North Carolina. At all times relevant to this action, East Coast Wall Systems performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the drywall, painting, and related waterproofing, flashing, and other associated components on some or all of the homes.

33. Defendant Fogel Services, Inc., formerly identified as John Doe #13, (hereinafter "Fogel Services") is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Fogel Services performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the

construction of the 656 Townhomes including but not limited to the supply and installation of the HVAC systems and associated components in some or all of the homes.

34. Defendant G&S Home Remodeling, LLC, formerly identified as John Doe #14, (hereinafter "G&S Home") is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, G&S Home performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the gutters and associated components on some or all of the homes.

35. Defendant Guaranteed Framing, LLC, formerly identified as John Doe #15, (hereinafter "Guaranteed Framing") is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Guaranteed Framing performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing members, windows, doors, and related components in some or all of the homes.

36. Defendant J. Mora Brick & Block Mason, LLC, formerly identified as John Doe #16, (hereinafter "J. Mora Brick") is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, J. Mora Brick performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the masonry veneer, masonry columns, concrete footings, masonry foundations, and related components in some or all of the homes.

37. Defendant Land/Site Services, Inc., formerly identified as John Doe #17, (hereinafter "Land/Site Services") is a company organized and existing under the laws of the State

of South Carolina. At all times relevant to this action, Land/Site Services performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to performing the site work and related components in the construction of the homes.

38. Defendant Landmark Construction Company, Inc., formerly identified as John Doe #18, (hereinafter "Landmark Construction") is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Landmark Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to performing the site work and related components in the construction of the homes.

39. Defendant Lutzen Construction, Inc., formerly identified as John Doe #19, (hereinafter "Lutzen Construction") is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Lutzen Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the foundations, concrete slabs, and other related components in the construction of the homes.

40. Defendant New Horizon Shutters, Inc. a/k/a New Horizon Shutters International, LLC, formerly identified as John Doe #20, (hereinafter "New Horizon") is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, New Horizon performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the shutters on some or all of the homes.

41. Defendant PJ Sanchez Masonry, LLC, formerly identified as John Doe #21, (hereinafter "PJ Sanchez Masonry") is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, PJ Sanchez Masonry performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the masonry veneer, masonry columns, concrete footings, masonry foundations, and related components in some or all of the homes.

42. Defendant Screens Plus, Inc., formerly identified as John Doe #22, (hereinafter "Screens Plus") is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Screens Plus performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the screens and related components in some or all of the homes.

43. Defendant Simons Construction Company, LLC, formerly identified as John Doe #23, (hereinafter "Simons Construction") is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Simons Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the exterior cladding, siding, exterior trim, and related components on some or all of the homes.

44. Defendant Stucco By Design, LLC, formerly identified as John Doe #24, (hereinafter "Stucco By Design") is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Stucco By Design performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products

used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the stucco, insulation, caulking, sealant, and related components on some or all of the homes.

45. John Doe Defendants 25-50 are the designers, subcontractors, suppliers and/or other entities involved in the design, construction, material manufacturing and/or supplying and/or repair of the 656 Coleman Townhomes, whose identity and location are unknown at this time.

FACTUAL ALLEGATIONS

46. This matter arises out of the design, development, construction, repair and sale of the 656 Coleman Townhomes.

47. At the time the Certificates of Occupancy were issued, the 656 Coleman Townhomes contained latent building defects.

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

49. A preliminary inspection of 656 Coleman Townhomes 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. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting there from.

50. Defendants had a duty to design, develop, construct, and repair 656 Coleman Townhomes in a workmanlike manner with suitable materials and free from all defects.

51. The aforementioned deficiencies and consequential damages evidence that Defendants breached their duties to Plaintiff.

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

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

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

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

PLAINTIFFS CLASS ACTION ALLEGATIONS

56. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff Nutley brings this action both individually and as a proposed class action against Defendants on behalf of himself and all other similarly situated persons and entities, who own, per the class definition, a townhome within 656 Coleman Townhomes (hereinafter collectively referred to as the "Class"). The Class is particularly defined as follows:

All persons and entities that own a condominium within 656 Coleman Townhomes 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.

57. *Numerosity:* The Class is composed of in excess of fifty (50) persons geographically dispersed throughout the State of South Carolina, the joinder of whom in one action is impractical.

58. *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 Defendants negligently designed, developed constructed and/or repaired 656 Coleman Townhomes;
- (b) Whether the construction and/or repair of 656 Coleman Townhomes was defective;
- (c) Whether Defendants knew or should have known of the original defects;
- (d) Whether Defendants know or should have known their repairs were defective;
- (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' 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;
- (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 other members of the Class for repair of their townhomes as well as 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.

59. *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 656 Coleman Townhomes, Defendants' conduct in concealing the defective condition of 656 Coleman Townhomes, and Plaintiff's and Class Members' purchasing homes containing building defects.

60. *Adequate Representation:* Plaintiff Nutley will fairly and adequately protect the

interests of the members of the Class and has no interests antagonistic to those of the Class. Plaintiff Nutley 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.

61. *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. Additionally, given potential overlapping ownership of some building elements, the class action is the superior mechanism for the presentation of this action.

62. Further, class certification is necessary because of the co-ownership of many of the building components require that Plaintiffs' claims be prosecuted together.

63. 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 656 Coleman Townhomes.

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

65. Each Class Member has an interest of more than \$100.00.
66. The relationship of the class claims with each other and with the Association claims makes piece meal litigation and individual claims difficult.

DEFENDANT CLASS ACTION ALLEGATIONS

67. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiffs bring this action against Winsor South, LLC and Jeffrey M. Thomas, both individually and on behalf of a proposed class of construction Defendants involved in the construction of the 656 Coleman Townhomes (hereinafter collectively referred to as "Defendant Class"). The Defendant Class is particularly defined as follows:

All persons and entities involved in the design, construction, material manufacture and/or supply, and/or repair of the 656 Coleman Townhomes 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; and (b) Plaintiffs.

68. *Numerosity*: The Defendant Class is composed of an unknown number of persons and/or entities geographically dispersed throughout the State of South Carolina or other States, the joinder of whom in one action is impractical.

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

- (a) Whether Defendant Class negligently designed, developed constructed and/or repaired 656 Coleman Townhomes;
- (b) Whether the construction and/or repair of 656 Coleman Townhomes was defective;
- (c) Whether Defendant Class knew or should have known of the original defects;
- (d) Whether Defendant Class knew or should have known their repairs were defective;
- (e) Whether Defendant Class failed to disclose to purchasers and/or homeowners the defects and/or unsuccessful repairs; and

- (f) Whether Defendant Class have acted or refused to act on grounds generally applicable to the Defendant Class.

70. *Typicality*: Plaintiff's claims against Defendant Winsor South, LLC are typical of the claims against the Defendant Class, as all such claims arise out of Defendant Class' wrongful conduct in designing, developing, constructing, and repairing 656 Coleman Townhomes, Defendants Class' conduct in concealing the defective condition of 656 Coleman Townhomes, and Plaintiff's and Plaintiff Class Members' purchasing homes containing building defects.

71. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Defendant 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 Defendant Class is impracticable. This class action presents few management difficulties while providing unitary adjudication, economies of scale, and comprehensive supervision by a single Court.

72. Class certification is appropriate under South Carolina law because Defendant Class engaged in a uniform and common practice.

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

73. Defendants are estopped from relying on any statutes of limitation or repose by virtue of their acts. Upon information and belief, Defendants should have known 656 Coleman Townhomes was defectively constructed and failed to alert the Plaintiffs of 656 Coleman Townhomes' defective condition.

74. Defendants had a duty to inform Plaintiffs of the defects described herein, which they should have known. Notwithstanding their duty, Defendants never disclosed the defects to Plaintiffs.

75. Despite exercising reasonable diligence, Plaintiffs could not have discovered the defective condition of 656 Coleman Townhomes due to their latency.

76. Given Defendants' failure to disclose this non-public information about the defective nature of 656 Coleman Townhomes – information over which they had exclusive control – and because Plaintiffs could not reasonably have known of 656 Coleman Townhomes' defective nature, Defendants are estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

ESTOPPEL FROM PLEADING WARRANTY OBLIGATION

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

78. By virtue of Defendants' acts, the work performed and/or materials supplied at 656 Coleman Townhomes have not lived up to Defendants' warranties and representations, and given the defective condition of 656 Coleman Townhomes and the premature deterioration of the life expectancy of 656 Coleman Townhomes' 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.

79. Defendants, in the exercise of required diligence, which negligently failed to occur, should have known that 656 Coleman Townhomes 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 Plaintiff and the Class. In fact, Defendants have previously seen other similar failures at other projects they have constructed.

80. Accordingly, any warranty provided by Defendants fails its essential purpose

because its purports to warrant that 656 Coleman Townhomes and/or its building components will be free from defects for a limited period of time when in fact 656 Coleman Townhomes and/or its building components fail far short of the expected life cycle of the townhomes.

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

82. Moreover, given the comparative posture, resources, sophistication, and knowledge of the parties, the warranty limitations are procedurally unconscionable; and given Defendants knew or should have known that the defects existed at the time they issued the warranty, the limitations are substantively unconscionable.

83. As a result, any 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

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

85. Upon information and belief, one or more of the Defendants were put on sufficient notice of 656 Coleman Townhomes' defective condition within any statutory period prescribed by the Act.

86. Therefore, the Defendants were provided an opportunity to cure 656 Coleman Townhomes' defective condition previously, but failed to adequately perform.

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

87. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

88. At all times relevant hereto, the Defendants, their 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 656 Coleman Townhomes 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.

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

- (a) In failing to construct 656 Coleman Townhomes in accordance with building code, the plans and specifications, and good workmanship;
- (b) In failing to properly supervise the work and construction of 656 Coleman Townhomes;
- (c) In failing to properly coordinate the subcontractors;
- (d) In failing to construct an adequate exterior building envelope;
- (e) In failing to act as a reasonable person would in the circumstances then and there prevailing;
- (f) In covering up their own defective work and the defective work of others;
- (g) In failing to make proper repairs; and
- (h) Such other failures to be proven at trial.

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

91. 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)

92. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

93. The design, construction, sale, and repair of 656 Coleman Townhomes came with express and implied warranties that the work would be performed in a careful, diligent and workmanlike manner and that 656 Coleman Townhomes would be constructed with suitable materials and components and free from all defects and be of superior quality befitting of an upscale condominium complex.

94. The design, construction, sale and/or repair of 656 Coleman Townhomes, and the components used therein, came with implied warranties of fitness, merchantability and workmanship and with a warranty of habitability.

95. Defendants have breached their warranties by constructing and/or repairing 656 Coleman Townhomes in a defective manner as set forth above.

96. 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 all of the Defendants and John Doe Defendants who manufactured and/or supplied components used in the construction of the 656 Coleman Townhomes)

97. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs if more fully set forth herein.

98. In manufacturing and supplying products for the construction of the 656 Coleman Townhomes, the manufacturer and supplier Defendants and John Doe Defendants, placed products into the stream of commerce.

99. By introducing their products into the stream of commerce, the manufacturers and suppliers, these Defendants and the John Doe Defendants, represented said products were safe and suitable for their foreseeable use.

100. In the manufacture and supply of products to the 656 Coleman Townhomes, the manufacturer and supplier Defendants and John Doe Defendants, anticipated and expected that their products would breach the public in substantially the same condition in which they were designed, developed, constructed, and sold.

101. The manufacturer and supplier Defendants and John Doe Defendants, have supplied and manufactured their products in a defective manner unreasonably dangerous to persons or property other than the products themselves, which has resulted in repeated water intrusion into and damage to the 656 Coleman townhomes and other building deficiencies.

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

103. The cost of altering the design, construction, and/or repair of the products supplied to the 656 Coleman Townhomes was substantially less than the resulting damage, cost, and injury suffered by the Plaintiffs.

104. The design and manufacture of the products supplied to the 656 Coleman Townhomes was inherently defective as sold was a direct and proximate cause of the damages suffered by Plaintiffs.

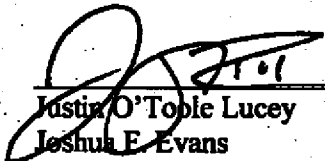
105. The manufacturer and supplier Defendants and John Doe Defendants, are therefore liable to Plaintiffs under the doctrine of strict liability in an amount to be determined by the trier of fact.

WHEREFORE, Plaintiffs demand a trial by jury and pray for actual and consequential damages; statutory or punitive damages; reasonable attorneys' fees; costs of suit; and prejudgment interest; treble damages; declaration/reformation of the Governing Documents; 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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January 12, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

SIX FIFTY SIX OWNERS ASSOCIATION,
INC. and ROBERT JOHN NUTLEY,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

vs.

WINSOR SOUTH, LLC AND JEFFREY M.
THOMAS, individually, and on behalf of a class
of construction defendants; SOUTHEASTERN
RECAPITALIZATION GROUP, LLC; WCM
CONSTRUCTION, LLC; JONATHAN J.
THOMAS; AC HEATING AND AIR
CONDITIONING SERVICE, INC.; ACME
DOORS, INC.; ALPHA OMEGA
CONSTRUCTION GROUP, INC.; ATLANTIC
CONSTRUCTION SERVICES, INC.; BUCK
LUMBER AND BUILDING SUPPLY, INC.;
BUILDERS FIRSTSOURCE, INC.;
BUILDERS FIRSTSOURCE-ATLANTIC
GROUP, LLC; BUILDERS FIRSTSOURCE-
FLORIDA, LLC A/K/A BUILDERS
FIRSTSOURCE-FLORIDA DESIGN
CENTER, LLC; BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC; CHARLOTTE
FLOORING, INC.; DIRIA TAWI PAINTING,
INC.; EAST COAST WALL SYSTEMS, INC.;
FOGEL SERVICES, INC.; G&S HOME
REMODELING, LLC; GUARANTEED
FRAMING, LLC; J. MORA BRICK & BLOCK
MASON, LLC; LAND/SITE SERVICES, INC.;
LANDMARK CONSTRUCTION COMPANY,
INC.; LUTZEN CONSTRUCTION, INC.; NEW
HORIZON SHUTTERS, INC. A/K/A NEW
HORIZON SHUTTERS INTERNATIONAL,
LLC; PJ SANCHEZ MASONRY, LLC;
SCREENS PLUS, INC.; SIMONS
CONSTRUCTION COMPANY, LLC; STUCCO
BY DESIGN, LLC; **FINE BUILDERS, LLC;**

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-10-3455

SECOND AMENDED COMPLAINT

(Defective Construction)

(Class Action)

(Jury Trial Demanded)

BY

JULIE J. ARNSTRONG
CLERK OF COURT

2017 APR 27 PM 12: 01

FILED

SPEEDTRUSS, INC.; AS)
CONSTRUCTION; JAVIER MORALES)
MERINO; NOVAC CONSTRUCTION,)
INC.; MJG CONSTRUCTION, INC.;)
ADVANCE PLUMBING, HEATING & AIR,)
INC.; ASHLEY STEEL, INC.; CAHILL)
CONTRACTING, LLC; COHEN'S)
DRYWALL, INC.; BOB PORTER D/B/A)
CUSTOM INTERIOR CONSTRUCTION;)
RB'S TRIM, INC.; SHARON'S PAINTING)
AND CONSTRUCTION A/K/A SHARON'S)
PAINTING, LLC; DAVIS TILE; TIMOTHY)
MITCHELL; ELECTRICAL DESIGN &)
CONSTRUCTION, INC.; AND JOHN DOE)
41-75,)

Defendants.)

The Plaintiffs, Six Fifty Six Owners Association, Inc. and Robert John Nutley, 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 Six Fifty Six Owners Association, Inc. (hereinafter "Association") is a non-profit corporation organized and existing under the laws of the State of South Carolina.

2. The Association is the property owners' association for Six Fifty Six Horizontal Property Regime.

3. The Six Fifty Six Horizontal Property Regime (hereinafter "656 Coleman Townhomes") is a Horizontal Property Regime which exists by virtue of a Master Deed dated March 19, 2007 and recorded on March 20, 2007 in the RMC Office of Charleston County, SC in Book E619, Page 738.

4. 656 Coleman Townhomes consists of fifty-two (52) townhomes in twelve (12) buildings and related common elements. Construction began in 2006 or 2007; and the final

Certificate of Occupancy was issued on June 18, 2014. The Developers turned over control of the Association to the homeowners in March 2016.

5. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code § 27-31-10, *et. seq.*, the Association is charged with certain duties, powers, rights and authority in connection with 656 Coleman Townhomes.

6. By virtue of the Master Deed and/or Bylaws, The Association is charged with, *inter alia*, the management and administration of 656 Coleman Townhomes, the investigation, maintenance and repair of 656 Coleman Townhomes' Common Elements and Areas of Responsibility, and has the right and authority to bring this action on behalf of the Association and its members.

7. The Association duly noticed and convened a Meeting of the Association wherein members of the Association overwhelmingly approved the Association's commencement of this litigation.

8. Plaintiff Robert John Nutley (hereinafter "Plaintiff Nutley") is a citizen of Charleston County, South Carolina, and is an owner of a townhome within 656 Coleman, more particularly described as 656 Coleman Blvd., Unit 204, Mount Pleasant, South Carolina, 29464.

9. Plaintiff Nutley entered into a contract to purchase the above-described real property on or about March 14, 2014.

10. By virtue of his property ownership in 656 Coleman, Plaintiff Nutley brings this action on behalf of himself and a Proposed Class of other similarly situated property owners. In addition to his common ownership interest, Plaintiff Nutley and the Proposed Class are also members of the Association. Consequently, Plaintiff Nutley fairly and adequately represents the interests of the entire Association membership - as a member of the Association, Plaintiff Nutley

shares common interests with other Association members regarding the resolution of this matter and Plaintiff Nutley is able and committed to prosecuting these common interests.

11. Defendant Winsor South, LLC is a limited liability company organized under the laws of the State of South Carolina. At all times, relevant to this action, Winsor South, LLC was engaged in the business of developing, designing, constructing, repairing and/or selling townhomes in Charleston County, South Carolina.

12. Upon information and belief, Defendant Jeffrey M. Thomas is an individual residing in Charleston, South Carolina. At all times, relevant to this action, Jeffrey M. Thomas was engaged in the business of developing, designing, constructing, repairing and/or selling townhomes in Charleston County, South Carolina.

13. Defendants Winsor South, LLC and Jeffrey M. Thomas were the initial builders of the 656 Coleman Townhomes.

14. Defendant Southeastern Recapitalization Group, LLC is a limited liability company organized and existing under the laws of the State of South Carolina.

15. Defendant Southeastern Recapitalization purchased one or more of the 656 Coleman Townhomes from the original Developer, WCB, LLC, pursuant to a Limited Warranty Deed executed on December 31, 2008 and filed with the Charleston County Register of Deeds on December 31, 2008, at Book 0027, Page 504.

16. Upon information and belief, Defendant Southeastern Recapitalization finished the design and construction of one or more of the original buildings and placed new townhouses into the stream of commerce and began the design and construction of additional buildings at the 656 Coleman Townhomes.

17. Defendant WCM Construction, LLC is a limited liability company organized under the laws of the State of South Carolina. At all times, relevant to this action, WCM Construction,

LLC was engaged in the business of developing, designing, constructing, repairing and/or selling townhomes in Charleston County, South Carolina.

18. Upon information and belief, Defendant Jonathan J. Thomas is an individual residing in Charleston, South Carolina. At all times, relevant to this action, Jonathan J. Thomas was engaged in the business of developing, designing, constructing, repairing, and/or selling townhomes in Charleston County, South Carolina

19. Defendants WCM Construction, LLC and Jonathan J. Thomas were the second builders of the 656 Coleman Townhomes.

20. Jeffrey M. Thomas and Jonathan J. Thomas owned and/or controlled Winsor South, LLC and WCM Construction, LLC. Additionally, Jeffrey M. Thomas and Jonathan J. Thomas owned and/or controlled the first two (2) developers of the 656 Coleman Townhouses.

21. Defendant AC Heating and Air Conditioning Service, Inc., formerly identified as John Doe #1, (hereinafter “AC Heating and Air”) is a corporation organized and existing under the laws of the State of South Carolina. Upon information and belief, at all times relevant to this action, AC Heating and Air performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the HVAC systems and associated components in some or all of the homes.

22. Defendant Acme Doors, Inc., formerly identified as John Doe #2, (hereinafter “Acme Doors”) is a corporation organized and existing under the laws of the State of South Carolina. Upon information and belief, at all times relevant to this action, Acme Doors performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the garage doors in some or all of the homes.

23. Defendant Alpha Omega Construction Group, Inc., formerly identified as John Doe #3, (hereinafter “Alpha Omega”) is a corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, Alpha Omega performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the installation of the roofing and related waterproofing, flashing, and other associated components on some or all of the homes.

24. Defendant Atlantic Construction Services, Inc., formerly identified as John Doe #4, (hereinafter “Atlantic Construction”) is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Atlantic Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing members, windows, doors, and related components on some or all of the homes.

25. Defendant Buck Lumber and Building Supply, Inc., formerly identified as John Doe #5, (hereinafter “Buck Lumber”) is a corporation organized and existing under the laws of the State of South Carolina. At all times, relevant to this action, Buck Lumber performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing members, windows, doors, and related components on some or all of the homes.

26. Defendant Builders FirstSource, Inc., formerly identified as John Doe #6, (hereinafter “Builders FirstSource”) is a corporation organized and existing under the laws of the State of Delaware. At all times, relevant to this action, Builders FirstSource performed certain

work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the windows and related waterproofing, flashing, and other associated components on some or all of the homes.

27. Defendant Builders FirstSource-Atlantic Group, LLC, formerly identified as John Doe #7, (hereinafter “Builders FirstSource-Atlantic”) is a company organized and existing under the laws of the State of Delaware. At all times, relevant to this action, Builders FirstSource-Atlantic performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the windows and related waterproofing, flashing, and other associated components on some or all of the homes.

28. Defendant Builders FirstSource-Florida, LLC a/k/a Builders FirstSource-Florida Design Center, LLC, formerly identified as John Doe #8, (hereinafter “Builders FirstSource-Florida”) is a company organized and existing under the laws of a State other than South Carolina. At all times, relevant to this action, Builders FirstSource-Florida performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the windows and related waterproofing, flashing, and other associated components on some or all of the homes.

29. Defendant Builders FirstSource-Southeast Group, LLC, formerly identified as John Doe #9, (hereinafter “Builders FirstSource-Southeast”) is a company organized and existing under the laws of the State of Delaware. At all times, relevant to this action, Builders FirstSource-Southeast performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but

not limited to the supply and installation of the windows and related waterproofing, flashing, and other associated components on some or all of the homes.

30. Defendant Charlotte Flooring, Inc., formerly identified as John Doe #10, (hereinafter “Charlotte Flooring”) is a company organized and existing under the laws of the State of North Carolina. At all times, relevant to this action, Charlotte Flooring performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the ceramic tile and other associated components on some or all of the homes.

31. Defendant Diria Tawi Painting, Inc., formerly identified as John Doe #11, (hereinafter “Diria Tawi”) is a company organized and existing under the laws of the State of South Carolina. At all times, relevant to this action, Diria Tawi performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the paint, caulking, and related waterproofing, flashing, and other associated components on some or all of the homes.

32. Defendant East Coast Wall Systems, Inc., formerly identified as John Doe #12, (hereinafter “East Coast Wall Systems”) is a company organized and existing under the laws of the State of North Carolina. At all times, relevant to this action, East Coast Wall Systems performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the drywall, painting, and related waterproofing, flashing, and other associated components on some or all of the homes.

33. Defendant Fogel Services, Inc., formerly identified as John Doe #13, (hereinafter “Fogel Services”) is a company organized and existing under the laws of the State of South

Carolina. At all times, relevant to this action, Fogel Services performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes including but not limited to the supply and installation of the HVAC systems and associated components in some or all of the homes.

34. Defendant G&S Home Remodeling, LLC, formerly identified as John Doe #14, (hereinafter “G&S Home”) is a company organized and existing under the laws of the State of South Carolina. At all times, relevant to this action, G&S Home performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the gutters and associated components on some or all of the homes.

35. Defendant Guaranteed Framing, LLC, formerly identified as John Doe #15, (hereinafter “Guaranteed Framing”) is a company organized and existing under the laws of the State of South Carolina. At all times, relevant to this action, Guaranteed Framing performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing members, windows, doors, and related components in some or all of the homes.

36. Defendant J. Mora Brick & Block Mason, LLC, formerly identified as John Doe #16, (hereinafter “J. Mora Brick”) is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, J. Mora Brick performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the masonry veneer, masonry columns, concrete footings, masonry foundations, and related components in some or all of the homes.

37. Defendant Land/Site Services, Inc., formerly identified as John Doe #17, (hereinafter “Land/Site Services”) is a company organized and existing under the laws of the State of South Carolina. At all times, relevant to this action, Land/Site Services performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to performing the site work and related components in the construction of the homes.

38. Defendant Landmark Construction Company, Inc., formerly identified as John Doe #18, (hereinafter “Landmark Construction”) is a company organized and existing under the laws of the State of South Carolina. At all times, relevant to this action, Landmark Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to performing the site work and related components in the construction of the homes.

39. Defendant Lutzen Construction, Inc., formerly identified as John Doe #19, (hereinafter “Lutzen Construction”) is a company organized and existing under the laws of the State of South Carolina. At all times, relevant to this action, Lutzen Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the foundations, concrete slabs, and other related components in the construction of the homes.

40. Defendant New Horizon Shutters, Inc. a/k/a New Horizon Shutters International, LLC, formerly identified as John Doe #20, (hereinafter “New Horizon”) is a company organized and existing under the laws of the State of South Carolina. At all times, relevant to this action, New Horizon performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or

supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the shutters on some or all of the homes.

41. Defendant PJ Sanchez Masonry, LLC, formerly identified as John Doe #21, (hereinafter “PJ Sanchez Masonry”) is a company organized and existing under the laws of the State of South Carolina. At all times, relevant to this action, PJ Sanchez Masonry performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the masonry veneer, masonry columns, concrete footings, masonry foundations, and related components in some or all of the homes.

42. Defendant Screens Plus, Inc., formerly identified as John Doe #22, (hereinafter “Screens Plus”) is a company organized and existing under the laws of the State of South Carolina. At all times, relevant to this action, Screens Plus performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the screens and related components in some or all of the homes.

43. Defendant Simons Construction Company, LLC, formerly identified as John Doe #23, (hereinafter “Simons Construction”) is a company organized and existing under the laws of the State of South Carolina. At all times, relevant to this action, Simons Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the exterior cladding, siding, exterior trim, and related components on some or all of the homes.

44. Defendant Stucco By Design, LLC, formerly identified as John Doe #24, (hereinafter “Stucco By Design”) is a company organized and existing under the laws of the State

of South Carolina. At all times, relevant to this action, Stucco By Design performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the stucco, insulation, caulking, sealant, and related components on some or all of the homes.

45. **Defendant Fine Builders, LLC, formerly identified as John Doe #25, (hereinafter “Fine Builders”) is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Fine Builders performed certain work and/or repairs as a sub-subcontractor of Atlantic Construction at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing, related components, and other work on some or all of the homes.**

46. **Defendant Speedtruss, Inc., formerly identified as John Doe #26, (hereinafter “Speedtruss”) is a company organized and existing under the laws of the State of New Jersey. At all times relevant to this action, Speedtruss performed certain work and/or repairs as a sub-subcontractor of Defendant Atlantic Construction at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes including but not limited to the supply and installation of the framing, related components, and other work on some or all of the homes.**

47. **Plaintiffs are informed and believe that Defendant AS Construction, formerly identified as John Doe #27, is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, AS Construction performed certain work and/or repairs as a sub-subcontractor of Defendant Atlantic Construction at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656**

Townhomes, including but not limited to the supply and installation of the framing, related components, and other work on some or all of the homes.

48. Upon Information and belief, Defendant Javier Morales Merino, formerly identified as John Doe #28, is a citizen and resident of the State of South Carolina. At all times relevant to this action, Defendant Merino installed certain stucco cladding and provided other materials and/or performed other work on some or all of the 656 Townhomes.

49. Defendant Novac Construction, Inc. formerly identified as John Doe #29, (hereinafter “Novac Construction”) is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Novac Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing members, windows, doors, and related components and performed other work on some or all of the homes.

50. Upon information and belief, Defendant MJG Construction, Inc., formerly identified as John Doe #30 (hereinafter “MJG”), is an entity organized and existing under the laws of the State of Texas. At all times relevant to this action, Defendant MJG performed certain concrete work and/or repairs on some or all of the 656 Townhomes.

51. Defendant Advance Plumbing, Heating & Air, Inc., formerly identified as John Doe #31 (hereinafter “Advance Plumbing”), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Advance Plumbing performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to plumbing work.

52. Defendant Ashley Steel, Inc., formerly identified as John Doe #32 (hereinafter “Ashley Steel”), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Ashley Steel performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to brick lintels and steel members, among other work.

53. Defendant Cahill Contracting, LLC, formerly identified as John Doe #33 (hereinafter “Cahill”), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Cahill performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to roofing work, among other work.

54. Defendant Cohen’s Drywall, Inc., formerly identified as John Doe #34 (hereinafter “Cohen’s”), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Cohen’s performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to insulation work, among other work.

55. Defendant Bob Porter d/b/a Custom Interior Construction, formerly identified as John Doe #35 (hereinafter “Custom Interior”), is an citizen and resident of the State of South Carolina. At all times relevant to this action, Custom Interior performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to interior trim work, among other work.

56. Defendant RB's Trim, Inc., formerly identified as John Doe #36 (hereinafter "RB's Trim"), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, RB's Trim performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to interior trim work, among other work.

57. Defendant Sharon's Painting and Construction a/k/a Sharon's Painting, LLC, formerly identified as John Doe #37 (hereinafter "Sharon's Painting"), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Sharon's Painting performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to paint work, among other work.

58. Defendant Davis Tile, formerly identified as John Doe #38, is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Davis Tile performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to tile work, among other work.

59. Defendant Timothy Mitchell, formerly identified as John Doe #39 (hereinafter "Mitchell"), is a citizen and resident of South Carolina. At all times relevant to this action, Mitchell performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to foundation work, among other work.

60. Defendant Electrical Design & Construction, Inc., formerly identified as John Doe #40 (hereinafter "Electrical Design"), is an entity organized and existing under the laws

of the State of South Carolina. At all times relevant to this action, Electrical Design performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to electrical work, among other work.

61. John Doe Defendants 41-75 are the designers, subcontractors, suppliers and/or other entities involved in the design, construction, material manufacturing and/or supplying and/or repair of the 656 Coleman Townhomes, whose identity and location are unknown at this time.

FACTUAL ALLEGATIONS

62. This matter arises out of the design, development, construction, repair and sale of the 656 Coleman Townhomes.

63. At the time the Certificates of Occupancy were issued, the 656 Coleman Townhomes contained latent building defects.

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

65. A preliminary inspection of 656 Coleman Townhomes 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. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting there from.

66. Defendants had a duty to design, develop, construct, and repair 656 Coleman Townhomes in a workmanlike manner with suitable materials and free from all defects.

67. The aforementioned deficiencies and consequential damages evidence that Defendants breached their duties to Plaintiff.

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

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

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

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

PLAINTIFFS CLASS ACTION ALLEGATIONS

72. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff Nutley brings this action both individually and as a proposed class action against Defendants on behalf of himself and all other similarly situated persons and entities, who own, per the class definition, a townhome within 656 Coleman Townhomes (hereinafter collectively referred to as the "Class"). The Class is particularly defined as follows:

All persons and entities that own a condominium within 656 Coleman Townhomes 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.

73. *Numerosity:* The Class is composed of in excess of fifty (50) persons geographically dispersed throughout the State of South Carolina, the joinder of whom in one action is impractical.

74. *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 Defendants negligently designed, developed constructed and/or repaired 656 Coleman Townhomes;
- (b) Whether the construction and/or repair of 656 Coleman Townhomes was defective;
- (c) Whether Defendants knew or should have known of the original defects;
- (d) Whether Defendants know or should have known their repairs were defective;
- (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' 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;
- (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 other members of the Class for repair of their townhomes as well as 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.

75. *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 656 Coleman Townhomes, Defendants' conduct in concealing the defective condition of 656 Coleman Townhomes, and Plaintiff's and Class Members'

purchasing homes containing building defects.

76. *Adequate Representation:* Plaintiff Nutley will fairly and adequately protect the interests of the members of the Class and has no interests antagonistic to those of the Class. Plaintiff Nutley 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.

77. *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. Additionally, given potential overlapping ownership of some building elements, the class action is the superior mechanism for the presentation of this action.

78. Further, class certification is necessary because of the co-ownership of many of the building components require that Plaintiffs' claims be prosecuted together.

79. 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 656 Coleman Townhomes.

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

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

82. The relationship of the class claims with each other and with the Association claims makes piece meal litigation and individual claims difficult.

DEFENDANT CLASS ACTION ALLEGATIONS

83. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure (“SCRCP”), Plaintiffs bring this action against Winsor South, LLC and Jeffrey M. Thomas, both individually and on behalf of a proposed class of construction Defendants involved in the construction of the 656 Coleman Townhomes (hereinafter collectively referred to as “Defendant Class”). The Defendant Class is particularly defined as follows:

All persons and entities involved in the design, construction, material manufacture and/or supply, and/or repair of the 656 Coleman Townhomes 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; and (b) Plaintiffs.

84. *Numerosity*: The Defendant Class is composed of an unknown number of persons and/or entities geographically dispersed throughout the State of South Carolina or other States, the joinder of whom in one action is impractical.

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

- (a) Whether Defendant Class negligently designed, developed constructed and/or repaired 656 Coleman Townhomes;
- (b) Whether the construction and/or repair of 656 Coleman Townhomes was defective;

- (c) Whether Defendant Class knew or should have known of the original defects;
- (d) Whether Defendant Class knew or should have known their repairs were defective;
- (e) Whether Defendant Class failed to disclose to purchasers and/or homeowners the defects and/or unsuccessful repairs; and
- (f) Whether Defendant Class have acted or refused to act on grounds generally applicable to the Defendant Class.

86. *Typicality*: Plaintiff's claims against Defendant Winsor South, LLC are typical of the claims against the Defendant Class, as all such claims arise out of Defendant Class' wrongful conduct in designing, developing, constructing, and repairing 656 Coleman Townhomes, Defendants Class' conduct in concealing the defective condition of 656 Coleman Townhomes, and Plaintiff's and Plaintiff Class Members' purchasing homes containing building defects.

87. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Defendant 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 Defendant Class is impracticable. This class action presents few management difficulties while providing unitary adjudication, economies of scale, and comprehensive supervision by a single Court.

88. Class certification is appropriate under South Carolina law because Defendant Class engaged in a uniform and common practice.

ESTOPPEL FROM PLEADING AND TOLLING OF APPLICABLE STATUTES OF LIMITATIONS

89. Defendants are estopped from relying on any statutes of limitation or repose by virtue of their acts. Upon information and belief, Defendants should have known 656 Coleman Townhomes was defectively constructed and failed to alert the Plaintiffs of 656 Coleman Townhomes' defective condition.

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

they should have known. Notwithstanding their duty, Defendants never disclosed the defects to Plaintiffs.

91. Despite exercising reasonable diligence, Plaintiffs could not have discovered the defective condition of 656 Coleman Townhomes due to their latency.

92. Given Defendants' failure to disclose this non-public information about the defective nature of 656 Coleman Townhomes – information over which they had exclusive control – and because Plaintiffs could not reasonably have known of 656 Coleman Townhomes' defective nature, Defendants are estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

ESTOPPEL FROM PLEADING WARRANTY OBLIGATION

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

94. By virtue of Defendants' acts, the work performed and/or materials supplied at 656 Coleman Townhomes have not lived up to Defendants' warranties and representations, and given the defective condition of 656 Coleman Townhomes and the premature deterioration of the life expectancy of 656 Coleman Townhomes' 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.

95. Defendants, in the exercise of required diligence, which negligently failed to occur, should have known that 656 Coleman Townhomes 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 Plaintiff and the Class. In fact, Defendants have previously seen other similar

failures at other projects they have constructed.

96. Accordingly, any warranty provided by Defendants fails its essential purpose because its purports to warrant that 656 Coleman Townhomes and/or its building components will be free from defects for a limited period of time when in fact 656 Coleman Townhomes and/or its building components fail far short of the expected life cycle of the townhomes.

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

98. Moreover, given the comparative posture, resources, sophistication, and knowledge of the parties, the warranty limitations are procedurally unconscionable; and given Defendants knew or should have known that the defects existed at the time they issued the warranty, the limitations are substantively unconscionable.

99. As a result, any 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

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

101. Upon information and belief, one or more of the Defendants were put on sufficient notice of 656 Coleman Townhomes' defective condition within any statutory period prescribed by the Act.

102. Therefore, the Defendants were provided an opportunity to cure 656 Coleman Townhomes' defective condition previously, but failed to adequately perform.

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

103. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

104. At all times relevant hereto, the Defendants, their 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 656 Coleman Townhomes 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.

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

- (a) In failing to construct 656 Coleman Townhomes in accordance with building code, the plans and specifications, and good workmanship;
- (b) In failing to properly supervise the work and construction of 656 Coleman Townhomes;
- (c) In failing to properly coordinate the subcontractors;
- (d) In failing to construct an adequate exterior building envelope;
- (e) In failing to act as a reasonable person would in the circumstances then and there prevailing;
- (f) In covering up their own defective work and the defective work of others;
- (g) In failing to make proper repairs; and
- (h) Such other failures to be proven at trial.

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

107. 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)

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

109. The design, construction, sale, and repair of 656 Coleman Townhomes came with express and implied warranties that the work would be performed in a careful, diligent and workmanlike manner and that 656 Coleman Townhomes would be constructed with suitable materials and components and free from all defects and be of superior quality befitting of an upscale condominium complex.

110. The design, construction, sale and/or repair of 656 Coleman Townhomes, and the components used therein, came with implied warranties of fitness, merchantability and workmanship and with a warranty of habitability.

111. Defendants have breached their warranties by constructing and/or repairing 656 Coleman Townhomes in a defective manner as set forth above.

112. 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 all of the Defendants and John Doe Defendants who manufactured and/or supplied components used in the construction of the 656 Coleman Townhomes)

113. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs if more fully set forth herein.

114. In manufacturing and supplying products for the construction of the 656 Coleman Townhomes, the manufacturer and supplier Defendants and John Doe Defendants, placed products into the stream of commerce.

115. By introducing their products into the stream of commerce, the manufacturers and suppliers, these Defendants and the John Doe Defendants, represented said products were safe and suitable for their foreseeable use.

116. In the manufacture and supply of products to the 656 Coleman Townhomes, the manufacturer and supplier Defendants and John Doe Defendants, anticipated and expected that their products would breach the public in substantially the same condition in which they were designed, developed, constructed, and sold.

117. The manufacturer and supplier Defendants and John Doe Defendants, have supplied and manufactured their products in a defective manner unreasonably dangerous to persons or property other than the products themselves, which has resulted in repeated water intrusion into and damage to the 656 Coleman townhomes and other building deficiencies.

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

119. The cost of altering the design, construction, and/or repair of the products supplied to the 656 Coleman Townhomes was substantially less than the resulting damage, cost, and injury suffered by the Plaintiffs.

120. The design and manufacture of the products supplied to the 656 Coleman Townhomes was inherently defective as sold was a direct and proximate cause of the damages suffered by Plaintiffs.

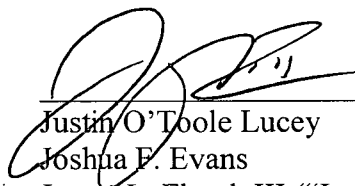
121. The manufacturer and supplier Defendants and John Doe Defendants, are therefore liable to Plaintiffs under the doctrine of strict liability in an amount to be determined by the trier of fact.

WHEREFORE, Plaintiffs demand a trial by jury and pray for actual and consequential damages; statutory or punitive damages; reasonable attorneys' fees; costs of suit; and prejudgment interest; treble damages; declaration/reformation of the Governing Documents; 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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April 25, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 2016-CP-10-03455

Six Fifty Six Owners Association, Inc. and
Robert John Nutley, individually, and on behalf
of others similarly situated,

Plaintiffs,

vs.

Winsor South, LLC and Jeffrey M. Thomas,
individually, and on behalf of a class of
construction defendants; Southeastern
Recapitalization Group, LLC; WCM
Construction, LLC; Jonathan J. Thomas; AC
Heating and Air Conditioning Service, Inc.;
ACME Doors, Inc.; Alpha Omega Construction
Group, Inc.; Atlantic Construction Services, Inc.;
Buck Lumber and Building Supply, Inc.;
Builders FirstSource, Inc.; Builders FirstSource-
Atlantic Group, LLC, Builders FirstSource-
Florida, LLC a/k/a Builders FirstSource-Florida
Design Center, LLC; Builders FirstSource-
Southeast Group, LLC; Charlotte Flooring, Inc.;
Diria Tawi Painting, inc.; East Coast Wall
Systems, Inc.; Fogel Services, Inc.; G&S Home
Remodeling, LLC; Guaranteed Framing, LLC; J.
Mora Brick & Black Mason, LLC; Land/Site
Services, Inc.; Landmark Construction
Company, Inc.; Lutzen Construction, Inc.; New
Horizon Shutters, Inc. a/k/a New Horizon
Shutters International, LLC; PJ Sanchez
Masonry, LLC; Screens Plus, Inc., Simons
Construction Company, LLC; Stucco by Design,
LLC; and John Doe 25 -50,

Defendants.

Stucco By Design, LLC,

Third Party Plaintiff,

vs.

BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC,
BUILDERS FIRSTSOURCE,
INC., BUILDERS
FIRSTSOURCE-ATLANTIC
GROUP, LLC, BUILDERS
FIRSTSOURCE-FLORIDA,
LLC A/K/A BUILDERS
FIRSTSOURCE-FLORIDA
DESIGN CENTER, LLC'S
ANSWER TO PLAINTIFF'S
SECOND AMENDED
COMPLAINT AND THE
THIRD PARTY COMPLAINT
OF BUILDERS
FIRSTSOURCE-
SOUTHEAST GROUP, LLC
AGAINST HURLEY
SERVICES, LLC,
CHARLESTON EXTERIORS,
LLC, AND DVS, INC.

FILED
2017 MAY -9 AM 11:14
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Javier Morales Merino,

Third Party Defendant.

Builders FirstSource-Southeast Group, LLC,

Third Party Plaintiff,

Vs.

Hurley Services, LLC, Charleston Exteriors,
LLC, and DVS, Inc.,

Third Party Defendants.

The Defendants, identified within the Second Amended Summons and Second Amended Complaint as Builders FirstSource, Inc., Builders FirstSource-Atlantic Group, LLC, Builders FirstSource-Florida, LLC a/k/a Builders FirstSource-Florida Design Center, LLC, and Builders FirstSource-Southeast Group, LLC (hereinafter sometimes collectively "Builders FirstSource Defendants" and/or "these Defendants"), reserving all rights under any and/or all pending and/or hereinafter filed motions, answering the Second Amended Complaint of the Plaintiffs, and asserting the third party claims of Builders FirstSource-Southeast Group, LLC (hereinafter sometimes "BFS" and/or "this Defendant/Third Party Plaintiff"), would respectfully allege unto this Honorable Court as follows:

FOR A FIRST DEFENSE

1. That each and every allegation set forth within the Second Amended Complaint (hereinafter sometimes "Second Amended Complaint" and/or

“Complaint”), not hereinafter specifically admitted, is denied, and strict proof demanded thereof.

2. That these Defendants are without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the Second Amended Complaint, and therefore deny the same, and demand strict proof thereof.
3. That these Defendants deny the allegations set forth in Paragraph 10 of the Second Amended Complaint.
4. That these Defendants are without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 of the Second Amended Complaint, and therefore deny the same, and demand strict proof thereof.
5. That these Defendants would show that the allegations of Paragraphs 21, 22, 23, 24, and 25 of the Second Amended Complaint relate to parties other than these Defendants, and require no response by these Defendants; to the extent that the allegations of said paragraphs may be deemed to require a response by these Defendants, such allegations are hereby specifically denied.
6. That these Defendants deny the allegations set forth in Paragraphs 26, 27, and 28 of the Second Amended Complaint, and demand strict proof thereof.

7. That these Defendants are without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraph 29 of the Second Amended Complaint, and therefore deny the same, and demand strict proof thereof.
8. That these Defendants would show that the allegations of Paragraph 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, and 61 of the Second Amended Complaint relate to parties other than these Defendants, and require no response by these Defendants; to the extent that the allegations of said paragraphs may be deemed to require a response by these Defendants, such allegations are hereby specifically denied.
9. That these Defendants admit only so much of Paragraph 62 of the Second Amended Complaint, as alleges, or may be construed to allege, that the instant litigation relates to the design, development, construction, repair, and/or sale of the Six Fifty Six townhomes, but denies so much thereof as alleges defects and/or deficiencies in such design, development, construction, repair, and/or sale, and further specifically deny so much thereof as alleges, or may be construed to allege, any liability and/or responsibility of these Defendants for any claims asserted within the Second Amended Complaint.
10. That these Defendants deny the allegations set forth in Paragraphs 63, 64, 65, 66, 67, 68, 69, 70, and 71 of the Second Amended Complaint.

11. That these Defendants deny the allegations set forth in Paragraphs 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, and 82 of the Second Amended Complaint.
12. That these Defendants deny the allegations set forth in Paragraphs 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, and 102, of the Second Amended Complaint.
13. That these Defendants, in responding to Paragraph 103 of the Second Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
14. That these Defendants would show that the allegations of Paragraph 104 of the Second Amended Complaint set forth conclusions of law, which these Defendants need neither admit nor deny; to the extent that the allegations of said paragraph may be deemed to require a response by these Defendants, such allegations are hereby specifically denied.
15. That these Defendants deny the allegations set forth in Paragraphs 105, 106, and 107 of the Second Amended Complaint.
16. That these Defendants, in responding to Paragraphs 108 of the Second Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
17. That these Defendants would show that the allegations of Paragraph 109, and 110 of the Second Amended Complaint set forth conclusions of law, which these Defendants need neither admit nor deny; to the extent that

the allegations of said paragraphs may be deemed to require a response by these Defendants, such allegations are hereby specifically denied.

18. That these Defendants deny the allegations set forth in Paragraphs 111 and 112 of the Second Amended Complaint.
19. That these Defendants, in responding to Paragraphs 113 of the Second Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
20. That these Defendants deny the allegations set forth in Paragraphs 114, 115, 116, 117, 118, 119, 120, and 121 of the Second Amended Complaint.

FOR AN AFFIRMATIVE DEFENSE
(Merger)

21. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
22. That these Defendants would show that, if any representations were made to the Plaintiffs during the course of negotiations between the parties, which representations are hereby specifically denied, then all representations merged into the contract between the parties.

FOR AN AFFIRMATIVE DEFENSE
(Statutes of Limitations)

23. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
24. That these Defendants would show that all claims asserted by the Plaintiffs are barred by the applicable statute and/or statutes of limitations.

FOR AN AFFIRMATIVE DEFENSE
(Notice)

25. That each and every allegation set forth in the preceding paragraphs, hereof is hereby re-alleged and reiterated as fully as if set forth herein.
26. That these Defendants would show that the Plaintiffs had constructive knowledge and/or actual knowledge of those conditions of which are alleged in the Amended Complaint, and nonetheless proceeded to purchase the subject property. Such circumstances constitute a complete bar to the Plaintiffs' claims.

FOR AN AFFIRMATIVE DEFENSE
(Insufficient Facts to Constitute Cause of Action)

27. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
28. That these Defendants would show that the allegations of the Amended Complaint fail to state facts sufficient to constitute a cause of action and/or causes of action against these Defendants.

FOR AN AFFIRMATIVE DEFENSE

29. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
30. That these Defendants would show that the Plaintiffs had no right or entitlement to rely upon any representations allegedly made by the Defendants, which representations are hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Superseding Negligence)

31. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
32. That these Defendants would show that the damages alleged by the Amended Complaint, which damages are hereby specifically denied, were the sole and proximate result of the intervening and/or superseding negligence and/or intervening and/or superseding willful acts and/or recklessness of third persons or parties, which intervening and/or superseding negligence and/or willful acts and/or other actions are a bar to the causes of action asserted against these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Contributory Negligence)

33. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
34. That these Defendants would show that the damages alleged by the Plaintiffs, which damages are hereby specifically denied, were due to and caused by the reckless, willful, wanton, negligent, careless and grossly negligent acts and conduct of the Plaintiffs, which actions combined and concurred with any negligence on the part of these Defendants, which negligence is hereby specifically denied, to produce such damages, without which the same would not have occurred.

FOR AN AFFIRMATIVE DEFENSE
(Comparative Negligence)

35. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
36. That these Defendants would show that the injuries and/or damages alleged by the Plaintiffs, which injuries and damages are hereby specifically denied, were due to and caused by the reckless, willful, wanton, negligent, careless and grossly negligent acts and conduct of the Plaintiffs, which acts were greater than any acts of negligence on the part of these Defendants, which acts on the part of these Defendants are hereby specifically denied, to produce such injury and/or damages, and without which the same would not have occurred.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Laches)

37. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
38. That these Defendants would show that the claims of the Plaintiffs are barred by the doctrine of laches.

FOR AN AFFIRMATIVE DEFENSE
(Assumption of the Risk)

39. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
40. That these Defendants would show that the Plaintiffs, by and through their actions and/or inactions with regard to the subject alleged in the Amended Complaint, have assumed the risk and/or accepted all portions of any

damages alleged by the Plaintiffs and such assumption of risk and/or acceptance is a bar to claims against these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Failure to Mitigate)

41. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
42. That these Defendants would show that the injuries and/or damages alleged by the Plaintiffs, which injuries and/or damages are hereby specifically denied, were due to and caused by the Plaintiffs' failure to mitigate, which failure is a complete bar to recovery by the Plaintiffs.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Estoppel)

43. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
44. That these Defendants would show that the Plaintiffs are barred by the doctrine of estoppel from asserting claims against these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Waiver)

45. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
46. That these Defendants would show that the claims of the Plaintiffs are barred by the doctrine of waiver.

FOR AN AFFIRMATIVE DEFENSE
(Economic Loss Rule)

- 47. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
- 48. That these Defendants would show that the claims of the Plaintiffs are barred by the economic loss rule.

FOR AN AFFIRMATIVE DEFENSE
(Sole Negligence of Third Parties)

- 49. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
- 50. That these Defendants would show that the injuries and/or damages alleged by the Plaintiffs, which injuries and/or damages are hereby specifically denied, were due to and were the proximate result of the sole negligence and/or recklessness of third persons or parties, for whose conduct these Defendants are not liable.

FOR AN AFFIRMATIVE DEFENSE

- 51. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
- 52. That to the extent punitive damages are claimed, this Defendant demands a bifurcated jury trial pursuant to South Carolina Code Annotated §15-32-520, and demands that said damages, if any, be limited to three (3) times the amount of any compensatory damages, or the sum of \$500,000.00, whichever is greater, if any.

FOR AN AFFIRMATIVE DEFENSE
(Exclusion of Warranty)

53. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
54. That these Defendants would show that any and/or all applicable warranties have been properly and effectively excluded by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Modification of Warranties)

55. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
56. That these Defendants would show that any and/or all applicable warranties have been properly and effectively modified by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Limitation of Warranties)

57. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
58. That these Defendants would show that any and all applicable warranties have been properly and effectively limited by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Expiration of Warranties)

59. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

60. That these Defendants would show that any relevant warranties have expired.

FOR AN AFFIRMATIVE DEFENSE
(Excluded Remedies)

61. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
62. That these Defendants would show that the available remedies have been properly and effectively excluded by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Modification of Remedies)

63. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
64. That these Defendants would show that all applicable remedies have been properly and effectively modified by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Limitation of Remedies)

65. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
66. That these Defendants would show that all available remedies have been properly and effectively limited by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Disclaimer of Warranties)

67. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

68. That these Defendants would show that any and all applicable warranties have been properly and effectively disclaimed by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Disclaimer of Remedies)

69. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
70. That these Defendants would show that any and all available remedies have been properly and effectively disclaimed by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Resolution by Arbitration)

71. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
72. That these Defendants would show that, to the extent that the claims against these Defendants are subject to resolution by arbitration, the instant action against these Defendants should be dismissed.

FOR AN AFFIRMATIVE DEFENSE
(Failure to Comply with Contractual Conditions Precedent)

73. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
74. That these Defendants would show that the Plaintiffs have failed properly to comply with contractual conditions precedent to the assertion of those claims set forth in the Amended Complaint, which failure is a bar to all claims against these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Failure to comply with Statutory Conditions Precedent)

75. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
76. That these Defendants would show that the Plaintiffs have failed to comply with the statutory conditions precedent to the assertion of claims set forth in the Amended Complaint.

FOR AN AFFIRMATIVE DEFENSE
(Failure to give notice of breach of warranty)

77. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
78. That these Defendants would show that the Plaintiffs have failed to give reasonable notice of any alleged breach of any applicable warranty, which breach of warranty or warranties is hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Reservation and Non-Waiver)

79. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
80. That these Defendants do not waive, and hereby specifically reserves, any additional and/or further defenses, the propriety of which may be indicated by additional information which may be acquired by these Defendants or its/their counsel during the course of discovery or otherwise.

FOR AN AFFIRMATIVE DEFENSE
(Joint Tort Feasors Act)

81. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
82. That these Defendants would show that, in the event of a verdict rendered jointly against these Defendants and the remaining Defendants, these Defendants are entitled to contribution from said remaining Defendants, pursuant to the provisions of the South Carolina Uniform Contribution Among Joint Tort Feasors Act and/or other provisions of law.

FOR AN AFFIRMATIVE DEFENSE

83. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
84. That this Defendant would allege that any recovery against this Defendant must be set off or reduced or abated or apportioned to the extent that any other party's actions caused or contributed to any damages, if any, or as otherwise provided pursuant to relevant sections of the South Carolina Contribution Among Joint Tort Feasors Act, Section 15-38-10, et seq. SC Code Amended.

FOR AN AFFIRMATIVE DEFENSE

85. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
86. That this Defendant would show that the design and materials used in the construction of subject property in question were developed, selected, and/or approved by other defendants, thereby reliving this Defendant of

any liability or responsibility for damages resulting from design deficiencies or materials which may not have been suitable for incorporation into the subject property.

FOR AN AFFIRMATIVE DEFENSE
(Protections under Constitution(s))

87. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
88. That these Defendants would show that the imposition of punitive damages is violative of protections afforded by the 5th, 8th, and 14th and/or other amendments to the United States and/or South Carolina constitutions.

FOR AN AFFIRMATIVE DEFENSE
(Statutes of Repose)

89. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
90. That these Defendants would show that the Plaintiffs' claims are barred by the applicable statute and/or statutes of repose.

FOR AN AFFIRMATIVE DEFENSE
(Statute of Frauds)

91. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
92. That these Defendants would show that the claims of the Plaintiffs are barred by the Statute of Frauds.

FOR AN AFFIRMATIVE DEFENSE
(Learned Intermediaries and Sophisticated User Doctrine)

93. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
94. Without admitting its products were installed on the subject structure, this Defendant submits that the products installed on the structure were sold to learned intermediaries or sophisticated users who, in turn, through the exercise of their own knowledge and expertise, should have known and appreciated the proper uses and requirements of the products and, therefore, this Defendant pleads the Learned Intermediary and Sophisticated User Doctrines as a complete defense to this action.

FOR AN AFFIRMATIVE DEFENSE
(Spoliation of Evidence)

95. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
96. Without admitting that its products were installed on the subject structure, this Defendant submits that repairs may have been made to the subject structure and further, that the alleged defective products may have been destroyed. To the extent that this Defendant has not been afforded the opportunity to inspect and examine the alleged defective products and/or their components, this Defendant pleads the Spoliation of Evidence Doctrine as a complete defense to this action.

FOR AN AFFIRMATIVE DEFENSE

97. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
98. That any products designed, manufactured, and/or distributed by this Defendant are found to be the cause of damages suffered by Plaintiffs, which this Defendant hereby specifically denies, the Plaintiffs cannot recover against this Defendant if and to the extent that the use of such products was under circumstances constituting an alteration or modification of the products as provided in South Carolina Code Section 15-73-10, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

99. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
100. In the event that the products designed, manufactured, and/or distributed by this Defendant are found to be the cause of damages suffered by Plaintiffs, which this Defendant specifically hereby denies, Plaintiffs cannot recover against this Defendant if and to the extent that the use of the products was under circumstances constituting a lack of reasonable or diligent care, and/or was an unreasonable use as defined in South Carolina Code Section 15-73-10, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

101. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

102. Products manufactured by this Defendant conformed to the current state of the art at all relevant times and such products were reasonably designed. Upon information and belief, Plaintiffs claims of alleged defects in the products, which claims are hereby specifically denied, are based upon an inherent characteristic of such products, that cannot be eliminated without substantially compromising the products usefulness or desirability, which is recognized by the ordinary person with the ordinary knowledge, and to the community, such that Plaintiffs cannot recover anything from this Defendant, as provided in South Carolina Code Section 15-73-20, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

103. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
104. To the extent that any petition in bankruptcy has been filed by or on behalf of this Defendant, this Defendant would pled discharge in bankruptcy as a complete defense to any and all claims.

FOR AN AFFIRMATIVE DEFENSE

105. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
106. That this Defendant would show that the Plaintiff lacks sufficient legal privity with this Defendant to permit imposition of liability.

FOR AN AFFIRMATIVE DEFENSE

107. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
108. That this Defendant would show that it has made no representations of warranties inducing the purchase for use of its products by Plaintiff or others, except such warranties which may be express and in writing, and such express warranties are the only and best evidence of their content and legal effect, and include lawful disclaimers of implied warranties of merchantability and fitness for a particular purpose, and include limitations and responsibility to this Defendant. This Defendant is not responsible for any warranties or representations of purchases and resellers of its products.

FOR AN AFFIRMATIVE DEFENSE

109. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
110. That the Plaintiffs are without standing to assert those claims set forth within the relevant Amended Complaint, and the Plaintiffs' claims should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE

111. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
112. That this Defendant would show that the Plaintiffs have failed to comply with those conditions precedent to litigation, as set forth within the relevant

Master Deed, By Law, and/or other governing documents, and the Plaintiffs' Amended Complaint, and all causes of action set forth therein, should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE

113. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
114. That this Defendant is informed and believes that the Plaintiffs have failed to comply with the provisions of Sections 40-59-10 et seq., and/or Section 40-11-10 et seq., South Carolina Code of Laws (1976), as amended, and the Plaintiffs' Amended Complaint should, therefore, be stayed and/or dismissed.

FOR AN AFFIRMATIVE DEFENSE

115. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
116. That, to the extent that the Plaintiff has failed to comply with the requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (Section 40-59-810 through 40-59-860), and/or Sections 40-11-500 through 40-11-570, South Carolina Codes of Laws (1976), including the provision of the required notice to the Defendant, and the provisions to the Defendant of an opportunity to cure, the Plaintiff's action must be stayed and/or otherwise barred.

FOR A FURTHER DEFENSE AND BY WAY OF
THIRD PARTY CLAIMS BY BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP, LLC, AGAINST HURLEY SERVICES, LLC, CHARLESTON
EXTERIORS, LLC, AND DVS, INC.

117. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
118. That this Defendant is informed and believes that Hurley Services, LLC, is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Hurley Services, LLC provided materials and services, including the installation of windows, doors, and/or other components, during original construction of the subject structures within the Six Fifty Six Coleman townhome complex.
119. That this Defendant is informed and believes that Charleston Exteriors, LLC, is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Charleston Exteriors, LLC provided materials and services, including the installation of windows, doors, and/or other components, during original construction of the subject structures within the Six Fifty Six Coleman townhome complex.
120. That this Defendant is informed and believes that DVS, Inc., is a corporation organized under and existing pursuant to the laws of the State

of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Hurley Services, LLC provided materials and services, including the installation of windows, doors, and/or other components, during original construction of the subject structures within the Six Fifty Six Coleman townhome complex.

FOR A FIRST CAUSE AS TO HURLEY SERVICES, LLC,
CHARLESTON EXTERIORS, LLC AND DVS, INC.

121. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
122. That the Plaintiff, Six Fifty Six Owners Association, Inc. and Robert John Nutley, individually and on behalf of others similarly situated have sued Builders FirstSource-Southeast Group, LLC (hereinafter sometimes "BFS"), asserting damages allegedly caused, inter alia, by deficiencies in materials and/or installation of windows, doors, and related components, during original construction of the subject structures.
123. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Second Amended Complaint.
124. That the Third-Party Defendants, Hurley Services, LLC, Charleston Exteriors, LLC, and DVS, Inc. (hereinafter sometimes "Third-Party Defendants") were responsible for provision of materials and services in connection with the installation of the aforesaid components of construction, for proper quality control, and for compliance with the contract documents, industry standards, and requirements of relevant

building codes. In the event that the Plaintiffs establish that the materials and/or services of the Third-Party Defendants were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event the Third-Party Defendants have failed properly to execute their duties, which failure has allegedly caused the Plaintiffs' damages.

125. That the respective subcontracts between this Defendant and the Third-Party Defendants, provide for contractual indemnification in favor of BFS.
126. That the Third Party Defendants served as subcontractors to BFS in connection with their services at the subject structures. Regardless, therefore, of any specific contractual obligation to indemnify, there exists a special relationship between this Defendant, and the Third-Party Defendants, sufficient to impose obligations of indemnity against the aforesaid Third-Party Defendants, in favor of BFS.
127. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of the Third-Party Defendants, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.
128. That BFS is entitled to full contractual and common law indemnification from the Third-Party Defendants, for any liability BFS is found to have to

the Plaintiffs or to others in this action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the Third-Party Defendants, entitling BFS to recover from the Third-Party Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the Third-Party Defendants any sums for which BFS may be held liable to the Plaintiffs or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

FOR A SECOND CAUSE OF ACTION AGAINST HURLEY SERVICES,
LLC, CHARLESTON EXTERIORS, LLC, AND DVS, INC.

129. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
130. That the Third Party Defendants made express warranties that materials, services, and/or workmanship provided in conjunction with their services at the subject structures, would be as required by and in accordance with the contract documents, applicable building codes, and industry standards.
131. That the respective sub-contract agreements between BFS and the Third Party Defendants include provisions, by which the Third-Party Defendants expressly undertook to provide materials and services in accordance with the contract documents.
132. That in the event that the Plaintiffs prove that the materials and/or services provided by the Third-Party Defendants are not in accordance with the requirements of the contract documents, industry standards, or relevant

building requirements, then and in that event the Third-Party Defendants have materially breached their express warranties.

133. That BFS is entitled to judgment against the Third-Party Defendants in the amount of any judgment which the Plaintiffs may obtain against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims, for breach of any express warranties on the part of the Third-Party Defendants, plus BFS costs for defense, inclusive of attorneys' fees.

FOR A THIRD CAUSE OF ACTION HURLEY SERVICES, LLC,
CHARLESTON EXTERIORS, LLC AND DVS, INC.

134. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
135. That the Third-Party Defendants made implied warranties of workmanlike services, merchantability, and fitness for particular purpose, in connection with its services in renovation, repair, and/or construction at the subject residence.
136. That in the event that the Plaintiffs prove that the services of the respective Third-Party Defendants were deficient, then and in that event the Third-Party Defendants have materially breached their implied warranties.
137. That BFS is entitled to judgment against the Third-Party Defendants in the event, and to the extent that the Plaintiffs may obtain judgment against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in

satisfaction of such claims, for breach of implied warranties, including such warranty of workmanlike service.

FOR A FORTH CAUSE OF ACTION AGAINST HURLEY SERVICES,
LLC, CHARLESTON EXTERIORS, LLC AND DVS, INC.

138. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
139. That Third-Party Defendants owed a duty of due care in providing services and materials in connection with construction and/or repair of the subject structures.
140. In the event that the Plaintiffs prove that due care was not exercised in the provision of materials and services by the Third-Party Defendants, then and in that event the Third-Party Defendants have breached their duties of due care.
141. In the event that the Plaintiffs obtains judgment against BFS as a direct, foreseeable and proximate result of the negligence of the Third-Party Defendants, then and in that event BFS is entitled to judgment against the Third-Party Defendants for the amount of any such judgment, or any amount Builders FirstSource-Southeast Group, LLC may pay in satisfaction of claims, plus costs of defense, inclusive of attorneys' fees.

FOR A FIFTH CAUSE OF ACTION AGAINST HURLEY SERVICES, LLC,
CHARLESTON EXTERIORS, LLC AND DVS, INC.

142. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

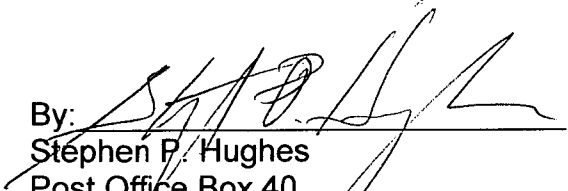
143. That the Third-Party Defendants were contractually responsible for provision of adequate materials and services in connection with their respective undertakings regarding construction of the subject structures.
144. That in the event that the Plaintiffs prove that the BFS contract was breached due to improper or inadequate materials and/or services provided by the respective Third-Party Defendants, then and in that event the Third-Party Defendants have materially breached their sub-contract, by failing properly and adequately to provide materials and services in connection with construction of the subject structures.
145. That BFS is entitled to judgment against the Third-Party Defendants in the event, and to the extent that the Plaintiffs may obtain judgment against BFS for breach of contract, or for any amount Builders FirstSource-Southeast Group, LLC may pay in satisfaction of claims, and BFS is further entitled to recover the costs of defense, inclusive of attorneys' fees.

WHEREFORE, having fully answered the Second Amended Complaint of the Plaintiffs, and having set forth its Third-Party Complaint of Builders FirstSource-Southeast Group, LLC, these Defendants pray as follows:

- a. That the Plaintiff's Second Amended Complaint be dismissed, as to these Defendants, with costs to this Defendants;
- b. That Builders FirstSource-Southeast Group, LLC be granted judgment on its Third-Party claims against Third Party Defendants Hurley Services, LLC, Charleston Exteriors, LLC and DVS, Inc.;
- c. That these Defendant have jury trial on all matters so triable;

d. That these Defendants be granted such other and further relief as this Court may deem just and proper.

HOWELL, GIBSON & HUGHES, P.A.

By: 

Stephen P. Hughes

Post Office Box 40

Beaufort, SC 29901-0040

(843) 522-2400

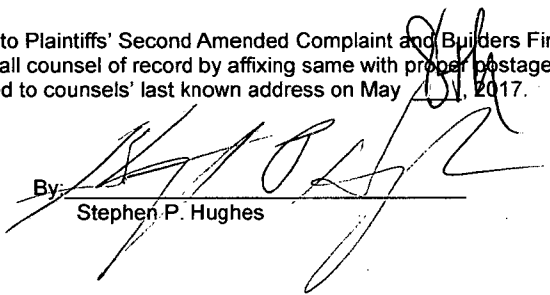
Attorney for Builders FirstSource, Inc.,
Builders FirstSource-Atlantic Group,
LLC, Builders FirstSource-Florida, LLC
a/k/a Builders FirstSource-Florida
Design Center, LLC, and Builders
FirstSource-Southeast Group, LLC

Beaufort, South Carolina

May 4, 2017

CERTIFICATE OF SERVICE

I certify that I served the foregoing Answer to Plaintiffs' Second Amended Complaint and Builders FirstSource-Southeast Group, LLC's Third Party Complaint upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on May 4, 2017.

By: 

Stephen P. Hughes

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-10-3455

SIX FIFTY SIX OWNERS ASSOCIATION,)
INC., and ROBERT JOHN NUTLEY and)
SYLVIA PLAYER HORRES, both)
individually, and on behalf of all others)
similarly situated,)

Plaintiffs,)

vs.)

WINSOR SOUTH, LLC AND JEFFREY M.)
THOMAS; SOUTHEASTERN)
RECAPITALIZATION GROUP, LLC; WCM)
CONSTRUCTION, LLC; JONATHAN J.)
THOMAS; AC HEATING AND AIR)
CONDITIONING SERVICE, INC.; ACME)
DOORS, INC.; ALPHA OMEGA)
CONSTRUCTION GROUP, INC.; ATLANTIC)
CONSTRUCTION SERVICES, INC.; BUCK)
LUMBER AND BUILDING SUPPLY, INC.;)
BUILDERS FIRSTSOURCE, INC.;)
BUILDERS FIRSTSOURCE-ATLANTIC)
GROUP, LLC; BUILDERS FIRSTSOURCE-)
FLORIDA, LLC A/K/A BUILDERS)
FIRSTSOURCE-FLORIDA DESIGN)
CENTER, LLC; BUILDERS FIRSTSOURCE-)
SOUTHEAST GROUP, LLC; CHARLOTTE)
FLOORING, INC.; DIRIA TAWI PAINTING,)
INC.; EAST COAST WALL SYSTEMS, INC.;)
FOGEL SERVICES, INC.; G&S HOME)
REMODELING, LLC; GUARANTEED)
FRAMING, LLC; J. MORA BRICK & BLOCK)
MASON, LLC; LAND/SITE SERVICES, INC.;)
LANDMARK CONSTRUCTION COMPANY,)
INC.; LUTZEN CONSTRUCTION, INC.; NEW)
HORIZON SHUTTERS, INC. A/K/A NEW)
HORIZON SHUTTERS INTERNATIONAL,)

THIRD AMENDED COMPLAINT

(Defective Construction)

(Class Action)

(Jury Trial Demanded)

2019 JAN -9 AM 11:05
JULIE J. ARMSTRONG
CLERK OF COURT
BY SB

FILED

LLC; PJ SANCHEZ MASONRY, LLC;)
 SCREENS PLUS, INC.; SIMONS)
 CONSTRUCTION COMPANY, LLC; STUCCO)
 BY DESIGN, LLC; FINE BUILDERS, LLC;)
 SPEEDTRUSS, INC.; **ARGENTINO JOSE**)
CAMPOS D/B/A AS CONSTRUCTION;)
 JAVIER MORALES MERINO; NOVAC)
 CONSTRUCTION, INC.; MJG)
 CONSTRUCTION, INC.; ADVANCE)
 PLUMBING, HEATING & AIR, INC.;)
 CAHILL CONTRACTING, LLC; COHEN'S)
 DRYWALL, INC.; BOB PORTER D/B/A)
 CUSTOM INTERIOR CONSTRUCTION;)
 RB'S TRIM, INC.; SHARON'S PAINTING,)
 LLC; DAVIS TILE; TIMOTHY MITCHELL;)
 ELECTRICAL DESIGN & CONSTRUCTION,)
 INC.; **HURLEY SERVICES, LLC;**)
CHARLESTON EXTERIORS LLC; JORGE)
DIAZ A/K/A JORGE LOUIS DIAZ PAZ;)
SAN LUIS CONSTRUCTION, INC. N/K/A)
ROOFING AMERICA METAL)
FABRICATIONS, LLC; ROGERIO DOS)
SANTOS D/B/A ROGERIO SANTOS)
CONSTRUCTION; FABIO OLIVIERA)
D/B/A FOUR SEASON SIDING; SUNRISE)
SIDING, LLC; GARCIA ROOFING, LLC.;)
ESPINO ROOFING, LLC; MIGUEL)
PAINTING, LLC; HORACIO JASSO;)
STANDARD PRECAST WALLS, LLC;)
ALFONSO RODRIGUEZ A/K/A ALFONSO)
RODRIGUEZ, JR. D/B/A AR SERVICES)
CO.; ALFONSO RODRIGUEZ VASQUEZ)
A/K/A ALFONSO RODRIGUEZ, SR.; AND)
JOHN DOE 55 -75,)
)

Defendants.

The Plaintiffs, Six Fifty Six Owners Association, Inc., Robert John Nutley, individually,
 and on behalf of all others similarly situated, **and Sylvia Player Horres, individually, and on**

behalf of all others similarly situated, complaining of the Defendants named herein, would respectfully allege and show the Court as follows:

THE PARTIES

1. Plaintiff Six Fifty Six Owners Association, Inc. (hereinafter “Association”), is a non-profit corporation organized and existing under the laws of the State of South Carolina.

2. The Association is the property owners association for Six Fifty Six Horizontal Property Regime.

3. The Six Fifty Six Horizontal Property Regime (hereinafter “656 Coleman Townhomes”) is a Horizontal Property Regime which exists by virtue of a Master Deed dated March 19, 2007, and recorded on March 20, 2007, in the RMC Office of Charleston County, SC, in Book E619, Page 738.

4. 656 Coleman Townhomes consists of fifty-two (52) townhomes in twelve (12) buildings and related common elements. Construction began in 2006 and the final Certificate of Occupancy was issued on June 18, 2014. The Developers turned over control of the Association to the homeowners **on March 22, 2016**.

5. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code §§ 27-31-10, *et. seq.*, the Association is charged with certain duties, powers, rights and authority in connection with 656 Coleman Townhomes.

6. By virtue of the Master Deed and/or Bylaws, the Association is charged with, *inter alia*, the management and administration of 656 Coleman Townhomes, the investigation, maintenance and repair of 656 Coleman Townhomes’ Common Elements and Areas of Responsibility, and has the right and authority to bring this action on behalf of the Association and its members.

7. The Association duly noticed and convened a Meeting of the Association wherein members of the Association overwhelmingly approved the Association's commencement of this litigation.

8. **The Association is the assignee of the claims of one or more of the homeowners.**

9. Plaintiff Robert John Nutley (hereinafter "Plaintiff Nutley") is a citizen of Charleston County, South Carolina, and is an owner of a townhome **constructed by The Ryland Group, Inc.** within 656 Coleman, more particularly described as 656 Coleman Blvd., Unit 204, Mount Pleasant, South Carolina, 29464.

10. Plaintiff Nutley entered into a contract to purchase the above-described real property on or about March 14, 2014.

11. **Plaintiff Sylvia Player Horres (hereinafter "Plaintiff Horres") is a citizen of Charleston County, South Carolina, and is an owner of a townhome constructed by Winsor South, LLC within 656 Coleman, more particularly described as 656 Coleman Blvd., Unit 602, Mount Pleasant, South Carolina, 29464.**

12. **Plaintiff Horres entered into a contract to purchase the above-described real property on or about May 20, 2014.**

13. By virtue of **their** property ownership in 656 Coleman, Plaintiff Nutley **and Plaintiff Horres** bring this action on behalf of **themselves** and a Proposed Class of other similarly situated property owners. In addition to **their** common ownership interest, Plaintiff Nutley, **Plaintiff Horres**, and the Proposed Class are also members of the Association. Consequently, Plaintiff Nutley **and Plaintiff Horres** fairly and adequately represent the interests of the entire Association membership - as members of the Association, Plaintiff Nutley **and Plaintiff Horres** share common interests with other Association members regarding the resolution of this matter

and Plaintiff Nutley **and Plaintiff Horres** are able and committed to prosecuting these common interests.

14. Defendant Winsor South, LLC, is a limited liability company organized under the laws of the State of South Carolina. At all times relevant to this action, Winsor South, LLC, was engaged in the business of developing, designing, constructing, repairing and/or selling townhomes in Charleston County, South Carolina.

15. Upon information and belief, Defendant Jeffrey M. Thomas is an individual residing in Charleston, South Carolina. At all times relevant to this action, Jeffrey M. Thomas was engaged in the business of developing, designing, constructing, repairing and/or selling townhomes in Charleston County, South Carolina.

16. Defendants Winsor South, LLC, and Jeffrey M. Thomas were the initial builders of the 656 Coleman Townhomes. **Winsor South, LLC, and Jeffrey M. Thomas constructed buildings 400, 500, and 600 (the “Winsor Buildings”)**

17. Defendant WCM Construction, LLC, is a limited liability company organized under the laws of the State of South Carolina. At all times relevant to this action, WCM Construction, LLC, was engaged in the business of developing, designing, constructing, repairing and/or selling townhomes in Charleston County, South Carolina.

18. Upon information and belief, Defendant Jonathan J. Thomas is an individual residing in Middlesex, Massachusetts. At all times relevant to this action, Defendant Jonathan J. Thomas was engaged in the business of developing, designing, constructing, repairing, and/or selling townhomes in Charleston County, South Carolina

19. **Jonathan J. Thomas served as the second developer of the 656 Coleman Townhomes.**

20. Defendant Southeastern Recapitalization Group, LLC, is a limited liability company organized and existing under the laws of the State of South Carolina.

21. Defendant Southeastern Recapitalization purchased **Building 400 and six (6) finished townhomes** from the original Developer, WCB, LLC, pursuant to a Limited Warranty Deed executed on December 31, 2008, and filed with the Charleston County Register of Deeds on December 31, 2008, at Book 0027, Page 504.

22. Upon information and belief, Defendant Southeastern Recapitalization **finished the design and construction of Building 400** and placed new townhouses into the stream of commerce.

23. **WCM Construction served as the general contractor for Southeastern Recapitalization, and completed construction of Building 400.**

24. **The Ryland Group, Inc. (hereinafter “Ryland”) is the developer and general contractor that constructed the 35 homes in Buildings 100, 200, 300, 700, 800, 900, 1000, 1100, and 1200 (the “Ryland Buildings”).**

25. **This lawsuit involves all 12 buildings that comprise the 656 Coleman Townhomes. Plaintiffs are distinguishing between buildings solely to specify which defendants worked on each set of buildings.**

Winsor South Subcontractors

26. Defendant AC Heating and Air Conditioning Service, Inc., formerly identified as John Doe #1 (hereinafter “AC Heating and Air”), is a corporation organized and existing under the laws of the State of South Carolina. Upon information and belief, at all times relevant to this action, AC Heating and Air performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656

Townhomes, including but not limited to the supply and installation of the HVAC systems and associated components in some or all of the **Winsor Buildings**.

27. Defendant Acme Doors, Inc., formerly identified as John Doe #2 (hereinafter “Acme Doors”), is a corporation organized and existing under the laws of the State of South Carolina. Upon information and belief, at all times relevant to this action, Acme Doors performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the garage doors in some or all of the **Winsor Buildings**.

28. Defendant Atlantic Construction Services, Inc., formerly identified as John Doe #4 (hereinafter “Atlantic Construction”), is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Atlantic Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing members, windows, doors, and related components on **Buildings 500 and 600**.

29. Defendant Buck Lumber and Building Supply, Inc., formerly identified as John Doe #5 (hereinafter “Buck Lumber”), is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Buck Lumber performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing members, windows, doors, and related components on some or all of the **Winsor Buildings**.

30. Defendant J. Mora Brick & Block Mason, LLC, formerly identified as John Doe #16 (hereinafter “J. Mora Brick”), is a company organized and existing under the laws of the State

of South Carolina. At all times relevant to this action, J. Mora Brick performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the masonry veneer, masonry columns, concrete footings, masonry foundations, and related components in some or all of the **Winsor Buildings**.

31. Defendant G&S Home Remodeling, LLC, formerly identified as John Doe #14 (hereinafter “G&S Home”), is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, G&S Home performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the gutters and associated components on some or all of the **Winsor Buildings**.

32. Defendant Guaranteed Framing, LLC, formerly identified as John Doe #15 (hereinafter “Guaranteed Framing”), is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Guaranteed Framing performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing members, windows, doors, and related components in **Building 400**.

33. Defendant Landmark Construction Company, Inc., formerly identified as John Doe #18 (hereinafter “Landmark Construction”), is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Landmark Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to performing the site work **for Winsor South**.

34. Defendant New Horizon Shutters, Inc. a/k/a New Horizon Shutters International, LLC, formerly identified as John Doe #20 (hereinafter “New Horizon”), is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, New Horizon performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the shutters on some or all of the **Winsor Buildings**.

35. Defendant Screens Plus, Inc., formerly identified as John Doe #22 (hereinafter “Screens Plus”), is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Screens Plus performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the screens and related components in some or all of the **Winsor Buildings**.

36. Defendant Stucco By Design, LLC, formerly identified as John Doe #24 (hereinafter “Stucco By Design”), is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Stucco By Design performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the stucco, insulation, caulking, sealant, and related components on some or all of the **Winsor Buildings**.

37. Defendant Fine Builders, LLC, formerly identified as John Doe #25 (hereinafter “Fine Builders”), is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Fine Builders performed certain work and/or repairs as a sub-subcontractor of Defendant Atlantic Construction at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not

limited to the supply and installation of the framing, related components, and other work on **Building 500**.

38. Defendant Speedtruss, Inc., formerly identified as John Doe #26 (hereinafter “Speedtruss”), is a company organized and existing under the laws of the State of New Jersey. At all times relevant to this action, Speedtruss performed certain work and/or repairs as a sub-subcontractor of Defendant Atlantic Construction at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing, related components, and other work on **Building 600**.

39. **Defendant Argentino Jose Campos d/b/a AS Construction**, formerly identified as John Doe #27 (**hereinafter AS Construction**), is an **individual residing in Goose Creek**, South Carolina. At all times relevant to this action, AS Construction performed certain work and/or repairs as a sub-subcontractor of Defendant Atlantic Construction at of the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing, related components, and other work on **Building 600**.

40. Upon Information and belief, Defendant Javier Morales Merino, formerly identified as John Doe #28, is a citizen and resident of the State of South Carolina. At all times relevant to this action, Defendant Merino installed certain stucco cladding and provided other materials and/or performed other work on some or all of the **Winsor Buildings**.

41. Upon information and belief, Defendant MJG Construction, Inc., formerly identified as John Doe #30 (hereinafter “MJG”), is an entity organized and existing under the laws of the State of Texas. At all times relevant to this action, Defendant MJG performed certain concrete work and/or repairs on some or all of the **Winsor Buildings**.

42. Defendant Advance Plumbing, Heating and Air, Inc., formerly identified as John Doe #31 (hereinafter “Advance Plumbing”), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Advance Plumbing performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to plumbing work **on the Winsor Buildings**.

43. Defendant Cahill Contracting, LLC, formerly identified as John Doe #33 (hereinafter “Cahill”), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Cahill performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to roofing work **on the Winsor Buildings**.

44. Defendant Cohen’s Drywall, Inc., formerly identified as John Doe #34 (hereinafter “Cohen’s”), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Cohen’s performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to insulation work **on the Winsor Buildings**.

45. Defendant Bob Porter d/b/a Custom Interior Construction, formerly identified as John Doe #35 (hereinafter “Custom Interior”), is a citizen and resident of the State of South Carolina. At all times relevant to this action, Custom Interior performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to interior trim work **on the Winsor Buildings**.

46. Defendant RB's Trim, Inc., formerly identified as John Doe #36 (hereinafter "RB's Trim"), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, RB's Trim performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to interior trim work **on the Winsor Buildings**.

47. Defendant Sharon's Painting and Construction a/k/a Sharon's Painting, LLC, formerly identified as John Doe #37 (hereinafter "Sharon's Painting"), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Sharon's Painting performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to paint work **on the Winsor Buildings**.

48. Defendant Davis Tile, formerly identified as John Doe #38, is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Davis Tile performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to tile work **on the Winsor Buildings**.

49. Defendant Timothy Mitchell, formerly identified as John Doe #39 (hereinafter "Mitchell"), is a citizen and resident of the State of South Carolina. At all times relevant to this action, Mitchell performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to concrete work **on the Winsor Buildings**.

50. Defendant Electrical Design & Construction, Inc., formerly identified as John Doe #40 (hereinafter "Electrical Design"), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Electrical Design performed certain

work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to electrical work **on the Winsor Buildings.**

51. **Defendant Jorge Diaz a/k/a Jorge Louis Diaz Paz, formerly identified as John Doe #43 (hereinafter “Diaz”), upon information and belief, is a citizen and resident of the State of South Carolina. At all times relevant to this action, Diaz performed certain work and/or repairs as a sub-subcontractor for Defendant Guaranteed Framing at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing members, windows, doors, and related components on Building 400.**

52. **Defendant San Luis Construction, Inc., n/k/a Roofing America Metal Fabrications, LLC, formerly identified as John Doe #44 (hereinafter “Roofing America”), is, upon information and belief, a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Roofing America performed various work and/or repairs as a sub-subcontractor for Defendant Cahill Contracting at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the installation of the roofing and related waterproofing, flashing, and other associated components on some or all of the Winsor Buildings.**

53. **Defendant Rogerio Dos Santos d/b/a Rogerio Santos Construction, formerly identified as John Doe #45 (hereinafter “Santos Construction”), is, upon information and belief, a person doing business in the State of South Carolina. At all times relevant to this action, Santos Construction performed various work and/or repairs as a sub-subcontractor for Defendant Simons Construction at the 656 Townhomes and/or supplied certain**

materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the window and door flashing and related components on Building 400.

54. Defendant Fabio De Oliveira d/b/a Four Season Siding, formerly identified as John Doe #46 (hereinafter “Four Season Siding”), is, upon information and belief, an person doing business in the State of South Carolina. At all times relevant to this action, Four Season Siding performed various work and/or repairs as a sub-subcontractor for Defendant Simons Construction at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the exterior cladding, siding, exterior trim, and related components on some or all of the Winsor Buildings.

55. Defendant Standard Precast Walls, LLC, formerly identified as John Doe #52 (hereinafter “Precast Walls”), is, upon information and belief, a limited liability company organized and existing under the laws of the State of Georgia. At all times relevant to this action, Precast Walls performed various work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the design, manufacture, supply and installation of the precast walls, related sealant joints, waterproofing, flashing, and other associated components on Building 400.

Ryland Subcontractors

56. Defendant Alpha Omega Construction Group, Inc., formerly identified as John Doe #3 (hereinafter “Alpha Omega”), is a corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, Alpha Omega performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products

used in the construction of the 656 Townhomes, including but not limited to the installation of the roofing and related waterproofing, flashing, and other associated components on some or all of the **Ryland Buildings**.

57. Defendant Builders FirstSource, Inc., formerly identified as John Doe #6 (hereinafter “Builders FirstSource”), is a corporation organized and existing under the laws of the State of Delaware. At all times relevant to this action, Builders FirstSource performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the windows and related waterproofing, flashing, and other associated components on some or all of the **Ryland Buildings**.

58. Defendant Builders FirstSource-Atlantic Group, LLC, formerly identified as John Doe #7 (hereinafter “Builders FirstSource-Atlantic”), is a company organized and existing under the laws of the State of Delaware. At all times relevant to this action, Builders FirstSource-Atlantic performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the windows and related waterproofing, flashing, and other associated components on some or all of the **Ryland Buildings**.

59. Defendant Builders FirstSource-Florida, LLC a/k/a Builders FirstSource-Florida Design Center, LLC, formerly identified as John Doe #8 (hereinafter “Builders FirstSource-Florida”), is a company organized and existing under the laws of a State other than South Carolina. At all times relevant to this action, Builders FirstSource-Florida performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation

of the windows and related waterproofing, flashing, and other associated components on some or all of the **Ryland Buildings**.

60. Defendant Builders FirstSource-Southeast Group, LLC, formerly identified as John Doe #9 (hereinafter “Builders FirstSource-Southeast”), is a company organized and existing under the laws of the State of Delaware. At all times relevant to this action, Builders FirstSource-Southeast performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the windows and related waterproofing, flashing, and other associated components on some or all of the **Ryland Buildings**.

61. Defendant Charlotte Flooring, Inc., formerly identified as John Doe #10 (hereinafter “Charlotte Flooring”), is a company organized and existing under the laws of the State of North Carolina. At all times relevant to this action, Charlotte Flooring performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the ceramic tile and other associated components on some or all of the **Ryland Buildings**.

62. Defendant Diria Tawi Painting, Inc., formerly identified as John Doe #11 (hereinafter “Diria Tawi”), is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Diria Tawi performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the paint, caulking, and related waterproofing, flashing, and other associated components on some or all of the **Ryland Buildings**.

63. Defendant Fogel Services, Inc., formerly identified as John Doe #13 (hereinafter “Fogel Services”), is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Fogel Services performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes including but not limited to the supply and installation of the HVAC systems and associated components in some or all of the **Ryland Buildings**.

64. Defendant Land/Site Services, Inc., formerly identified as John Doe #17 (hereinafter “Land/Site Services”), is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Land/Site Services performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to performing the site work and related components in the construction of the **Ryland Buildings**.

65. Defendant Lutzen Construction, Inc., formerly identified as John Doe #19 (hereinafter “Lutzen Construction”), is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Lutzen Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the foundations, concrete slabs, and other related components in the construction of the **Ryland Buildings**.

66. Defendant PJ Sanchez Masonry, LLC, formerly identified as John Doe #21 (hereinafter “PJ Sanchez Masonry”), is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, PJ Sanchez Masonry performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to

the supply and installation of the masonry veneer, masonry columns, concrete footings, masonry foundations, and related components in some or all of the **Ryland Buildings**.

67. Defendant Novac Construction, Inc., formerly identified as John Doe #29 (hereinafter “Novac Construction”), is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Novac Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the framing members, windows, doors, and related components and performed other work on some or all of the **Ryland Buildings**.

68. Defendant Hurley Services, LLC, formerly identified as John Doe #41 (hereinafter “Hurley Services”), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Hurley Services performed certain work and/or repairs as a sub-subcontractor for Defendant Builders First Source at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the windows, doors, and related waterproofing, flashing, and other associated components on some or all of the **Ryland Buildings**.

69. Defendant Charleston Exteriors LLC, formerly identified as John Doe #42 (hereinafter “Charleston Exteriors”), is an entity organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Charleston Exteriors performed certain work and/or repairs as a sub-subcontractor for Defendant Builders First Source at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation

of the windows, doors, and related waterproofing, flashing, and other associated components on some or all of the Ryland Buildings.

70. Defendant Sunrise Siding, LLC formerly identified as John Doe #47, is, upon information and belief, a limited liability corporation organized in the State of South Carolina. At all times relevant to this action, Sunrise Siding performed various work and/or repairs as a sub-subcontractor for Defendant Simons Construction at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the exterior cladding, siding, exterior trim, and related components on some or all of the Ryland Buildings.

71. Defendant Garcia Roofing, LLC, formerly identified as John Doe #48 (hereinafter “Garcia”), is, upon information and belief, a limited liability corporation organized under the laws of the State of South Carolina. At all times relevant to this action, Garcia Roofing, LLC, performed various work and/or repairs as a sub-subcontractor for Defendant Alpha Omega at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the installation of the roofing and related waterproofing, flashing, and other associated components on some or all of the Ryland Buildings.

72. Defendant Espino Roofing, LLC, formerly identified as John Doe #49 (hereinafter “Espino”), is, upon information and belief, a limited liability corporation organized under the laws of the State of South Carolina. At all times relevant to this action, Espino performed various work and/or repairs as a sub-subcontractor for Defendant Alpha Omega at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the installation of the

roofing and related waterproofing, flashing, and other associated components on some or all of the Ryland Buildings.

73. Defendant Miguel Painting, LLC, formerly identified as John Doe #50 (hereinafter “Miguel”), is, upon information and belief, a limited liability corporation organized under the laws of the State of South Carolina. At all times relevant to this action, Miguel performed various work and/or repairs as a sub-subcontractor for Defendant Diria Tawi at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the paint, caulking, and related waterproofing, flashing, and other associated components on some or all of the Ryland Buildings.

74. Defendant Horacio Jasso, formerly identified as John Doe #51 (hereinafter “Jasso”), is, upon information and belief, a citizen of and resident of the State of South Carolina. At all times relevant to this action, Jasso performed various work and/or repairs as a sub-subcontractor for Defendant Diria Tawi at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the paint, caulking, and related waterproofing, flashing, and other associated components on some or all of the Ryland Buildings.

75. Defendant Alfonso Rodriguez a/k/a Alfonso Rodriguez, Jr. d/b/a AR Services Co. formerly identified as John Doe #53 (hereinafter “AR Services”), is, upon information and belief, an individual that resides in Orangeburg County and performs HVAC installation in Charleston County, South Carolina. At all times relevant to this action, AR Services performed various work and/or repairs as a subcontractor for Defendant Fogel Services at the 656 Townhomes, including but not limited to the supply and installation of the HVAC systems and associated components in some or all of the Ryland Buildings.

76. **Defendant Alfonso Rodriguez Vasquez a/k/a Alfonso Rodriguez, Sr. formerly identified as John Doe #54 (hereinafter “Alfonso Vasquez”), is, upon information and belief, an individual that resides in Dorchester County and performs HVAC installation in Charleston County, South Carolina. At all times relevant to this action, Alfonso Vasquez performed various work and/or repairs as a subcontractor for Defendant Fogel Services at the 656 Townhomes, including but not limited to the supply and installation of the HVAC systems and associated components in some or all of the Ryland Buildings.**

Dual Provider Subcontractors

77. Defendant East Coast Wall Systems, Inc., formerly identified as John Doe #12 (hereinafter “East Coast Wall Systems”), is a company organized and existing under the laws of the State of North Carolina. At all times relevant to this action, East Coast Wall Systems performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the drywall, painting, and related waterproofing, flashing, and other associated components on some or all of the homes.

78. Defendant Simons Construction Company, LLC, formerly identified as John Doe #23 (hereinafter “Simons Construction”), is a company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Simons Construction performed certain work and/or repairs as a subcontractor at the 656 Townhomes and/or supplied certain materials/products used in the construction of the 656 Townhomes, including but not limited to the supply and installation of the exterior cladding, siding, exterior trim, and related components on some or all of the homes.

79. **East Coast Wall Systems and Simons Construction performed work on both the Winsor Buildings and the Ryland Buildings at the project.**

80. **John Doe Defendants 55-75 are the designers, subcontractors, suppliers and/or other entities involved in the design, construction, material manufacturing and/or supplying and/or repair of the 656 Coleman Townhomes, whose identity and location are unknown at this time.**

FACTUAL ALLEGATIONS

81. This matter arises out of the design, development, construction, repair and sale of the 656 Coleman Townhomes.

82. At the time the Certificates of Occupancy were issued, the 656 Coleman Townhomes contained latent building defects.

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

84. A preliminary inspection of 656 Coleman Townhomes 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. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting there from.

85. Defendants had a duty to design, develop, construct, and repair 656 Coleman Townhomes in a workmanlike manner with suitable materials and free from all defects.

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

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

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

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

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

PLAINTIFFS CLASS ACTION ALLEGATIONS

91. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff Nutley **and Plaintiff Horres** 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 townhome within 656 Coleman Townhomes (hereinafter collectively referred to as the "Class"). The Class is particularly defined as follows:

All persons and entities that own a condominium within 656 Coleman Townhomes 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.

92. **Plaintiff Nutley and Plaintiff Horres will each represent a sub-class, where Plaintiff Nutley represents the Class Members who own homes built by Ryland and its subcontractors, and Plaintiff Horres represents the Class Members who own homes built by Winsor South and its subcontractors.**

93. *Numerosity:* The Class is composed of in excess of fifty (50) 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 one hundred members.**

94. *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 Defendants negligently designed, developed constructed and/or repaired 656 Coleman Townhomes;
- (b) Whether the construction and/or repair of 656 Coleman Townhomes was defective;
- (c) Whether Defendants knew or should have known of the original defects;
- (d) Whether Defendants have acted or refused to act on grounds generally applicable to the Class;
- (e) Whether Plaintiff 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 townhomes as well as repair/replacement of other property damage; (ii) temporary repairs and (iii) compensation for loss of use; and,
- (f) Whether the Plaintiff and the Class are entitled to prejudgment interest, attorneys' fees and costs from Defendants.

95. *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 656 Coleman Townhomes, Defendants' conduct in concealing the defective condition of 656 Coleman Townhomes, and Plaintiffs' and Class Members' purchasing homes containing building defects.

96. *Adequate Representation:* Plaintiff Nutley **and Plaintiff Horres** will fairly and

adequately protect the interests of the members of the Class and have no interests antagonistic to those of the Class. Plaintiff Nutley **and Plaintiff Horres** 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.

97. *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. Additionally, given potential overlapping ownership of some building elements, the class action is the superior mechanism for the presentation of this action.

98. Further, class certification is necessary because of the co-ownership of many of the building components require that Plaintiffs' claims be prosecuted together.

99. 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 656 Coleman Townhomes.

100. Plaintiff Nutley, **Plaintiff Horres** and the Class envision no unusual difficulty in the management of this action as a class action.

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

102. The relationship of the class claims with each other and with the Association claims makes piece meal litigation and individual claims difficult.

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

103. Defendants are estopped from relying on any statutes of limitation or repose by virtue of their acts. Upon information and belief, Defendants should have known 656 Coleman Townhomes was defectively constructed and failed to alert the Plaintiffs of 656 Coleman Townhomes' defective condition.

104. Defendants had a duty to inform Plaintiffs of the defects described herein, which they should have known. Notwithstanding their duty, Defendants never disclosed the defects to Plaintiffs.

105. Despite exercising reasonable diligence, Plaintiffs could not have discovered the defective condition of 656 Coleman Townhomes due to their latency.

106. Given Defendants' failure to disclose this non-public information about the defective nature of 656 Coleman Townhomes – information over which they had exclusive control – and because Plaintiffs could not reasonably have known of 656 Coleman Townhomes' defective nature, Defendants are estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

ESTOPPEL FROM PLEADING WARRANTY OBLIGATION

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

108. By virtue of Defendants' acts, the work performed and/or materials supplied at 656 Coleman Townhomes have not lived up to Defendants' warranties and representations, and given

the defective condition of 656 Coleman Townhomes and the premature deterioration of the life expectancy of 656 Coleman Townhomes' 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.

109. Defendants, in the exercise of required diligence, which negligently failed to occur, should have known that 656 Coleman Townhomes 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 Plaintiff and the Class. In fact, Defendants have previously seen other similar failures at other projects they have constructed.

110. Accordingly, any warranty provided by Defendants fails its essential purpose because its purports to warrant that 656 Coleman Townhomes and/or its building components will be free from defects for a limited period of time when in fact 656 Coleman Townhomes and/or its building components fail far short of the expected life cycle of the townhomes.

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

112. Moreover, given the comparative posture, resources, sophistication, and knowledge of the parties, the warranty limitations are procedurally unconscionable; and given Defendants knew or should have known that the defects existed at the time they issued the warranty, the limitations are substantively unconscionable.

113. As a result, any 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

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

115. Upon information and belief, one or more of the Defendants were put on sufficient notice of 656 Coleman Townhomes' defective condition within any statutory period prescribed by the Act.

116. Therefore, the Defendants were provided an opportunity to cure 656 Coleman Townhomes' defective condition previously, but failed to adequately perform.

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

117. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

118. At all times relevant hereto, the Defendants, their 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 656 Coleman Townhomes 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.

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

- (a) In failing to construct 656 Coleman Townhomes in accordance with building code, the plans and specifications, and good workmanship;
- (b) In failing to properly supervise the work and construction of 656 Coleman Townhomes;
- (c) In failing to properly coordinate the subcontractors;
- (d) In failing to construct an adequate exterior building envelope;

- (e) In failing to act as a reasonable person would in the circumstances then and there prevailing;
- (f) In covering up their own defective work and the defective work of others;
- (g) In failing to make proper repairs; and
- (h) Such other failures to be proven at trial.

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

121. 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)

122. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

123. The design, construction, sale, and repair of 656 Coleman Townhomes came with implied warranties that the work would be performed in a careful, diligent and workmanlike manner and that 656 Coleman Townhomes would be constructed with suitable materials and components and free from all defects and be of superior quality befitting of an upscale condominium complex.

124. The design, construction, sale and/or repair of 656 Coleman Townhomes, and the components used therein, came with implied warranties of fitness, merchantability and workmanship and with a warranty of habitability.

125. Defendants have breached their warranties by constructing and/or repairing 656 Coleman Townhomes in a defective manner as set forth above.

126. 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 Atlantic Construction Services, Inc.; Buck Lumber and Building Supply, Inc.; Builders FirstSource, Inc.; Builders FirstSource-Atlantic Group, LLC; Builders FirstSource-Florida, LLC a/k/a Builders FirstSource-Florida Design Center, LLC; Builders FirstSource-Southeast Group, LLC; New Horizon Shutters, Inc. a/k/a New Horizon Shutters International, LLC; Standard Precast Walls, LLC; and Speedtruss, Inc.)

127. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs if more fully set forth herein.

128. In manufacturing and supplying products for the construction of the 656 Coleman Townhomes, **Atlantic Construction Services, Inc.; Buck Lumber and Building Supply, Inc.; Builders FirstSource, Inc.; Builders FirstSource-Atlantic Group, LLC; Builders FirstSource-Florida, LLC a/k/a Builders FirstSource-Florida Design Center, LLC; Builders FirstSource-Southeast Group, LLC; New Horizon Shutters, Inc. a/k/a New Horizon Shutters International, LLC; Standard Precast Walls, LLC; and Speedtruss, Inc.**, placed products into the stream of commerce.

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

130. In the manufacture and supply of products to the 656 Coleman Townhomes, these Defendants, anticipated and expected that their products would reach the public in substantially the same condition in which they were designed, developed, constructed, and sold.

131. These Defendants, have supplied and manufactured their products in a defective manner unreasonably dangerous to persons or property other than the products themselves, which has resulted in repeated water intrusion into and damage to the 656 Coleman townhomes and other building deficiencies.

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

133. The cost of altering the design, construction, and/or repair of the products supplied to the 656 Coleman Townhomes was substantially less than the resulting damage, cost, and injury suffered by the Plaintiffs.

134. The design and manufacture of the products supplied to the 656 Coleman Townhomes was inherently defective as sold was a direct and proximate cause of the damages suffered by Plaintiffs.

135. These Defendants, are therefore liable to Plaintiffs under the doctrine of strict liability in an amount to be determined by the trier of fact.

WHEREFORE, Plaintiffs demand a trial by jury and pray for:

1. a judgment against the Defendants that supplied labor and/or materials to the Winsor South Buildings, joint and several;
2. a judgment against the Defendants that supplied labor and/or materials to the Ryland Buildings, joint and several;
3. actual and consequential damages;
4. punitive damages;
5. reasonable attorneys' fees;
6. costs of suit;
7. prejudgment interest;
8. such further relief as the Court deems just and proper.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By:

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Joshua F. Evans
James L. Floyd, III ("Lee")

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January 7, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

SIX FIFTY SIX OWNERS)
ASSOCIATION, INC. AND ROBERT)
JOHN NUTLEY AND SYLVIA PLAYER)
HORRES, BOTH INDIVIDUALLY AND)
ON BEHALF OF ALL OTHERS)
SIMILARLY SITUATED,)

Plaintiffs,)

v.)

WINSOR SOUTH, LLC AND JEFFREY)
M. THOMAS, INDIVIDUALLY AND)
ON BEHALF OF A CLASS OF)
CONSTRUCTION DEFENDANTS;)
SOUTHEASTERN RECAPITALIZATION)
GROUP, LLC; WCM CONSTRUCTION,)
LLC; JONATHAN J. THOMAS; AC)
HEATING AND AIR CONDITIONING)
SERVICE, INC.; ACME DOORS, INC.;)
ALPHA OMEGA CONSTRUCTION)
GROUP, INC.; ATLANTIC)
CONSTRUCTION SERVICES, INC.;)
BUCK LUMBER AND BUILDING)
SUPPLY, INC.; BUILDERS)
FIRSTSOURCE, INC.; BUILDERS)
FIRSTSOURCE-ATLANTIC GROUP,)
LLC; BUILDERS FIRSTSOURCE-)
FLORIDA, LLC A/K/A BUILDERS)
FIRSTSOURCE-FLORIDA DESIGN)
CENTER, LLC; BUILDERS)
FIRSTSOURCE-SOUTHEAST GROUP,)
LLC; CHARLOTTE FLOORING, INC.;)
DIRIA TAWI PAINTING, INC.; EAST)
COAST WALL SYSTEMS, INC.; FOGEL)
SERVICES, INC.; G&S HOME)
REMODELING, LLC; GUARANTEED)
FRAMING, LLC; J. MORA BRICK &)
BLOCK MASON, LLC;)
LAND/SITESERVICES, INC.;)
LANDMARK CONSTRUCTION)
COMPANY, INC.; LUTZEN)
CONSTRUCTION, INC.; NEW)
HORIZON SHUTTERS INC., A/K/A NEW)

IN THE COURT OF COMMON PLEAS
C/A No.: 2016-CP-10-03455

HURLEY SERVICES, LLC'S
ANSWER TO PLAINTIFFS' THIRD
AMENDED COMPLAINT
(Jury Trial Demanded)

FILED
2019 JAN 17 PM 1:33
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

HORIZON SHUTTERS)
 INTERNATIONAL, LLC; PJ SANCHEZ)
 MASONRY, LLC; SCREENS PLUS INC.;)
 SIMONS CONSTRUCTION COMPANY)
 LLC; STUCCO BY DESIGN, LLC; FINE)
 BUILDERS, LLC; SPEEDTRUSS, INC.;)
 ARGENTINO JOSE CAMPOS D/B/A AS)
 CONSTRUCTION; JAVIER MORALES)
 MERINO; NOVAC CONSTRUCTION,)
 INC.; MJG CONSTRUCTION, INC;)
 ADVANCE PLUMBING, HEATING &)
 AIR, INC.; ASHLEY STEEL, INC.;)
 CAHILL CONTRACTING, LLC;)
 COHEN'S DRYWALL, INC.; BOB)
 PORTER D/B/A CUSTOM INTERIOR)
 CONSTRUCTION; RB'S TRIM, INC.;)
 SHARON'S PAINTING AND)
 CONSTRUCTION A/K/A SHARON'S)
 PAINTING, LLC; DAVIS TILE;)
 TIMOTHY MITCHELL; ELECTRICAL)
 DESIGN & CONSTRUCTION, INC;)
 HURLEY SERVICES, LLC;)
 CHARLESTON EXTERIORS LLC;)
 JORGE DIAZ A/K/A JORGE LOUIS DIAZ)
 PAZ; SAN LUIS CONSTRUCTION, INC.)
 N/K/A ROOFING AMERICA METAL)
 FABRICATIONS, LLC; ROGERIO DOS)
 SANTOS D/B/A ROGERIO SANTOS)
 CONSTRUCTION; FABIO OLIVIERA)
 D/B/A FOUR SEASON SIDING;)
 SUNRISE SIDING, LLC; GARCIA)
 ROOFING, LLC; ESPINO ROOFING,)
 LLC; MIGUEL PAINTING, LLC;)
 HORACIO JASSO; STANDARD)
 PRECAST WALLS, LLC; ALFONSO)
 RODRIGUEZ A/K/A ALFONSO)
 RODRIGUEZ, JR. D/B/A AR SERVICES)
 CO.; ALFONSO RODRIGUEZ VASQUEZ)
 A/K/A ALFONSO RODRIGUEZ, SR.;)
 AND JOHN DOE 55-75,)
)

Defendants.

TO: JUSTIN O'TOOLE LUCEY, ESQUIRE, AND JUSTIN O'TOOLE LUCEY, P.A.
COUNSEL FOR PLAINTIFFS

1. Defendant Hurley Services, LLC (hereinafter “Hurley”), by and through its attorneys at Walker Gressette Freeman & Linton, LLC answers Plaintiffs’ Third Amended Complaint as follows:

2. Each and every allegation of the Third Amended Complaint not specifically admitted, explained or modified herein is denied.

3. The allegations contained in Paragraphs 1 through 67, inclusive, of the Third Amended Complaint do not pertain to Hurley, and therefore, do not require a response; to the extent any response is required, Hurley denies the allegations and demands strict proof thereof.

4. Answering the allegations of Paragraph 68 of the Third Amended Complaint, Hurley admits only that it was a domestic limited liability company and was authorized to conduct business in the State of South Carolina. Hurley lacks sufficient information to form a belief as to the truth of the remaining allegations of Paragraph 68 of the Third Amended Complaint, and, therefore denies them, and demands strict proof thereof.

5. The allegations contained in Paragraph 69 through 80, inclusive, of the Third Amended Complaint do not pertain to Hurley, and therefore, do not require a response; to the extent any response is required, Hurley denies the allegations and demands strict proof thereof.

6. Hurley lacks sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 81 through 84, inclusive, of the Third Amended Complaint, and therefore, denies them, to the extent directed at Hurley, and demands strict proof thereof.

7. The allegations of Paragraph 85 of the Third Amended Complaint state conclusions of law which do not require a response; to the extent any response is required of this Defendant, the allegations are denied and strict proof is demanded thereof.

8. Hurley denies the allegations contained in Paragraphs 86 through 90, inclusive, of the Third Amended Complaint to the extent directed at Hurley and demands strict proof thereof.

9. The allegations of Paragraphs 91 through 94, inclusive, including all subparts, of the Third Amended Complaint do not pertain to Hurley and state conclusions of law; therefore, these allegations do not require a response. To the extent any response is required of this Defendant, the allegations of these paragraphs are denied and strict proof is demanded thereof.

10. Hurley denies the allegations contained in Paragraph 95 of the Third Amended Complaint to the extent directed at Hurley and demands strict proof thereof.

11. The allegations of Paragraphs 96 through 102, inclusive, of the Third Amended Complaint state conclusions of law which do not require a response; to the extent any response is required of this Defendant, the allegations are denied and strict proof is demanded thereof.

12. Hurley denies the allegations contained in Paragraph 103 of the Third Amended Complaint to the extent directed at Hurley and demands strict proof thereof.

13. The allegations of Paragraph 104 of the Third Amended Complaint state conclusions of law which do not require a response; to the extent any response is required of this Defendant, the allegations are denied and strict proof is demanded thereof.

14. Hurley denies the allegations contained in Paragraph 105 and 106 of the Third Amended Complaint to the extent directed at Hurley and demands strict proof thereof.

15. The allegations of Paragraph 107 of the Third Amended Complaint state conclusions of law which do not require a response; to the extent any response is required of this Defendant, the allegations are denied and strict proof is demanded thereof.

16. Hurley denies the allegations contained in Paragraphs 108 through 113, inclusive, of the Third Amended Complaint to the extent directed at Hurley and demands strict proof thereof.

17. The allegations of Paragraph 114 of the Third Amended Complaint state conclusions of law which do not require a response; to the extent any response is required of this Defendant, the allegations are denied and strict proof is demanded thereof.

18. Hurley denies the allegations contained in Paragraphs 115 and 116 of the Third Amended Complaint to the extent directed at Hurley and demands strict proof thereof.

19. Answering the allegations of Paragraph 117 of the Third Amended Complaint, Hurley realleges and repeats each and every allegation of the preceding Paragraphs of this Answer as if fully set forth verbatim herein.

20. The allegations of Paragraph 118 of the Third Amended Complaint state conclusions of law which do not require a response; to the extent any response is required of this Defendant, the allegations are denied and strict proof is demanded thereof.

21. Hurley denies the allegations contained in Paragraphs 119 through 121, inclusive, including all subparts, of the Third Amended Complaint to the extent directed at Hurley and demands strict proof thereof.

22. Answering the allegations of Paragraph 122 of the Third Amended Complaint, Hurley realleges and repeats each and every allegation of the preceding Paragraphs of this Answer as if fully set forth verbatim herein.

23. The allegations of Paragraphs 123 and 124 of the Third Amended Complaint state conclusions of law which do not require a response; to the extent any response is required of this Defendant, the allegations are denied and strict proof is demanded thereof.

24. Hurley denies the allegations contained in Paragraphs 125 and 126 of the Third Amended Complaint to the extent directed at Hurley and demands strict proof thereof.

25. Answering the allegations of Paragraph 127 of the Third Amended Complaint, Hurley

realleges and repeats each and every allegation of the preceding Paragraphs of this Answer as if fully set forth verbatim herein.

26. The allegations contained in Paragraphs 128 through 135, inclusive, of the Third Amended Complaint do not pertain to Hurley, and therefore, do not require a response; to the extent any response is required, Hurley denies the allegations and demands strict proof thereof.

27. Hurley denies the allegations contained in the “Wherefore” Paragraph of the Third Amended Complaint, which is the remainder of the Third Amended Complaint, and strict proof is demanded thereof.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Failure to State a Cause of Action)**

28. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

29. Hurley would show that the allegations of Third Amended Complaint fail to state facts sufficient to constitute a cause of action and/or causes of action against it.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Lack of Capacity and/or Standing)**

30. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

31. The claims asserted against Hurley are barred, in whole or in part, to the extent that Plaintiffs lack the capacity and/or standing to pursue such claims.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Unjustifiable Reliance)**

32. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

33. Hurley would show that Plaintiffs had no right or entitlement to rely upon any representations made by Hurley, which representations are hereby specifically denied.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Parol Evidence)**

34. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

35. Hurley would show that any and all representations allegedly made by it, which representations are hereby specifically denied, constitute parol evidence outside the terms of any contract, if any, and therefore cannot serve to supplement the written contract.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(No Privity)**

36. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

37. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs lack privity with Hurley.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Contributory Negligence)**

38. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

39. Hurley would show that the damages alleged by Plaintiffs, which damages are hereby specifically denied, were due to and caused by Plaintiffs' and/or Plaintiffs' own negligent, careless and grossly negligent acts and conduct, without which the same would not have occurred.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Comparative Negligence)**

40. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

41. Hurley would show that the injuries and/or damages alleged by Plaintiffs, which injuries and/or damages are hereby specifically denied, were due to and caused by Plaintiffs' and/or Plaintiffs' own negligent, careless and grossly negligent acts and conduct, whose acts were greater than any alleged acts of negligence on the part of Hurley, which negligence is hereby specifically denied, and such comparative negligence serves to bar Plaintiffs' claims or reduce the recovery, if any.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Sole Negligence of Third Parties)**

42. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

43. Hurley would show that the injuries and/or damages alleged by Plaintiffs, which injuries and/or damages are hereby specifically denied, were due to and were the proximate result of the sole negligence and/or recklessness of third persons or parties, for whose conduct Hurley is not liable.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Intervening/Superseding Cause)**

44. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

45. The damages alleged, if any, were proximately caused by unforeseeable independent, intervening, and/or superseding acts of third-parties beyond the control and unrelated to any actions or conduct of Hurley, which therefore bars any recovery from Hurley.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Equity)**

46. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

47. Hurley would show that the claims at issue in this lawsuit are barred by the equitable doctrines of laches, estoppel, unclean hands, and/or waiver.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Assumption of the Risk)**

48. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

49. Hurley would show that Plaintiffs, by and through their actions and/or inactions with regard to the allegations in Third Amended Complaint, have assumed the risk and/or accepted all portions of any alleged damages, and such assumption of risk and/or acceptance is a bar to claims against Hurley.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Acceptance)**

50. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

51. Hurley would show that Plaintiffs, by and through their actions and/or inactions with regard to the allegations in the Third Amended Complaint, have assumed the risk and/or accepted all portions of any alleged damages, and such assumption of risk and/or acceptance is a bar to claims against Hurley.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Failure to Mitigate)**

52. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

53. Hurley would show that the injuries and/or damages alleged against him, which injuries and/or damages are hereby specifically denied, were due to and caused by Plaintiffs' and/or Plaintiffs' failure to mitigate, which failure is a complete bar to recovery against Hurley.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Limitation/Disclaimer/Exclusion/Expiration of Warranties)**

54. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

55. Hurley would show that any applicable warranties have been effectively limited, disclaimed, excluded, and/or expired, and no warranty of services was provided.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Limitation/Disclaimer/Exclusion of Remedies)**

56. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

57. Hurley would show that the remedies sought by Plaintiffs have been effectively limited, disclaimed, and/or excluded by agreement.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Statute of Frauds)**

58. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

59. Hurley would show that Plaintiffs' claims are barred by the Statute of Frauds.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Statutes of Limitations & Repose)**

60. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

61. Hurley would show that Plaintiffs' and/or Plaintiffs' claims are barred by the applicable statute of limitations and/or statute of repose.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Failure to Give Notice & Opportunity to Cure and/or Satisfy Conditions Precedent)**

62. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

63. Hurley would show that Plaintiffs' claims are barred for failing to give proper notice and opportunity to cure the alleged defects in construction and to comply with conditions precedent to filing

suit as required under South Carolina law, including, but not limited to S.C. Code Ann. § 40-59-810 et seq.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Economic Loss Rule)**

64. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

65. The claims against Hurley are barred, in whole or in part, by the Economic Loss Rule.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Conformity with Standards, Instructions, Plans, & Specifications)**

66. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

67. The work or services of Hurley, if any, met all construction industry customs, practices and standards applicable to Plaintiffs' claims and/or conformed to the instructions, plans, and specifications furnished by others, which were impliedly warranted to be sufficient, complete, and code conforming.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Spearin Doctrine)**

68. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

69. Plaintiffs' claims are barred by the Spearin Doctrine.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Certificate of Occupancy)**

70. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

71. Hurley alleges the property at issue was inspected and certified for occupancy in conformity with the codes, industry standards, regulations or statutory requirements, then and there existing; therefore, since the property was certified for occupancy, the claims as to Hurley are barred.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Failure to State a Claim for Punitive Damages)**

72. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

73. Third Amended Complaint fails to state a cause of action upon which punitive damages may be based.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Punitive Damages Are Unconstitutional)**

74. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

75. Hurley denies it is liable for any punitive and/or exemplary damages. Hurley avers that any award of punitive damages against it would violate the constitutional safeguards provided under the Constitution of the United States of America, and the Constitution of South Carolina, in that punitive damages violate due process and equal protection guarantees, place an undue burden on interstate commerce, violate the right to assembly and petition the government, and violate the proscription against excessive fines.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Set-off)**

76. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

77. Hurley asserts that any recovery by Plaintiffs against it must be set-off or reduced by any amount recovered by any other party whose acts caused or contributed to Plaintiffs' damages, if any.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Credit for Settlement Proceeds Paid)**

78. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

79. If Plaintiffs has heretofore settled or should hereafter settle for any of its alleged injuries and damages with any parties, then Hurley is entitled to a credit in the amount of said settlement.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Settlement, Release, and/or Waiver)**

80. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

81. Plaintiffs' claims are barred to the extent they have been settled, compromised, released, and /or waived.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Spoliation of Evidence)**

82. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

83. Plaintiffs' claims are barred in whole or part due to the loss, destruction, and spoliation of evidence, including but not limited to the lack of any provision of notice and opportunity to Hurley to observe and participate in destructive testing at the subject property.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Open & Obvious)**

84. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

85. Plaintiffs' claims are barred in whole or part because Plaintiffs either knew or should have known of any alleged deficiencies in the construction and accepted the same with such knowledge.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Misuse/Abuse of Goods/Failure to Maintain)**

86. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

87. Any defect or nonconformity of which Plaintiffs complains in this matter was proximately caused by the unauthorized or unreasonable use or abuse of the goods, and/or failure to maintain the property.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(State-of-the-Art)**

88. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

89. The sale and/or installation of any part of the property by Hurley, if any, met all state-of-the-art design and manufacturer's requirements and applicable federal and state codes at the time of sale.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Material Alterations)**

90. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

91. The injuries, if any, for which Plaintiffs seeks recovery were caused and/or contributed to, in whole or in part, by said property being materially changed, altered, or damaged from its original condition by other parties, and Hurley had no control over such material changes or alterations.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Failure to State a Claim for Treble Damages)**

92. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

93. Third Amended Complaint fails to state a cause of action upon which punitive or treble damages may be based.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Beneficial Use)**

94. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

95. Plaintiffs' claims must be reduced by the value of the beneficial use which Plaintiff has appreciated at the subject property.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Betterment)**

96. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

97. Plaintiffs' claims must be reduced by the value of any betterments and improvements that have been made from the original design and construction of the property.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Lack of Personal Jurisdiction)**

98. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

99. This Court may lack personal jurisdiction over Hurley if the legal requirements for service have not been properly met.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Failure to Name Indispensable Parties)**

100. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

101. Third Amended Complaint fails to name indispensable parties and, therefore, must be

dismissed or, alternatively, this civil action should be stayed pending other appropriate relief by the Court.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Incorporation and Adoption of Affirmative Defenses of Other Parties)**

102. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

103. Hurley reserves the right to rely upon the affirmative defenses raised in the pleadings of any other party to this action, and each and every such alleged affirmative defense set forth in those pleadings is hereby realleged and reiterated as fully as if set forth and incorporated herein.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Reservation of the Right to Amend the Reply & Non-Waiver)**

104. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

105. Hurley reserves the right to amend this Answer and its affirmative defenses after investigation, discovery and further information are disclosed, including any and all defenses supported by the evidence proffered at trial of this matter, and Hurley is not waiving any defenses that may arise during investigation, discovery, and trial of this litigation.

**FOR A FURTHER DEFENSE TO ALL CAUSES OF ACTION
(Reservation of the Right to Raise Claims)**

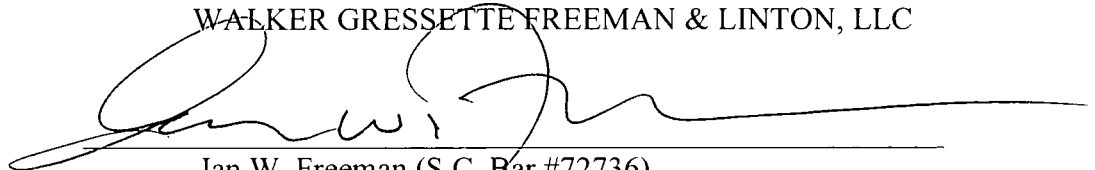
106. Each and every allegation set forth in the preceding paragraphs hereof is hereby realleged and reiterated as fully as if set forth herein.

107. Hurley reserves and does not waive the right to raise claims of any type against any party and/or third parties, including, without limitation, those for indemnity and/or contribution pursuant to S.C. Code Ann. section 15-38-10, et seq.

WHEREFORE, having answered the Third Amended Complaint, Hurley prays the Court as follows:

- a. That all claims against Hurley be dismissed with prejudice;
- b. That all Hurley's costs, including reasonable attorneys' fees, be taxed to a party other than Hurley;
- c. For a trial by jury on all triable issues; and
- d. For such other and further relief as the court deems just and proper.

WALKER GRESSETTE FREEMAN & LINTON, LLC

A handwritten signature in black ink, appearing to read 'Ian W. Freeman', is written over a horizontal line.

Ian W. Freeman (S.C. Bar #72736)

P.O. Drawer 22167

Charleston, SC 29413-2216

Tel: 843-727-2242

E-mail: Freeman@wgflaw.com

Attorney for Defendant Hurley Services, LLC

Charleston, South Carolina

January 16, 2019

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 2016-CP-10-03455

Six Fifty Six Owners Association, Inc. and
Robert John Nutley, individually, and on behalf
of others similarly situated,

Plaintiffs,

vs.

Winsor South, LLC and Jeffrey M. Thomas,
individually, and on behalf of a class of
construction defendants; Southeastern
Recapitalization Group, LLC; WCM
Construction, LLC; Jonathan J. Thomas; AC
Heating and Air Conditioning Service, Inc.;
ACME Doors, Inc.; Alpha Omega Construction
Group, Inc.; Atlantic Construction Services, Inc.;
Buck Lumber and Building Supply, Inc.;
Builders FirstSource, Inc.; Builders FirstSource-
Atlantic Group, LLC, Builders FirstSource-
Florida, LLC a/k/a Builders FirstSource-Florida
Design Center, LLC; Builders FirstSource-
Southeast Group, LLC; Charlotte Flooring, Inc.;
Diria Tawi Painting, Inc.; East Coast Wall
Systems, Inc.; Fogel Services, Inc.; G&S Home
Remodeling, LLC; Guaranteed Framing, LLC; J.
Mora Brick & Black Mason, LLC; Land/Site
Services, Inc.; Landmark Construction
Company, Inc.; Lutzen Construction, Inc.; New
Horizon Shutters, Inc. a/k/a New Horizon
Shutters International, LLC; PJ Sanchez
Masonry, LLC; Screens Plus, Inc., Simons
Construction Company, LLC; Stucco by Design,
LLC; Fine Builders, LLC; Speedtruss, Inc.;
Argentino Jose Campos d/b/a as Construction;
Javier Morales Merino; Novac Construction,
Inc.; MJG Construction, Inc.; Advance
Plumbing, Heating & Air, Inc.; Cahill
Contracting, LLC; Cohen's Drywall, Inc.; Bob
Porter d/b/a Custom Interior Construction; RB's
Trim, Inc.; Sharon's Painting, LLC; David Tile;

BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC,
BUILDERS FIRSTSOURCE,
INC., BUILDERS
FIRSTSOURCE-ATLANTIC
GROUP, LLC, BUILDERS
FIRSTSOURCE-FLORIDA,
LLC A/K/A BUILDERS
FIRSTSOURCE-FLORIDA
DESIGN CENTER, LLC'S
ANSWER TO PLAINTIFF'S
THIRD AMENDED
COMPLAINT AND THE
CROSSCLAIMS OF
BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC
AGAINST HURLEY
SERVICES, LLC, AND
CHARLESTON EXTERIORS,
LLC

FILED
2019 JAN 24 PM 1:47
JULIE J. ARMSTRONG
CLERK OF COURT

Timothy Mitchell; Electrical Design &)
Construction, Inc.; Hurley Services, LLC;)
Charleston Exteriors LLC; Jorge Diaz aka Jorge)
Louis Paz; San Luis Construction, Inc. nka)
Roofing America Metal Fabrications, LLC;)
Rogerio Dos Santos dba Rogerio Santos)
Construction; Fabio Oliviera dba Four Season)
Siding; Sunrise Siding; Garcia Roofing, LLC;)
Espino Roofing, LLC; Migual Painting, LLC;)
Horacio Jasso; Standard Precast Walls, LLC;)
Alfonso Rodriguez Vasquez aka Alfonso)
Rodriguez, Sr.; and John Does 55-75)
))
Defendants.)
_____)
)

The Defendants, identified within the Third Amended Summons and Third Amended Complaint as Builders FirstSource, Inc., Builders FirstSource-Atlantic Group, LLC, Builders FirstSource-Florida, LLC a/k/a Builders FirstSource-Florida Design Center, LLC, and Builders FirstSource-Southeast Group, LLC (hereinafter sometimes collectively “Builders FirstSource Defendants” and/or “these Defendants”), reserving all rights under any and/or all pending and/or hereinafter filed motions, answering the Third Amended Complaint of the Plaintiffs (sometimes “Complaint” or “Amended Complaint”), and asserting the crossclaims of Builders FirstSource-Southeast Group, LLC (hereinafter sometimes “BFS” and/or “this Defendant/Crossclaim Plaintiff”), would respectfully allege unto this Honorable Court as follows:

FOR A FIRST DEFENSE

1. That each and every allegation set forth within the Third Amended Complaint (hereinafter sometimes “Third Amended Complaint” and/or

“Amended Complaint” and/or “Complaint”), not hereinafter specifically admitted, is denied, and strict proof demanded thereof.

2. That these Defendants are without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the Third Amended Complaint, and therefore deny the same, and demand strict proof thereof.
3. That these Defendants deny the allegations set forth in Paragraph 13 of the Third Amended Complaint.
4. That these Defendants are without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraphs 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 of the Third Amended Complaint, and therefore deny the same, and demand strict proof thereof.
5. That these Defendants would show that the allegations of Paragraphs 21, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56 of the Third Amended Complaint relate to parties other than these Defendants, and require no response by these Defendants; to the extent that the allegations of said paragraphs may be deemed to require a response by these Defendants, such allegations are hereby specifically denied.
6. That these Defendants deny the allegations set forth in Paragraphs 57, 58, and 59 of the Third Amended Complaint, and demand strict proof thereof.

7. That these Defendants admit only so much of Paragraph 60 of the Third Amended Complaint alleges that Builders FirstSource-Southeast Group, LLC is a company organized and existing pursuant to the laws of the State of Delaware. These defendants admit only so much of the remaining allegations of Paragraph 60 as may be established by reference relevant records. These defendants deny the remaining allegations of Paragraph 60.
8. That these Defendants would show that the allegations of Paragraph 61, 62, 63, 64, 65, 66, and 67, and of Paragraph 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, and 80 of the Third Amended Complaint relate to parties other than these Defendants, and require no response by these Defendants; to the extent that the allegations of said paragraphs may be deemed to require a response by these Defendants, such allegations are hereby specifically denied.
9. That these Defendants admit only some of the allegations of Paragraphs 68 and 69 of the Third Amended Complaint as may be established by reference to relevant records, and deny the remaining allegations of Paragraphs 68 and 69.
10. That these Defendants admit only so much of Paragraph 81 of the Third Amended Complaint, as alleges, or may be construed to allege, that the instant litigation relates to the design, development, construction, repair, and/or sale of the Six Fifty Six townhomes, but deny so much thereof as alleges defects and/or deficiencies in such design, development,

construction, repair, and/or sale, and further specifically deny so much thereof as alleges, or may be construed to allege, any liability and/or responsibility of these Defendants for any claims asserted within the Third Amended Complaint.

11. That these Defendants deny the allegations set forth in Paragraphs 82, 83, 84, 85, 86, 87, 88, 89, and 90 of the Third Amended Complaint.
12. That these Defendants deny the allegations set forth in Paragraph 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, and 102 of the Third Amended Complaint.
13. That these Defendants deny the allegations set forth in Paragraphs 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, and 116 of the Third Amended Complaint.
14. That these Defendants, in responding to Paragraph 117 of the Third Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
15. That these Defendants would show that the allegations of Paragraph 118 of the Third Amended Complaint set forth conclusions of law, which these Defendants need neither admit nor deny; to the extent that the allegations of said paragraph may be deemed to require a response by these Defendants, such allegations are hereby specifically denied.
16. That these Defendants deny the allegations set forth in Paragraphs 119, 120, and 121 of the Third Amended Complaint.

17. That these Defendants, in responding to Paragraphs 122 of the Third Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
18. That these Defendants would show that the allegations of Paragraph 123, and 124 of the Third Amended Complaint set forth conclusions of law, which these Defendants need neither admit nor deny; to the extent that the allegations of said paragraphs may be deemed to require a response by these Defendants, such allegations are hereby specifically denied.
19. That these Defendants deny the allegations set forth in Paragraphs 125 and 126 of the Third Amended Complaint.
20. That these Defendants, in responding to Paragraphs 127 of the Third Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
21. That these Defendants deny the allegations set forth in Paragraphs 128, 129, 130, 131, 132, 133, 134, and 135 of the Third Amended Complaint.

FOR AN AFFIRMATIVE DEFENSE
(Merger)

22. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
23. That these Defendants would show that, if any representations were made to the Plaintiffs during the course of negotiations between the parties, which representations are hereby specifically denied, then all representations merged into the contract between the parties.

FOR AN AFFIRMATIVE DEFENSE

(Statutes of Limitations)

24. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
25. That these Defendants would show that all claims asserted by the Plaintiffs are barred by the applicable statute and/or statutes of limitations.

FOR AN AFFIRMATIVE DEFENSE
(Notice)

26. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
27. That these Defendants would show that the Plaintiffs had constructive knowledge and/or actual knowledge of those conditions of which are alleged in the Amended Complaint, and nonetheless proceeded to purchase the subject property. Such circumstances constitute a complete bar to the Plaintiffs' claims.

FOR AN AFFIRMATIVE DEFENSE
(Insufficient Facts to Constitute Cause of Action)

28. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
29. That these Defendants would show that the allegations of the Amended Complaint fail to state facts sufficient to constitute a cause of action and/or causes of action against these Defendants.

FOR AN AFFIRMATIVE DEFENSE

30. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
31. That these Defendants would show that the Plaintiffs had no right or entitlement to rely upon any representations allegedly made by the Defendants, which representations are hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Superseding Negligence)

32. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
33. That these Defendants would show that the damages alleged by the Amended Complaint, which damages are hereby specifically denied, were the sole and proximate result of the intervening and/or superseding negligence and/or intervening and/or superseding willful acts and/or recklessness of third persons or parties, which intervening and/or superseding negligence and/or willful acts and/or other actions are a bar to the causes of action asserted against these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Contributory Negligence)

34. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
35. That these Defendants would show that the damages alleged by the Plaintiffs, which damages are hereby specifically denied, were due to and caused by the reckless, willful, wanton, negligent, careless and grossly

negligent acts and conduct of the Plaintiffs, which actions combined and concurred with any negligence on the part of these Defendants, which negligence is hereby specifically denied, to produce such damages, without which the same would not have occurred.

FOR AN AFFIRMATIVE DEFENSE
(Comparative Negligence)

36. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
37. That these Defendants would show that the injuries and/or damages alleged by the Plaintiffs, which injuries and damages are hereby specifically denied, were due to and caused by the reckless, willful, wanton, negligent, careless and grossly negligent acts and conduct of the Plaintiffs, which acts were greater than any acts of negligence on the part of these Defendants, which acts on the part of these Defendants are hereby specifically denied, to produce such injury and/or damages, and without which the same would not have occurred.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Laches)

38. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
39. That these Defendants would show that the claims of the Plaintiffs are barred by the doctrine of laches.

FOR AN AFFIRMATIVE DEFENSE
(Assumption of the Risk)

40. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
41. That these Defendants would show that the Plaintiffs, by and through their actions and/or inactions with regard to the subject alleged in the Amended Complaint, have assumed the risk and/or accepted all portions of any damages alleged by the Plaintiffs and such assumption of risk and/or acceptance is a bar to claims against these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Failure to Mitigate)

42. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
43. That these Defendants would show that the injuries and/or damages alleged by the Plaintiffs, which injuries and/or damages are hereby specifically denied, were due to and caused by the Plaintiffs' failure to mitigate, which failure is a complete bar to recovery by the Plaintiffs.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Estoppel)

44. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
45. That these Defendants would show that the Plaintiffs are barred by the doctrine of estoppel from asserting claims against these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Waiver)

46. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
47. That these Defendants would show that the claims of the Plaintiffs are barred by the doctrine of waiver.

FOR AN AFFIRMATIVE DEFENSE
(Economic Loss Rule)

48. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
49. That these Defendants would show that the claims of the Plaintiffs are barred by the economic loss rule.

FOR AN AFFIRMATIVE DEFENSE
(Sole Negligence of Third Parties)

50. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
51. That these Defendants would show that the injuries and/or damages alleged by the Plaintiffs, which injuries and/or damages are hereby specifically denied, were due to and were the proximate result of the sole negligence and/or recklessness of third persons or parties, for whose conduct these Defendants are not liable.

FOR AN AFFIRMATIVE DEFENSE

52. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

53. That to the extent punitive damages are claimed, this Defendant demands a bifurcated jury trial pursuant to South Carolina Code Annotated §15-32-520, and demands that said damages, if any, be limited to three (3) times the amount of any compensatory damages, or the sum of \$500,000.00, whichever is greater, if any.

FOR AN AFFIRMATIVE DEFENSE
(Exclusion of Warranty)

54. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
55. That these Defendants would show that any and/or all applicable warranties have been properly and effectively excluded by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Modification of Warranties)

56. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
57. That these Defendants would show that any and/or all applicable warranties have been properly and effectively modified by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Limitation of Warranties)

58. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
59. That these Defendants would show that any and all applicable warranties have been properly and effectively limited by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Expiration of Warranties)

60. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
61. That these Defendants would show that any relevant warranties have expired.

FOR AN AFFIRMATIVE DEFENSE
(Excluded Remedies)

62. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
63. That these Defendants would show that the available remedies have been properly and effectively excluded by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Modification of Remedies)

64. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
65. That these Defendants would show that all applicable remedies have been properly and effectively modified by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Limitation of Remedies)

66. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
67. That these Defendants would show that all available remedies have been properly and effectively limited by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Disclaimer of Warranties)

68. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

69. That these Defendants would show that any and all applicable warranties have been properly and effectively disclaimed by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Disclaimer of Remedies)

70. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

71. That these Defendants would show that any and all available remedies have been properly and effectively disclaimed by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Resolution by Arbitration)

72. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

73. That these Defendants would show that, to the extent that the claims against these Defendants are subject to resolution by arbitration, the instant action against these Defendants should be dismissed.

FOR AN AFFIRMATIVE DEFENSE
(Failure to Comply with Contractual Conditions Precedent)

74. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

75. That these Defendants would show that the Plaintiffs have failed properly to comply with contractual conditions precedent to the assertion of those

claims set forth in the Amended Complaint, which failure is a bar to all claims against these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Failure to comply with Statutory Conditions Precedent)

- 76. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
- 77. That these Defendants would show that the Plaintiffs have failed to comply with the statutory conditions precedent to the assertion of claims set forth in the Amended Complaint.

FOR AN AFFIRMATIVE DEFENSE
(Failure to give notice of breach of warranty)

- 78. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
- 79. That these Defendants would show that the Plaintiffs have failed to give reasonable notice of any alleged breach of any applicable warranty, which breach of warranty or warranties is hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Reservation and Non-Waiver)

- 80. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
- 81. That these Defendants do not waive, and hereby specifically reserves, any additional and/or further defenses, the propriety of which may be indicated by additional information which may be acquired by these Defendants or its/their counsel during the course of discovery or otherwise.

FOR AN AFFIRMATIVE DEFENSE
(Joint Tort Feasors Act)

82. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
83. That these Defendants would show that, in the event of a verdict rendered jointly against these Defendants and the remaining Defendants, these Defendants are entitled to contribution from said remaining Defendants, pursuant to the provisions of the South Carolina Uniform Contribution Among Joint Tort Feasors Act and/or other provisions of law.

FOR AN AFFIRMATIVE DEFENSE

84. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
85. That these Defendant would allege that any recovery against this Defendant must be set off or reduced or abated or apportioned to the extent that any other party's actions caused or contributed to any damages, if any, or as otherwise provided pursuant to relevant sections of the South Carolina Contribution Among Joint Tort Feasors Act, Section 15-38-10, et seq. SC Code Amended.

FOR AN AFFIRMATIVE DEFENSE

86. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
87. That these Defendant would show that the design and materials used in the construction of subject property in question were developed, selected, and/or approved by other defendants, thereby reliving these Defendant of

any liability or responsibility for damages resulting from design deficiencies or materials which may not have been suitable for incorporation into the subject property.

FOR AN AFFIRMATIVE DEFENSE
(Protections under Constitution(s))

88. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
89. That these Defendants would show that the imposition of punitive damages is violative of protections afforded by the 5th, 8th, and 14th and/or other amendments to the United States and/or South Carolina constitutions.

FOR AN AFFIRMATIVE DEFENSE
(Statutes of Repose)

90. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
91. That these Defendants would show that the Plaintiffs' claims are barred by the applicable statute and/or statutes of repose.

FOR AN AFFIRMATIVE DEFENSE
(Statute of Frauds)

92. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
93. That these Defendants would show that the claims of the Plaintiffs are barred by the Statute of Frauds.

FOR AN AFFIRMATIVE DEFENSE
(Spoliation of Evidence)

94. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
95. Without admitting that its products were installed on the subject structure, these Defendants submit that repairs may have been made to the subject structure and further, that the alleged defective products may have been destroyed. To the extent that these Defendants have not been afforded the opportunity to inspect and examine the alleged defective products and/or their components, these Defendants plead the Spoliation of Evidence Doctrine as a complete defense to this action.

FOR AN AFFIRMATIVE DEFENSE

96. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
97. That any products designed, manufactured, and/or distributed by these Defendants are found to be the cause of damages suffered by Plaintiffs, which these Defendants hereby specifically denies, the Plaintiffs cannot recover against these Defendants if and to the extent that the use of such products was under circumstances constituting an alteration or modification of the products as provided in South Carolina Code Section 15-73-10, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

98. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
99. In the event that the products designed, manufactured, and/or distributed by these Defendants are found to be the cause of damages suffered by Plaintiffs, which this Defendant specifically hereby denies, Plaintiffs cannot recover against these Defendants if and to the extent that the use of the products was under circumstances constituting a lack of reasonable or diligent care, and/or was an unreasonable use as defined in South Carolina Code Section 15-73-10, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

100. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

101. Products manufactured by these Defendants conformed to the current state of the art at all relevant times and such products were reasonably designed. Upon information and belief, Plaintiffs claims of alleged defects in the products, which claims are hereby specifically denied, are based upon an inherent characteristic of such products, that cannot be eliminated without substantially compromising the products usefulness or desirability, which is recognized by the ordinary person with the ordinary knowledge, and to the community, such that Plaintiffs cannot recover anything from these Defendants, as provided in South Carolina Code Section 15-73-20, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

102. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
103. To the extent that any petition in bankruptcy has been filed by or on behalf of this Defendant, this Defendant would pled discharge in bankruptcy as a complete defense to any and all claims.

FOR AN AFFIRMATIVE DEFENSE

104. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
105. That these Defendants would show that the Plaintiff lacks sufficient legal privity with these Defendants to permit imposition of liability.

FOR AN AFFIRMATIVE DEFENSE

106. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
107. That these Defendants would show that it has made no representations of warranties inducing the purchase for use of its products by Plaintiff or others, except such warranties which may be express and in writing, and such express warranties are the only and best evidence of their content and legal effect, and include lawful disclaimers of implied warranties of merchantability and fitness for a particular purpose, and include limitations and responsibility to this Defendant. These Defendants are not responsible for any warranties or representations of purchases and resellers of its products.

FOR AN AFFIRMATIVE DEFENSE

108. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
109. That the Plaintiffs are without standing to assert those claims set forth within the relevant Amended Complaint, and the Plaintiffs' claims should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE

110. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
111. That these Defendants would show that the Plaintiffs have failed to comply with those conditions precedent to litigation, as set forth within the relevant

Master Deed, By Law, and/or other governing documents, and the Plaintiffs' Amended Complaint, and all causes of action set forth therein, should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE

112. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
113. That these Defendants are informed and believes that the Plaintiffs have failed to comply with the provisions of Sections 40-59-10 et seq., and/or Section 40-11-10 et seq., South Carolina Code of Laws (1976), as amended, and the Plaintiffs' Amended Complaint should, therefore, be stayed and/or dismissed.

FOR AN AFFIRMATIVE DEFENSE

114. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
115. That, to the extent that the Plaintiff has failed to comply with the requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (Section 40-59-810 through 40-59-860), and/or Sections 40-11-500 through 40-11-570, South Carolina Codes of Laws (1976), including the provision of the required notice to the Defendant, and the provision to these Defendants of an opportunity to cure, the Plaintiff's action must be stayed and/or otherwise barred.

FOR A FURTHER DEFENSE AND BY WAY OF
CROSSCLAIMS BY BUILDERS FIRSTSOURCE-SOUTHEAST GROUP,
LLC, AGAINST HURLEY SERVICES, LLC, AND
CHARLESTON EXTERIORS, LLC

116. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
117. That this Defendant is informed and believes that Hurley Services, LLC, is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Hurley Services, LLC provided materials and services, including the installation of windows, doors, and/or other components, during original construction of the subject structures within the Six Fifty Six Coleman townhome complex.
118. That this Defendant is informed and believes that Charleston Exteriors, LLC, is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Charleston Exteriors, LLC provided materials and services, including the installation of windows, doors, and/or other components, during original construction of the subject structures within the Six Fifty Six Coleman townhome complex.

FOR A FIRST CAUSE AS TO HURLEY SERVICES, LLC AND
CHARLESTON EXTERIORS, LLC

119. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
120. That the Plaintiffs, Six Fifty Six Owners Association, Inc. and Robert John Nutley, individually and on behalf of others similarly situated have sued Builders FirstSource-Southeast Group, LLC (hereinafter sometimes "BFS"), asserting damages allegedly caused, inter alia, by deficiencies in materials and/or installation of windows, doors, and related components, during original construction of the subject structures.
121. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Second Amended Complaint.
122. That the Third-Party Defendants, Hurley Services, LLC, and Charleston Exteriors, LLC (hereinafter sometimes "CrossClaim Defendants") were responsible for provision of materials and services in connection with the installation of the aforesaid components of construction, for proper quality control, and for compliance with the contract documents, industry standards, and requirements of relevant building codes. In the event that the Plaintiffs establish that the materials and/or services of the CrossClaim Defendants were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event the CrossClaim Defendants have failed properly to execute their duties, which failure has allegedly caused the Plaintiffs' damages.

123. That the respective subcontracts between this Defendant and the CrossClaim Defendants, provide for contractual indemnification in favor of BFS.
124. That the CrossClaim Defendants served as subcontractors to BFS in connection with their services at the subject structures. Regardless, therefore, of any specific contractual obligation to indemnify, there exists a special relationship between this Defendant, and the CrossClaim Defendants, sufficient to impose obligations of indemnity against the aforesaid CrossClaim Defendants, in favor of BFS.
125. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of the CrossClaim Defendants, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.
126. That BFS is entitled to full contractual and common law indemnification from the CrossClaim Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the CrossClaim Defendants, entitling BFS to recover from the Third-Party Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the CrossClaim

Defendants any sums for which BFS may be held liable to the Plaintiffs or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

FOR A SECOND CAUSE OF ACTION AGAINST HURLEY SERVICES,
LLC, AND CHARLESTON EXTERIORS, LLC

127. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
128. That the CrossClaim Defendants made express warranties that materials, services, and/or workmanship provided in conjunction with their services at the subject structures, would be as required by and in accordance with the contract documents, applicable building codes, and industry standards.
129. That the respective sub-contract agreements between BFS and the CrossClaim Defendants include provisions, by which the CrossClaim Defendants expressly undertook to provide materials and services in accordance with the contract documents.
130. That in the event that the Plaintiffs prove that the materials and/or services provided by the CrossClaim Defendants are not in accordance with the requirements of the contract documents, industry standards, or relevant building requirements, then and in that event the CrossClaim Defendants have materially breached their express warranties.
131. That BFS is entitled to judgment against the Third-Party Defendants in the amount of any judgment which the Plaintiffs may obtain against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction

of such claims, for breach of any express warranties on the part of the CrossClaim Defendants, plus BFS costs for defense, inclusive of attorneys' fees.

FOR A THIRD CAUSE OF ACTION HURLEY SERVICES, LLC, AND
CHARLESTON EXTERIORS, LLC

132. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
133. That the CrossClaim Defendants made implied warranties of workmanlike services, merchantability, and fitness for particular purpose, in connection with its services in renovation, repair, and/or construction at the subject residence.
134. That in the event that the Plaintiffs prove that the services of the respective CrossClaim Defendants were deficient, then and in that event the CrossClaim Defendants have materially breached their implied warranties.
135. That BFS is entitled to judgment against the CrossClaim Defendants in the event, and to the extent that the Plaintiffs may obtain judgment against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims, for breach of implied warranties, including such warranty of workmanlike service.

FOR A FOURTH CAUSE OF ACTION AGAINST HURLEY SERVICES,
LLC, AND CHARLESTON EXTERIORS, LLC

136. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

137. That CrossClaim Defendants owed a duty of due care in providing services and materials in connection with construction and/or repair of the subject structures.
138. In the event that the Plaintiffs prove that due care was not exercised in the provision of materials and services by the CrossClaim Defendants, then and in that event the CrossClaim Defendants have breached their duties of due care.
139. In the event that the Plaintiffs obtain judgment against BFS as a direct, foreseeable and proximate result of the negligence of the CrossClaim Defendants, then and in that event BFS is entitled to judgment against the CrossClaim Defendants for the amount of any such judgment, or any amount Builders FirstSource-Southeast Group, LLC may pay in satisfaction of claims, plus costs of defense, inclusive of attorneys' fees.

FOR A FIFTH CAUSE OF ACTION AGAINST HURLEY SERVICES, LLC,
AND CHARLESTON EXTERIORS, LLC

140. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
141. That the CrossClaim Defendants were contractually responsible for provision of adequate materials and services in connection with their respective undertakings regarding construction of the subject structures.
142. That in the event that the Plaintiffs prove that the BFS contract was breached due to improper or inadequate materials and/or services provided by the respective CrossClaim Defendants, then and in that event the CrossClaim Defendants have materially breached their sub-contract,

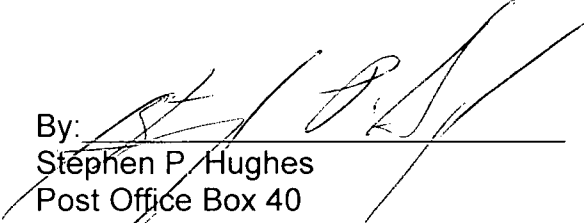
by failing properly and adequately to provide materials and services in connection with construction of the subject structures.

143. That BFS is entitled to judgment against the CrossClaim Defendants in the event, and to the extent that the Plaintiffs may obtain judgment against BFS for breach of contract, or for any amount Builders FirstSource-Southeast Group, LLC may pay in satisfaction of claims, and BFS is further entitled to recover the costs of defense, inclusive of attorneys' fees.

WHEREFORE, having fully answered the Second Amended Complaint of the Plaintiffs, and having set forth its CrossClaim of Builders FirstSource-Southeast Group, LLC, these Defendants pray as follows:

- a. That the Plaintiff's Second Amended Complaint be dismissed, as to these Defendants, with costs to this Defendants;
- b. That Builders FirstSource-Southeast Group, LLC be granted judgment on its CrossClaims against Third Party Defendants Hurley Services, LLC, and Charleston Exteriors, LLC;
- c. That these Defendant have jury trial on all matters so triable;
- d. That these Defendants be granted such other and further relief as this Court may deem just and proper.

HOWELL, GIBSON & HUGHES, P.A.

By: 

Stephen P. Hughes

Post Office Box 40

Beaufort, SC 29901-0040

(843) 522-2400

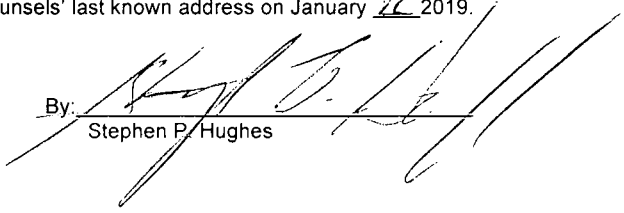
Attorney for Builders FirstSource, Inc.,
Builders FirstSource-Atlantic Group,
LLC, Builders FirstSource-Florida, LLC
a/k/a Builders FirstSource-Florida
Design Center, LLC, and Builders
FirstSource-Southeast Group, LLC

Beaufort, South Carolina

January 22, 2019

CERTIFICATE OF SERVICE

I certify that I served the foregoing Answer to Plaintiffs' Third Amended Complaint and Builders FirstSource-Southeast Group, LLC's upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service and by email addressed to counsels' last known address on January 22 2019.

By: 

Stephen P. Hughes

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A No.: 2016-CP-10-03455
Six Fifty Six Owners Association, Inc., et al,	)	
	)	
	)	
Plaintiffs,	)	DEFENDANT HURLEY
vs.	)	SERVICES, LLC'S NOTICE OF
	)	MOTION AND MOTION FOR
	)	SUMMARY JUDGMENT
Winsor South, LLC; et al.,	)	AGAINST THE CLAIMS OF
	)	BUILDERS FIRST SOURCE-
Defendants.	)	SOUTHEAST GROUP, LLC
	)	

TO: STEPHEN P. HUGHES, ESQ. AND THE LAW FIRM OF HOWELL, GIBSON & HUGHES, PA, COUNSEL OF RECORD FOR DEFENDANT BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC

PLEASE TAKE NOTICE that Defendant Hurley Services, LLC ("Hurley Services"), by and through its undersigned counsel, will move before this Honorable Court, ten (10) days after the service of this notice of motion and motion or as soon thereafter as counsel may be heard, for an order granting summary judgment in favor of Hurley Services, LLC and against Builders FirstSource-Southeast Group, LLC (hereafter "BFS") pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. The grounds for this Motion are as follows:

- 1) There exists no genuine issue as to any material fact and Hurley Services is entitled to judgment dismissing all cross-claims against it as a matter of law;
- 2) BFS's cross-claims for breach of contract, breach of express and implied warranty, and negligence are "merely disguised ... claims for equitable indemnity" and fail as a matter of law. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 634, (Ct. App. 2015);

3) BFS's cross-claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal, are against public policy and the laws of South Carolina, and, thus, fail as a matter of law. *See Concord and Cumberland HPR v. Concord and Cumberland, LLC*, 2018 WL 3748616 (S.C. Ct. App. 2018); and

4) BFS's cross-claims are barred by the doctrine of collateral estoppel.

In support of this motion, Defendant Hurley Services craves reference to Builders FirstSource-Southeast Group, LLC's Master Subcontractor Agreement dated May 14, 2012 (attached hereto as Exhibit A), its memorandum of law in support of this motion, pertinent deposition testimony and evidence presented at or before the hearing, the pleadings on file with the Court, and applicable South Carolina law.

Respectfully submitted,

s/ Ian W. Freeman

Ian W. Freeman (SC Bar #72736)

Direct: 843.727.2242

E-mail: Freeman@wgflaw.com

Jennifer S. Ivey (SC Bar #102533)

Direct: 843.727.2216

Email: Ivey@wgflaw.com

WALKER GRESSETTE FREEMAN & LINTON, LLC

Mailing: P.O. Box 22167, Charleston, SC 29413

Office: 66 Hasell St., Charleston, SC 29401

Telephone: 843.227.2200

ATTORNEYS FOR HURLEY SERVICES, LLC

Charleston, South Carolina
January 22, 2020

EXHIBIT A



BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC MASTER SUBCONTRACTOR AGREEMENT

THIS MASTER SUBCONTRACTOR AGREEMENT (this “Agreement”) is entered into effective as of May 14, 2012, between Builders FirstSource – Southeast Group, LLC, a Delaware limited liability company, address: 2001 Bryan Street, Suite 1600, Dallas, Texas 75201, telephone: _____, fax: _____, Contact: _____, e-mail: _____@bldr.com (“Contractor”), and Hurley Services, LLC, address: 201 Sparkleberry Lane, Ladson, SC 29456, telephone: 843-425-5100, fax: 803-972-6563, Contact: Giovanni N. Mendes, e-mail: Hurley Services LLC@gmail.com (“Subcontractor”).

SECTION 1. Introduction.

a. **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the “Work”) from time to time for Contractor on any project (the “Project”). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor’s customer (the “Owner”). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the “Contract Documents”) and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor’s only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

b. **Work Orders.** It is contemplated under this Agreement that Subcontractor may perform Work on multiple projects at multiple locations. The description, completion date, special conditions, and cost of Work to be performed on a Project will be set forth in the written purchase order or work order (together, “Work Order”) delivered by Contractor to Subcontractor relating to that Project. Such Work Order(s)

GM
Subcontractor
W
Contractor

are incorporated herein by reference as if fully set forth. The Work described in Work Orders must be performed under the terms of this Agreement.

c. **Term.** This Agreement shall be for an initial term of three (3) years. Upon the expiration of such initial term or any renewal term, this Agreement shall automatically renew for subsequent one (1) year periods unless either party gives written notice to the other party that it is electing to terminate this Agreement at the end of the then current term. Such written notice of intent to terminate must be given at least sixty (60), but not more than one hundred twenty (120), days prior to the end of the then current term. The provisions of Sections 3, 4, and 5 shall survive termination of this Agreement. If Contractor terminates this Agreement, Contractor will pay to Subcontractor sums due for the Work performed to the date of termination, as provided in Section 8.

d. **Notice.** Any notice or communication hereunder or in any agreement entered into in connection with the transactions contemplated hereby must be in writing and given by depositing the same in the United States mail, addressed to the party to be notified, postage prepaid, and registered or certified with return receipt requested, or by delivering the same in person or by facsimile transmission. Such notice shall be deemed received on the date on which it is hand-delivered or received by facsimile transmission or on the third business day following the date on which it is so mailed. For purposes of notice, the addresses of the parties shall be as set forth on the front page of this Agreement. Any party may change its address for notice by written notice given to the other parties in accordance with this Section.

SECTION 2. Materials and Workmanship.

Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

a. **Scope of Work; Knowledge of Site; Plans and Specifications.** Subcontractor shall take all action necessary to familiarize itself and its employees, agents, and subcontractors with the scope and requirements of the Work, the existing site conditions, and any work to be performed by others that may affect the performance of the Work. Subcontractor shall confirm that the Contract Documents are correct and immediately notify Contractor of any errors and/or omissions.

b. **Change Orders.** Contractor may make any changes to the nature or scope of the Work; provided, however, that any changes resulting in a change in price must be agreed to in writing by Subcontractor and Contractor prior to the Work being performed. Subcontractor shall be notified of changes by written change order. Subcontractor shall not perform any extra work without written authorization by Contractor.

c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

d. **Safety and Environmental.**

(1) **Compliance with Laws.** Subcontractor will carefully check the drawings, plans, and specifications for conformity with all local, state, and Federal laws, codes, rules, and regulations bearing on the Work (the "Law") before commencing the Work. Unless Contractor or Owner otherwise agrees in writing, before commencement of the Work Subcontractor will obtain at its sole cost and expense all permits necessary for the Work. Subcontractor will comply with product manufacturer's specifications and will give all notices and comply with all Law bearing on the Work, including by way of enumerations and not limitation, safety, health, and environmental rules and regulations established by or pursuant to Federal, state, and local safety and environmental laws. Subcontractor at all times will furnish to its agents and employees a safe place of employment. If Subcontractor observes any violation of Law, it will immediately report such violation to Contractor in writing. Subcontractor will be responsible for any fines, charges, in-kind training or supplies, or penalties related to the Work, including, without limitation, fines, charges, and/or penalties related to the operation of equipment, the Subcontractor's performance of the Work, the handling of materials, or any other function that is in violation of the Law. All workmanship and materials will conform to Law and, if the Subcontractor performs or permits the performance of any Work not in compliance with Law, it will immediately cause such Work to be redone and bear all costs in connection therewith. The Work, as performed, will meet with the approval of, and pass any inspection of, any governmental authority having jurisdiction thereof. If the Work is being constructed under specifications of the Federal Housing Administration or the Veterans Administration, the Work will meet the requirements of these governmental agencies. No Work will be deemed complete until final inspection is made and approval is received from every governmental authority whose approval is required.

(2) **The Occupational Safety and Health Administration ("OSHA") and the Environmental Protection Agency ("EPA").** Regulations have been promulgated by OSHA and EPA ("Regulations") that require all contractors and subcontractors to exchange Material Safety Data Sheets ("MSDS") and share information about precautionary measures necessary to protect all workers on a building project.

Subcontractor agrees as follows:

(A) Subcontractor will fully comply with the Regulations and will cooperate with Contractor and/or Owner and all subcontractors of Owner in order to assure compliance with the Regulations.

(B) Subcontractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Project.

(C) **TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL CLAIMS, DAMAGES, LIABILITIES, AND CAUSES OF ACTION THAT ARISE FROM THE FAILURE OF SUBCONTRACTOR TO COMPLY WITH THE REGULATIONS.**

(D) Subcontractor will assist Contractor in complying with the Regulations.

(E) Subcontractor will not use any chemicals in its performance of the Work for

Contractor or incorporate any chemicals into materials or products supplied to Contractor or to the Project unless Subcontractor has given Contractor prior written notice of the existence and the possible exposure to such chemical, has delivered an MSDS to Contractor, and has received a written consent of Contractor to use such chemicals.

(3) **Subcontractor's Safety Program.** Subcontractor's safety program must specifically address, among other safety issues, scaffolding, fall hazards, trenching, and shoring, as may be applicable. For "hard hat" jobs, approved safety helmets and hard soled shoes must be worn at the Project at all times. Safety glasses must be worn when power equipment is used. Subcontractor shall erect and maintain all reasonable safeguards for safety and protection, including, but not limited to, necessary signage, protective barriers, and other warnings against hazards. Subcontractor shall furnish all flagmen, barricades, and other items required for public safety and right-of-way maintenance required by the installation of the Work. Safety vests shall be worn in the public right-of-way.

(4) **Default.** If Subcontractor fails to immediately comply with safety and environmental requirements after verbal or written notice from Contractor, Contractor may correct the violation and deduct the cost from any Partial Payment or final payment in addition to all other remedies available to Contractor, including, without limitation, consequential damages. Subcontractor shall pay any fines assessed to Owner or Contractor due to the acts, omissions, or negligence of Subcontractor. If construction at the Project in whole or in part is delayed or halted by any governmental authority as a result of Subcontractor's Work, Subcontractor shall pay to Contractor as liquidated damages, and not as a penalty, the amount of \$200 per hour for a minimum ten (10) hour day until construction at the Project can be safely resumed.

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. If Subcontractor fails to perform under this warranty, the party entitled to performance or Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be

intended non-incidental third party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

SECTION 4. Insurance.

At all times while performing the Work, and continuing thereafter until the expiration of the applicable statute of limitations for any claims, Subcontractor will maintain for the benefit of itself and Contractor (and Owner, when requested), the following minimum insurance coverage:

- a. **Workers' Compensation Insurance** - statutory limits in the state where each Project is located.
- b. **Employer's Liability Insurance** - \$1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.
- c. **Commercial General Liability** - \$1,000,000 per occurrence, \$1,000,000 products-completed operations aggregate, \$1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.
- d. **Business Auto Liability**, including hired and non-owned auto coverage - \$500,000 combined single limit.

Insurance policies shall (a) be issued by companies with a "Best's Rating A" and a "Financial Size Category of VIII", (b) be on an "occurrence" form, and (c) list Contractor and if requested, Owner, as additional insureds per Form CG 20 10 edition 11/85 or its equivalent on the General Liability and Automobile Liability Policies. For purposes of this additional insured requirement, the term "equivalent" means coverage for liability arising out of Subcontractor's Work performed for Contractor and includes both ongoing and products-completed operations coverage. The Workers' Compensation Policy shall include an Alternate Employer's Endorsement naming the Contractor. If Subcontractor utilizes any leased employees, Contractor must also be listed on an Alternate Employer's Endorsement on the Workers' Compensation Policy covering the leased employees.

Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this Section promptly after the date of this Agreement and thirty (30) days before the expiration date of each policy or at any time upon request of Contractor. A copy of the actual additional insured endorsement and Alternate Employer's Endorsement must be supplied with the certificate of insurance. If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or final payment), the required insurance on behalf of Subcontractor. The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement to the policy must be deleted. To the fullest extent permitted by law, any provision on the face of any certificate of insurance provided by Subcontractor that states anything to the effect that the certificate of insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such certificate of insurance. The insurance provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all insurance policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.

SECTION 5. INDEMNITY.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION

OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

SECTION 6. Independent Subcontractor Status and Warranty to be Lawfully Entitled to Work in the United States of America.

Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of

GIM
Subcontractor
Contractor

construction of the Work. Further, Subcontractor warrants and agrees it will independently verify that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) shall be lawfully entitled to work under the laws of the United States of America.

SECTION 7. Default and Damages.

a. Subcontractor's Default. The following acts on the part of Subcontractor will, at Contractor's option, result in the immediate termination of this Agreement and all Work Orders, and dismissal of Subcontractor from each site.

- (1) Any delays of the Work caused by Subcontractor's failure or refusal to supply enough skilled labor or materials to meet Contractor's schedule.
- (2) Subcontractor's failure to promptly pay any labor, material suppliers, or lien claimants with respect to any Work.
- (3) Adjudication of Subcontractor to be bankrupt or insolvent either by Contractor or any court or governmental entity.
- (4) If Subcontractor or any of its employees, subcontractors, or agents (or employees, subcontractors, or agents of any subcontractor retained by Subcontractor to perform Work) consume, use, or are under the influence of alcohol or illegal drugs while on the site. (Subcontractor agrees to strictly enforce rules to this effect and to inform all employees, agents, and subcontractors that such rules will be strictly enforced.)
- (5) Failure of Subcontractor or its agents, subcontractors, or employees to (a) operate motorized vehicles or equipment in a safe and orderly manner, (b) comply with safe labor and material installation practices designated by Contractor or Owner or otherwise accepted by the industry, or (c) leave the Project site in a safe condition (as determined by Contractor in its sole discretion) during or after construction.
- (6) Subcontractor's failure to comply with the provisions of this Agreement regarding assignment or subcontracting.
- (7) Any other violations of the Contract Documents including, without limitation, this Agreement.

b. Damages.

(1) **No Damages for Delay.** Notwithstanding anything to the contrary in this Agreement and to the fullest extent permitted by law, Contractor will not be liable for any loss, claim, cost, liability, or damage incurred by Subcontractor, whether direct or indirect or whether related to efforts by Contractor to accelerate the Work, on account of any delay, disruption, hindrance, or any other impediment whatsoever, no matter by what, or by whom caused. Rather, the Cost of Work (defined in Section 8) is understood and agreed to include and cover all expenses and costs due to delays, disruptions, hindrances, or any other impediments regardless of their cause. Subcontractor agrees not to make, and hereby waives, any such claim for damages.

(2) **Subcontractor's Liability to Contractor upon Termination.** If this Agreement is terminated at Contractor's option as provided in this Section 7, Subcontractor will be liable to Contractor for all costs and damages incurred by Contractor due to Subcontractor's failure to

perform under this Agreement or other Contract Documents (including, without limitation, the amount by which the cost to complete the Project exceeds the cost of the Work), Subcontractor's failure to keep up the progress of the Work as required, or Subcontractor's failure to execute the Work as directed by Contractor. In addition to all costs and damages incurred by Contractor, Subcontractor shall be liable to Contractor for an additional amount equal to 25% of all costs and damages for Contractor's additional overhead and related costs.

c. **Reimbursement for Fines.** Subcontractor shall promptly reimburse to Contractor and shall indemnify, defend, and hold harmless Contractor regarding any fines or penalties incurred by Contractor or Owner as a result of the actions or inaction of Subcontractor or its employees, agents, or subcontractors, relating to performance of Work or otherwise, including, without limitation, their failure to abide by the requirements of Section 2(d).

SECTION 8. Payment to Subcontractor.

a. **Payment by Owner is Condition Precedent.** Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("**Cost of Work**") performed pursuant to Work Orders and that Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accepts Subcontractor's Work and Contractor receives payments from Owner for all payments to Subcontractor. It is expressly agreed that any basis for non-payment by Owner, including, without limitation, the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner.

b. **Partial Payments.** Partial payments ("**Partial Payments**") for portions of the Work that have been completed will be made by Contractor to Subcontractor as the Work progresses, but not more often than in accordance with Contractor's regular payment procedures. As a condition precedent to Partial Payments, Subcontractor must submit written applications that provide a description of the portion of the Work that has been completed during the payment period (including, without limitation, materials and supplies used therein if provided by Subcontractor), an estimate of the percentage of completion of the Work, a copy of each change order for the payment period, safety meeting sheets for the period of time since the last submission for payment, sheets indicating the number of hours worked by any employees of Subcontractor or any of its subcontractors ("**Employee Time Sheets**") for the period of time since the last submission for payment, evidence of payment, waivers (including, without limitation, lien-waivers), and supplier affidavits in form satisfactory to Owner and Contractor, for itself, its subcontractors and material suppliers, and all other information Contractor is required to provide to Owner as a condition to Contractor's right to receive payment. Contractor reserves the right to modify such estimates in its sole and exclusive discretion and such modifications will bind Subcontractor for the purpose of Partial Payments. Partial Payments will be made to Subcontractor on or about the thirtieth day following approval of the application for payment by Contractor and receipt of payment by Contractor from Owner.

c. **Retainage.** Contractor will retain at least ten percent (10%) of each Partial Payment (the "**Retainage Amount**") or any greater amount Contractor chooses to retain in its sole discretion. Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payments or final payment.

d. **Grounds for Withholding Payments.** Contractor may withhold any Partial Payments or the final payment in whole or in part upon the occurrence of any breach of this Agreement by Subcontractor until a cure satisfactory to Contractor has been completed.

e. **Work Covered by Partial Payments.** All the completed Work covered by Partial Payments or final payment made to Subcontractor will thereupon become the sole property of Contractor, but this provision will not be construed as relieving Subcontractor from the sole responsibility for all Work upon which Partial Payments have been made, for the restoration of any damaged Work, for the correction of defective Work, or as a waiver of Contractor's right to require fulfillment of all of the terms of this Agreement. Payment to Subcontractor is specifically agreed not to imply acceptance by Contractor or Owner of any portion of the Work that fails to comply with the Contract Documents.

f. **Final Payment.** Final payment constitutes the entire unpaid balance of the Cost of Work minus any amounts retained. Final payment will be made by Contractor to Subcontractor upon satisfaction of the following conditions:

- (1) The Work is fully performed in accordance with the requirements of the Contract Documents, and Subcontractor is not in default under this Agreement or the Contract Documents;
- (2) Subcontractor has submitted satisfactory evidence of payments to, waivers by, and releases from all claims by, Subcontractor and any persons, firms, or corporations having performed work, labor, or services or furnished materials, equipment, tools, or supplies to Subcontractor for the Work (including, without limitation, lien waivers) if requested by Contractor;
- (3) Subcontractor has delivered to Contractor all as-built drawings, certifications, maintenance manuals, operating instructions, written guaranties, warranties, and bonds;
- (4) Subcontractor has provided safety meeting sheets and Employee Time Sheets for the period of time since the last submission for payment;
- (5) Owner, any general contractor, any lender, any architect, and Contractor have accepted the Work; and
- (6) Contractor has received payment from Owner.

g. **Release of Retainage.** Contractor will release any Retainage Amount thirty (30) days after all conditions precedent to Subcontractor's receipt of the final payment are met.

h. **Subcontractor's Agreement to Pay.** Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.

i. **INDEMNIFICATION FOR LIENS.** TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBRANCES, OR DEMANDS.

SECTION 9. Miscellaneous.

a. **Assignment and Successors.** Subcontractor may not assign or subcontract any portion of the Work or its other obligations or rights hereunder without the prior written consent of Contractor. If Subcontractor assigns or subcontracts any portion of the Work (with the prior written consent of Contractor), Subcontractor will require each such assignee or sub-tier subcontractor to comply with the Contract Documents, including, without limitation, the pertinent provisions of this Agreement (including, without limitation, Section 5) by written agreement, a copy of which must be provided to Contractor. Subcontractor hereby unconditionally guarantees the compliance of each such assignee or sub-tier subcontractor with this Agreement. Subject to the preceding provisions of this Section, this Agreement will be binding on and will inure to the benefit of the parties and their respective heirs, administrators, executors, successors, and permitted assigns.

b. **Acts of Affiliates.** For the purpose of this Agreement, any action of any agent, employee, subcontractor, director, officer, or invitee of Subcontractor or any of their agents, employees, subcontractors, officers, or invitees shall be deemed an act of Subcontractor. For the purposes hereof, any obligation or liability imposed on Subcontractor with regard to its employees or agents shall also be deemed an obligation or liability of Subcontractor with regard to employees or agents of its

subcontractors. Subcontractors of Subcontractor shall include any suppliers of Subcontractor other than Contractor.

c. **Offset.** In addition to any other right provided hereunder, Contractor shall be entitled to offset any amount owed to it by Subcontractor hereunder against any Partial Payments or final payment under this Agreement or any other agreement.

d. **Clean up.** Subcontractor will at all times keep the Project safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove all rubbish and waste produced by its operations or Work hereunder from the Project as well as all of its tools, equipment, machinery, and surplus materials no longer needed and leave the Project in a "broom clean" or equivalent condition and safe for Subcontractor's employees and subsequent contractors to perform their work, unless otherwise specified in writing. If Subcontractor fails to clean up, Contractor may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.

e. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.

f. **Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

EXECUTED to be effective as of the date first above written.

SUBCONTRACTOR:

Hurley Services, LLC

By:

Giovanni N. Mendes

Name: Giovanni N. Mendes

Title: Owner

80-0203713

Subcontractor Social Security No. or Federal I.D.
No.

BUILDERS FIRSTSOURCE -
SOUTHEAST GROUP, LLC

By:

Deryl Ward

Name:

Deryl Ward

Title:

Vice President

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Six Fifty-Six Owners Association, Inc.

Plaintiffs,

v.

Winsor South, LLC, et al.

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2016-CP-10-03455

CHARLESTON EXTERIORS, LLC'S MOTION
TO JOIN IN DEFENDANT HURLEY
SERVICES, LLC'S MOTION FOR SUMMARY
JUDGMENT AS TO THE CLAIMS ASSERTED
BY BUILDERS FIRST SOURCE SOUTHEAST
GROUP

The undersigned hereby moves on behalf of Defendant Charleston Exteriors, LLC, to be allowed to join the Motion for Summary Judgment filed by Defendants Hurley Services, LLC.

No issues have been raised separate and distinct from the allegations against Defendants Hurley Services or Charleston Exteriors, LLC in this action.

The undersigned would hereby request that he be allowed to adopt the Motion for Summary Judgment filed by Defendant Hurley Services in the above-captioned action.

THIS the 20 day of February 2020

Respectfully submitted,

CHARLESTON EXTERIORS, LLC

By: s/ C. Clay Olson, Esq.
C. Clay Olson, SC Bar No. 17007
Harper Little, PLLC
164 Market Street, Suite 139
Charleston, South Carolina 29401
Tel: 843.224.6676
Fax: 662.259.8464
clay@harperlittlelaw.com

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Six Fifty Six Owners Association, Inc., et al,
Plaintiffs,

vs.

Winsor South, LLC; et al.,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL CASE NO. 2016-CP-10-03455

**HURLEY SERVICES, LLC'S
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

TO: STEPHEN P. HUGHES, ESQ. AND THE LAW FIRM OF HOWELL, GIBSON & HUGHES, PA, COUNSEL OF RECORD FOR DEFENDANT BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC

You will please take notice that the undersigned, as counsel for the Defendant Hurley Services, LLC, ("Hurley") submits the following in support for its Motion for Summary Judgment: against Co-Defendant Builders FirstSource-Southeast Group, LLC ("BFS").

FACTUAL/PROCEDURAL BACKGROUND

This litigation arises out of alleged construction defects at Six Fifty Six Coleman Boulevard, a twelve-building townhome community in Mount Pleasant, SC ("the Project"). BFS is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. See BFS Answer to Third Amend. Compl., ¶7; Terry Rosamond Deposition, p.8, l.8-22, p.44, l.2 - p.45, l.22-25, p.65, l.1-18, attached as Exhibit 1; BFS License statement, attached as Exhibit 2. It is undisputed that BFS holds an unlimited commercial general contractor's license (License No. 112969) with the South Carolina Labor Licensing & Regulation ("SC-LLR"), and Terry Rosamond is BFS's representative that serves as the "qualifying party" for such licensure in this state. Id. Defendant BFS supplied and installed windows and doors as a subcontractor of the Ryland Group for only the "Ryland Phase" buildings

at the Project, which consists of nine (9) buildings that were constructed in 2013 and 2014. It is undisputed that BFS furnished the windows, related flashings, and caulk and provided superintendents to oversee such installation for the Ryland Phase buildings at the Project.

BFS filed a third-party complaint in the present litigation on May 9, 2017 asserting third-party claims against Hurley for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. Hurley was ultimately made a direct defendant by Plaintiffs and BFS then asserted cross-claims against Hurley in lieu of it previously asserted third-party claims, but on all the same causes of action and grounds. BFS's operative cross-claims are contained in BFS's Answer to Plaintiffs' Third Amended Complaint filed on January 24, 2019. BFS's cross-claims allege that BFS is entitled to be indemnified in the amount which BFS "may pay in satisfaction" of Plaintiffs' claim "plus BFS [sic] costs for defense, inclusive of attorneys' fees, without regard for the fault of either Hurley or BFS. See BFS Answer to Third Amend. Compl., ¶¶ 126, 131, 135, 139, & 143.

Plaintiffs' expert engineer Russell Mease, P.E. of RTM Engineering, LLC investigated the Project for construction deficiencies. He prepared a comprehensive 146-page report concerning his findings and was deposed on multiple occasions about his investigation of the Project. Mease testified that the windows and doors at Ryland Phase buildings of the Project were installed into the buildings' framing in accordance with "a protocol that's acceptable in the industry." Deposition of Russell Mease, P.E., Vol. 1, p.121, l.20 – p.122, l.3; Vol. 3 p.601, l.3 – p.606, l.21, together attached as Exhibit 3. Mease's opinions concerning defects and damages surrounding window installations at the Ryland Phase buildings related to the work of other trades such as the brick mason and siding subcontractor as well as the lack of supervision by the general contractor. Deposition of Russell Mease, P.E., Vol. 2, p.209, l.3 – p.213, l.14; attached as Exhibit 4. Mease

testified as to only one criticism with regard to the installation of the windows into the rough openings of the Ryland Phase buildings. Despite never removing a window from a rough opening in the Ryland Phase, Mease contended that he did not see evidence of caulk underneath the nailing fin at the sills of the windows he examined, however, he could not say unequivocally that the caulk was missing. Deposition of Russell Mease, P.E., Vol. 3, p.594, l.23 – p.601, l.2; attached as Exhibit 5. Mease admitted that the omission of caulk from behind the sill nailing fin to allow for drainage of moisture was consistent with best practices that existed at the time of construction and presently, but he was relying upon a 2007 Florida test “cut sheet” from the window manufacturer that referenced caulk behind the perimeter of the nailing fin. Id. Notably, this single criticism concerning caulking is not mentioned in Mease’s 146-page report and Plaintiffs’ expert did not attribute damage at the Project to this condition, only a concern about the prospect of air infiltration which he had not investigated. Id.

BFS’s corporate witness, Terry Rosamond, testified during a 30(b)(6) deposition in this action that best practices applicable at the time the Ryland Phase buildings were constructed called for the omission of caulk underneath a window’s sill nailing fin so that any incidental moisture could exit or weep from the window assembly, and he noted window manufacturers’ installation instructions have evolved over time to recognize this practice which promotes the drainage of water out of the wall. Deposition of Terry Rosamond for BFS, p.8, l.8-22, p.168, l.7 – p.170, l.7; attached as Exhibit 6; see also 30(b)(6) Deposition Notice attached as Exhibit 7. Rosamond, serving as a designee for BFS, further testified that BFS’s subcontractors at the Project installed the windows in accordance with these best practices per the instructions of BFS’s superintendents, which instructions included the omission of caulk behind the sill fin. Id.

Hurley is alleged to have installed windows and doors at the Project as a subcontractor to BFS in 2013 and 2014. It is undisputed that Hurley has never held any licenses of any kind relative to construction with the SC-LLR and the absence of such licensure is a matter of public record. See Exhibit 8. According to BFS, Hurley executed a BFS “Master Subcontractor Agreement” dated May 14, 2012 (hereafter “Master Agreement”). See Exhibit A filed with the Notice of Motion. The Master Agreement at issue here is a BFS contract form bearing “Version – 5/17/06.”¹ BFS seeks to recover from Hurley and BFS’s subcontractors in indemnity under the terms of the applicable BFS Master Agreement.

Section 5 of the Master Agreement contains multiple indemnity clauses. The first such indemnity provision states:

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFENDANT AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY’S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, **ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR’S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR** OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR’S INSURANCE REQUIREMENTS ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

¹ This version of the Master Agreement is also the same version at issue in Defendant Charleston Exteriors, LLC’s motion for summary judgment.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES") FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTORS, OR ANY OF ITS SUBCONTRACTORS, **REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES**, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND **THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES**. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD

HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

Yet another indemnity provision found in Section 8 of the Master Agreement states as follows:

TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, **ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS.** IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR; THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND, EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR.

See Exhibit A, emphasis added in bold.

Following extensive discovery and multiple sessions and days of mediation, Hurley, BFS, and BFS's other subcontractor (Charleston Exteriors, LLC) have settled with Plaintiffs. BFS did not extinguish any liability whatsoever of its subcontractors in its settlement with Plaintiffs. The

only remaining claims pending against Hurley in this litigation are BFS's cross-claims seeking indemnification.

LEGAL STANDARD

Summary judgment is appropriate if the circuit court finds "there is no genuine issue as to any material fact" Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, "the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 329–30 (2009). The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. Manley v. Manley, 291 S.C. 325, 329 (Ct. App. 1987). "[S]ummary judgment is [used] to expedite disposition of cases [that] do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452 (2001). Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571 (Ct. App. 2001). Summary judgment should be granted when there is a failure of the nonmoving party to make a showing sufficient to establish the existence of an essential element of that party's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Argument

1. Plaintiff's Claims for Breach of express and implied warranties, breach of contract, and negligence are merely claims for indemnity in disguise.

BFS has only alleged cross-claims against Hurley and BFS's other subcontractor as a result of the claims against it filed by the Plaintiffs for alleged construction deficiencies at the Project. Claims conditioned on liability to third parties are considered claims for indemnity "in disguise".

See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not “suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit,” trial court “properly granted summary judgment on [general contractor’s] breach of contract and breach of warranty cross-claims because they are not independent causes of action from [the general contractor’s] equitable indemnity claim”). See also Holland v. Hucks Pool Co., Inc., No. 4:15-cv-00141-RBH, 2016 WL 6157491 (D.S.C. Oct. 24, 2016) (“[The contractor’s] breach of contract/warranty crossclaim is not viable as a cause of action separate from its equitable indemnity crossclaim.... [The contractor’s] allegations indicate it did not sustain its own damages as a result of any breach of contract or warranty by [the subcontractor].... Accordingly, the Court will grant [the subcontractor’s] motion for summary judgment as to [the contractor’s] breach of contract/warranty crossclaim....”). Thus, BFS’s cross-claims should be dismissed and Hurley’s Motion for Summary Judgment should be granted in these respects.

2. BFS’s claims for contractual indemnity are based on contractual provisions that do not comply with South Carolina law, are neither clear nor unequivocal, are contrary to public policy, and, thus, they fail as a matter of law.

a. The Master Agreement’s indemnification clauses are confusing, contradictory, and contrary to South Carolina’s legal standards.

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the standard of being clear and unequivocal when seeking to recover for an indemnitee’s concurrent negligence; indemnification clauses that do not meet this standard are against public policy. See Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 819 S.E.2d 166, 172 (S.C. App. 2018), reh'g denied (Oct. 18, 2018) (affirming trial court’s grant of summary judgment in favor of subcontractor dismissing contractual indemnity cross-claims of contractor based on application of the clear and unequivocal standard). There is

one Master Agreement between BFS and Hurley at issue in this matter, a copy of which is attached to Hurley's Motion as Exhibit A. There are multiple indemnity provisions in that contract; those indemnity provisions are unclear, conflict in certain respects, and violate South Carolina law. As a result, the Master Agreement's indemnity provisions are unenforceable.

A review of the Master Agreement's numerous indemnification clauses reveals that there is nothing clear and unequivocal about them. This smorgasbord of indemnification reflects that, in terms of indemnity, BFS took a 'throw everything in the kitchen sink' approach to drafting the contract, presumably under the theory that if one clause fails another may stand. On one hand, BFS Master Agreement contemplates indemnification of all attorneys' fees incurred in the defense of the BFS as well as all amounts paid in settlement or to satisfy demands – each without any regard to the fault of the subcontractor or any reference to the negligence of BFS; in other areas the Master Agreement refers to indemnification in favor of BFS regardless of the sole or concurrent negligence of BFS; and yet other provisions qualify indemnification to the extent the loss is caused in whole or part by the negligence of Subcontractor. The terms are confusing at best, contradictory at times, and arguably misleading. As such, the Master Agreement's indemnity clauses are unenforceable as a matter of law.

b. The Master Agreement's indemnification provision for BFS's sole negligence violates Section 32-2-10 of the SC Code of Laws and, thus, is against public policy and unenforceable.

The Master Agreement's provision that requires indemnification of BFS regardless of its "sole negligence" violates Section 32-2-10 of the SC Code of Laws, and, therefore, the Master Agreement's entire indemnity section fails for this reason alone (but for other reasons as well). That offending clause cannot be blue-penciled out of the indemnity section by the Court. See Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 694 S.E.2d 15, 18 (S.C. 2010) (recognizing

that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy). Section 32-2-10 provides: “Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately **caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable.**” SC Code Ann. § 32-2-10 (Emphasis added). The Master Agreement plainly includes indemnification terms that require indemnification regardless of BFS’s sole negligence. For this reason alone, this Court should grant Hurley’s Motion for Summary Judgment on grounds that the indemnification clauses of the Master Agreement are unenforceable as a matter of law.

c. BFS is seeking to recover in indemnity for its concurrent or sole negligence.

BFS is seeking through its cross-claims to recover in indemnity from Hurley regardless of BFS’s concurrent, if not sole, negligence. BFS is a licensed contractor that supplied the subject windows and provided turn-key installation of the windows for Ryland Group; such installation work was performed by unlicensed subcontractors, including Hurley. “Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee’s license group and license classification or subclassification; provided, the licensee provides supervision. **The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.**” SC Code Ann. § 40-11-27(E) (Emphasis added). Thus, as a matter of law, BFS had an obligation to supervise the

work of its subcontractors and BFS is by statute responsible if the subcontractors committed any violation of the building code (if any).

BFS's corporate designee testified at 30(b)(6) deposition that BFS's superintendents instructed the subcontractors to install the windows without caulk behind the sill fin - the manner of installation that Plaintiffs' expert engineer Mease criticized at deposition. Therefore, based on the undisputed facts, BFS is seeking to recover in indemnity for its concurrent negligence and arguably for its sole negligence. The allegations of BFS's cross-claims also do not restrict BFS's recovery in indemnity to losses to the extent caused by the subcontractor's negligence; the allegations are, like the Master Agreement's indemnity clauses, much broader. The Master Agreement's indemnification clauses fail to meet South Carolina's applicable rules of construction, including, without limitation, the clear and unequivocal standard, that apply in this context. Furthermore, the Master Agreement is violative of Section 32-2-10 of the SC Code of Laws which prohibits indemnification for claims based on the indemnitee's sole negligence.

d. The Honorable Judge Clifton Newman has recently granted summary judgment to co-defendant Charleston Exteriors, LLC finding that this same BFS Master Agreement is unenforceable as a matter of law.

Significantly, the Honorable Clifton Newman recently found this same version of the BFS Master Agreement to be unenforceable as a matter of law because the indemnification clauses are not clear and unequivocal and they violate South Carolina's rules of contract construction. See Exhibit 9; Amended Order Granting Charleston Exteriors, LLC and ECC Contracting, LLC's Motions for Summary Judgment in the matter of Builders FirstSource-Southeast Group, LLC v. MI Windows & Doors, Inc., Case No. 2018-CP-08-02547 (S.C.Com.Pl. Feb. 3, 2020). In striking down BFS's Master Agreement's indemnity clauses, Judge Newman determined that the indemnification provisions "are confusing at best and deceptive at worst." Id. at 6. Indeed, one

of the two BFS Master Agreements found unenforceable by Judge Newman in favor of co-defendant Charleston Exteriors, LLC in the prior action is same version of the Master Agreement at issue for Hurley in this motion. The BFS Master Agreement with Hurley is equally unenforceable for all the same reasons identified in the order entered by Judge Newman and if the indemnity clauses therein fail in any respect they fail as a whole.

e. South Carolina’s legal contract construction rules support striking the BFS Master Agreement’s indemnification clauses in their entirety.

“[F]or a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement.” Id. quoting Davis v. Greenwood Sch. Dist., 50, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). “A contract is read as a whole document....” McGill v. Moore, 672 S.E.2d 571, 574 (S.C. 2009). The intention of the parties to a contract is gathered primarily from the contents of the writing itself, or, as otherwise stated, “from the four corners of the instrument” alone. McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945). Any uncertainty as to the meaning of any term “should be resolved against the party who prepared the contract”, which here, is BFS. Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 687 S.E.2d 714, 718 (S.C. App. 2009). “[W]ords cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.” Id.; see also ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011) (“It is not the function of the court to rewrite contracts for parties.”). Accordingly, South Carolina courts will not “blue pencil” an agreement and rewrite a contract’s terms to make it comply with the law. Poynter Invs., Inc. v. Cent. Builders, supra, 694 S.E.2d at 18 (S.C. 2010). Under South Carolina law, contracts “must stand or fall on their own terms.” Id. If part of the contract’s covenant fails, the agreement is unenforceable. Id.

In this case, the indemnification clauses set forth in the BFS Master Agreement must fall altogether. If one or more of the indemnification clauses fails, they all fail. And the Court cannot rewrite the contract to save the legally defective indemnity clauses. The Master Agreement's indemnification clauses are unenforceable as a matter of law. Thus, the Court should grant Hurley's Motion for Summary Judgment.

3. BFS should be collaterally estopped from enforcing the indemnification provisions of the Master Agreement because it litigated – and lost – the same issues in prior litigation before Judge Clifton Newman.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct.App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App. 1984). The offensive use of collateral estoppel was first adopted by this State in Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984).

To invoke collateral estoppel, a party need not have also been a party in the prior action; the law only requires that the party *against* whom estoppel is applied have been a party to that action and had a full and fair opportunity to litigate the issue in the prior action. South Carolina Property Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). In other words, the modern application of collateral estoppel permits parties to invoke collateral estoppel even in the absence of “mutuality.” Id.

Here, the contract terms have been actually litigated, directly determined in the prior action, and the issues were essential to the judgment, such that collateral estoppel should apply to the issues surrounding the enforceability of BFS's indemnification provisions.

The issues that Hurley raises in this Motion with respect to the Master Agreement, the indemnification provisions contained therein, and BFS's claims for indemnity have been litigated in a prior action: Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc. et al., case number 2018-CP-08-02547, filed in the Berkeley County Court of Common Pleas (the "Prior Action").

The Master Agreement and indemnity provisions that BFS now wishes to assert against Hurley involve the same agreement and indemnity provisions that were at issue in the Prior Action. BFS has already litigated the issue of the enforceability of its indemnification provisions; so it should not be permitted to now relitigate the same exact issue on the same exact form contract. In granting the subcontractor defendant's motions for summary judgment in the Prior Action, Judge Newman specifically considered the provisions of the same indemnification clauses present here and found "the specific language from the Master Subcontract Agreement is confusing, conflicting, and neither clear nor unequivocal." Lastly, Judge Newman's determination of the unenforceability of the indemnification provisions in the Prior Action was essential to the final order reached therein. See Exhibit 9

BFS had the opportunity, and did in fact, litigate the issue of the enforceability of the indemnification clause in its Master Agreement in the Prior Action. Where the "illegality of the contract has been actually litigated and directly determined in the prior action and that issue was essential to the judgment," the application of collateral estoppel is appropriate. South Carolina

Property Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). Accordingly, this Court should grant Hurley's Motion for Summary Judgment and apply principles of collateral estoppel to invalidate BFS's indemnification clauses and dismiss its cross-claims.

WHEREFORE for the foregoing reasons, Hurley respectfully requests this Court enter an Order dismissing BFS's cross-claims and granting summary judgment in Hurley's favor. Hurley adopts and incorporates by reference any additional arguments presented by co-defendant and co-moving party, Charleston Exteriors, LLC, as if fully set forth herein. Hurley reserves the right to supplement this motion and present additional arguments and evidence at the hearing before the Court.

Respectfully submitted,

s/ Ian W. Freeman

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Office: 66 Hasell St., Charleston, SC 29401

Telephone: 843.227.2200

ATTORNEYS FOR HURLEY SERVICES, LLC

Charleston, South Carolina
March 3, 2020

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 CHARLESTON COUNTY

4 DEPOSITION OF TERRY ROSAMOND
5 As 30(b)(6) representative of
6 BUILDERS FIRSTSOURCE

7 SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
8 ROBERT JOHN NUTLEY, Individually and on Behalf of
9 All Others Similarly Situated,

10 Plaintiffs,

11 vs. CASE NO. 2016-CP-10-03455

12 WINSOR SOUTH, LLC, and JEFFREY M. THOMAS,
13 Individually and on Behalf of a Class of
14 Construction Defendants: SOUTHEASTERN
15 RECAPITALIZATION GROUP, LLC, WCM CONSTRUCTION,
16 LLC, JONATHAN J. THOMAS, AC HEATING AND AIR
17 CONDITIONING SERVICE, INC., ACME DOORS, INC.,
18 ALPHA OMEGA CONSTRUCTION GROUP, INC., ATLANTIC
19 CONSTRUCTION SERVICES, INC., BUCK LUMBER AND
20 BUILDING SUPPLY, INC., et al.,

21 Defendants.

22 DEPONENT: TERRY ROSAMOND
23 DATE: APRIL 16, 2019
24 TIME: 10:09 AM
25 LOCATION: LUCEY LAW FIRM
 MOUNT PLEASANT, SOUTH CAROLINA
26 REPORTED BY: VALERIE G. MELKUS, RPR
 NCRA REGISTERED PROFESSIONAL
 REPORTER
 CLARK & ASSOCIATES, INC.
 CHARLESTON, SC 29415



1 TERRY ROSAMOND,
2 having been first duly sworn, was examined and
3 testified as follows:

4 EXAMINATION

5 BY MR. FULLER:

6 Q. Good morning, sir.

7 A. Good morning.

8 Q. Thanks for coming in today. My name is
9 Collin Fuller. I represent the homeowners and
10 the association in the 656 Coleman matter. Are
11 you familiar with the townhomes at 656 Coleman?

12 A. Yes, I am.

13 Q. And you are the designee for Builders
14 FirstSource, correct?

15 A. Correct.

16 Q. And are you the person who is best able
17 to answer questions about the work that Builders
18 FirstSource did on the 656 townhomes?

19 A. I think so.

20 Q. And would you state your full name for
21 the record, please?

22 A. Terry Eugene Rosamond.

23 Q. At the time that Builders FirstSource
24 was working on the 656 townhomes, were you
25 employed by BFS?

1 A. No, I did not.

2 Q. After that license expired, what was
3 your next educational advancement or license that
4 you got?

5 A. The next license I got was when I was at
6 BFS. We had a gentleman who was getting ready to
7 retire who -- he had the builder's license, and
8 he was the qualifier for BFS. And my boss --
9 who's deceased now, but he was the COO at the
10 time in the east. He said, I need you to go get
11 your builder's license, so that's what I did. I
12 went and did the -- it's called a NASCLA, which
13 you take the builder's exam, and that qualifies
14 you for that portion of it.

15 And then in each state, some of them may
16 require that you do a business license part also.
17 And at the time because he was the holder of the
18 license for South Carolina, they wanted me to be
19 sure and get that one. So I got that one, did
20 the business exam also. Those licenses are
21 reciprocal to other states, but some of them I
22 would still have to go do a little small business
23 exam if I wanted to activate them.

24 Q. How is a NASCLA license different from a
25 residential builder's license?

1 A. Well, it's more -- it gives you higher
2 qualifications. In other words, it's a general
3 contractor's license versus just residential.

4 Q. What did you have to do to get that
5 license?

6 A. I had to study for about a month and a
7 half. Then it's like an 8- or 10-hour exam that
8 you have to go take.

9 Q. And that one is not state-specific?

10 A. You can do a state-specific, but when
11 you do the NASCLA, it already qualifies you for
12 like eight different states. And there may be
13 more now. That was back when I got it, and I've
14 had it now about seven or eight years or six or
15 seven years.

16 It's no different than if I wanted to
17 just go and do the general contractor's license
18 for South Carolina. But by doing the NASCLA, you
19 get qualified and approved for other states. And
20 then, like I said, all you'd have to do is do a
21 small business exam.

22 Q. The work that Builders FirstSource does
23 on the install side, that work is done under your
24 license?

25 A. Correct.

1 Q. What all turnkey installation services
2 were being offered by Moncks Corner in 2013?

3 A. Best of my knowledge, they were doing
4 installed framing, they were doing installed
5 trim. They may have been doing a little bit of
6 installed siding. Other than that, I don't know
7 of anything else they were doing.

8 Q. What all falls under framing?

9 A. Typically just framing a building. You
10 know, installing trusses, you know, putting --
11 no -- unless they get to building in the dry,
12 does not mean installing shingles and new
13 roofing. But normally doing all the framing,
14 putting the roof on, wall sheathing, those kinds
15 of things.

16 Q. And they were doing windows and doors
17 too, right?

18 A. Yes.

19 Q. Anything else?

20 A. I don't think there was anything else
21 they were doing at the time.

22 Q. Does BFS have its own product lines?

23 A. We have a few product lines or items.
24 We have a manufacturing facility that does
25 windows and all in Texas. They don't do anything

[Print this page](#)**Board: Commercial Contractors****BUILDERS FIRSTSOURCE-SOUTHEAST GROUP LLC**

2001 BRYAN STREET STE 1600

DALLAS, TX 75201

(214)880-3500

License number: 112969

License type: GENERAL CONTRACTOR

Status: ACTIVE

Expiration: 10/31/2020

First Issuance Date: 01/05/2007

Classification: BD5

Qualified By: Financial Statement

President / Owner: MORRIS TOLLY

[Click here for Classification definitions and licensee's contract dollar limit](#)

Supervised By

ROSAMOND TERRY (CQG)[File a Complaint against this licensee](#)**Board Public Action History:**[View Orders](#)[View Other License for this Person](#)

No Orders Found



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

DEPOSITION OF RUSSELL MEASE, PE
Volume 1

SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
ROBERT JOHN NUTLEY, Individually and on Behalf of
All Others Similarly Situated,

Plaintiffs,

vs. CASE NO. 2016-CP-10-03455

WINSOR SOUTH, LLC, and JEFFREY
M. THOMAS, Individually and on Behalf of a Class
of Construction Defendants:, SOUTHEASTERN
RECAPITALIZATION GROUP, LLC, WCM CONSTRUCTION,
LLC, JONATHAN J. THOMAS, AC HEATING AND AIR
CONDITIONING SERVICE, INC., ACME DOORS, INC.,
ALPHA OMEGA CONSTRUCTION GROUP, INC., ATLANTIC
CONSTRUCTION SERVICES, INC., BUCK LUMBER AND
BUILDING SUPPLY, INC., et al.,

Defendants.

DEPONENT: RUSSELL MEASE, PE
DATE: JANUARY 25, 2018
TIME: 10:03 AM
LOCATION: LUCEY LAW FIRM
MOUNT PLEASANT, SOUTH CAROLINA
REPORTED BY: DARAH L. NEKOLA, RPR, CSR(IA)
NCRA CERTIFIED REPORTER
CLARK & ASSOCIATES, INC.
CHARLESTON, SC 29415
843-762-6294
WWW.CLARK-ASSOCIATES.COM
Darahnekola@gmail.com



1 mouse again.

2 A. You can see just a little edge here that
3 is open. You can see where the house wrap was
4 cut a little less -- you know, just a little bit
5 lower.

6 So we should have seen, you know, 2 or
7 3 inches of adhesive material exposed, if you
8 really want it to bond to the wall. If you cover
9 the whole thing over the back of it with Tyvek,
10 well, it's not going to stick to anything but the
11 Tyvek. It's like trying to put the band-aid on
12 without taking the wrapper off.

13 Q. Did you observe that lack of sufficient
14 sticky area on more windows than 601?

15 A. That's the first one that popped in my
16 head. I'd have to dig through these and try
17 to -- to try to find another example, and I will
18 be glad to do that if you want me to.

19 Q. I think I will hold off for now. What
20 were the deficiencies with the installation of
21 the Ryland windows?

22 A. Again, without the installation
23 instructions from MI, I can't say with
24 100 percent certainty. What I will say is they
25 followed generally a protocol that's acceptable

1 in the industry, so it wasn't the worst I have
2 ever seen, but I can't confirm it with the
3 manufacturer's instructions.

4 Q. And how about the windows on building
5 400?

6 A. That was a whole other set of issues,
7 and they were actually done the worst of any.

8 Q. Do you have a photograph of that?

9 A. I do.

10 All right. I'm going to step you
11 through what we found. This is unit 405.
12 They've had a chronic water intrusion problem at
13 this first floor window that faces the parking
14 lot on the front of the building. It's the
15 window adjacent to the front entryway door.

16 Q. And what Bates number?

17 A. Oh, I'm sorry. This is Bates RTM4081.
18 Now, we've already removed the exterior trim that
19 was on the wall at the head of the window, so
20 what you're seeing is some blocking at the head
21 of the window, and you can see the bottom of the
22 the precast concrete panel.

23 So once we removed -- I'm going to step
24 through some pictures here. I just wanted you to
25 have a footing.

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 CHARLESTON COUNTY

4 DEPOSITION OF RUSSELL MEASE, PE
5 Volume 3

6 SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
7 ROBERT JOHN NUTLEY, Individually and on Behalf of
8 All Others Similarly Situated,

9 Plaintiffs,

10 vs. CASE NO. 2016-CP-10-03455

11 WINSOR SOUTH, LLC, and JEFFREY M. THOMAS,
12 Individually and on Behalf of a Class of
13 Construction Defendants, SOUTHEASTERN
14 RECAPITALIZATION GROUP, LLC, WCM CONSTRUCTION,
15 LLC, JONATHAN J. THOMAS, AC HEATING AND AIR
16 CONDITIONING SERVICE, INC., ACME DOORS, INC.,
17 ALPHA OMEGA CONSTRUCTION GROUP, INC., ATLANTIC
18 CONSTRUCTION SERVICES, INC., BUCK LUMBER AND
19 BUILDING SUPPLY, INC., et al.,

20 Defendants.

21 DEPONENT: RUSSELL MEASE, PE

22 DATE: MAY 22, 2018

23 TIME: 9:24 AM

24 LOCATION: Young Clement Rivers
25 25 Calhoun Street
 Charleston, South Carolina

26 REPORTED BY: DARAH L. NEKOLA, RPR, CSR(IA)
27 NCRA CERTIFIED REPORTER
28 CLARK & ASSOCIATES, INC.
29 CHARLESTON, SC 29415
30 843-762-6294
31 WWW.CLARK-ASSOCIATES.COM
32 Darahnekola@gmail.com

Clark and Associates Inc.

1 instructions by the manufacturer, but he did
2 follow general protocols.

3 Q. If we look at -- I believe this is
4 Exhibit 11 that we have blown up on the screen
5 here.

6 Exhibit 11 is a spreadsheet that you
7 prepared, giving an overview of the various
8 deficiencies that you found at the project and
9 stating the location where you found them,
10 correct?

11 A. Yes. At the time of development of this
12 document. I've done more since.

13 Q. And kind of in the middle of that,
14 under -- is a section entitled Windows, and I
15 have three categories there: Damage to window
16 frame, trim abutted to window, and window abutted
17 to brick; is that correct?

18 A. Yes.

19 Q. And I believe we talked at length during
20 the course of your deposition that -- let's just
21 start with the trim abutted to window.

22 That would be a condition that you would
23 blame on whatever trade installed the trim?

24 A. Yes. It has to be held off of the
25 window. You can't make the window smaller.

1 Q. And the point of that is you want that
2 quarter-inch space left for an engineered caulk
3 joint around the window, correct?

4 A. Yes. You need the space to properly
5 install sealant.

6 Q. And the point of that sealant is to keep
7 the water out and to remove a pathway for water
8 to intrude around the window?

9 A. Yes. And also to allow for thermal
10 expansion and contraction of the materials around
11 each other so they don't stress or create stress
12 in the windows or the trim.

13 Q. And then there's a similar issue with
14 regard to window abutted to brick, which is
15 another one of your columns here.

16 You also want a space left for an
17 engineered caulk joint around the brick, correct?

18 A. Yes. Same condition.

19 Q. So, number one, prevent water from
20 intruding around the window vis-à-vis the
21 engineered caulk joint and, two, to allow for
22 thermal expansion of the window.

23 A. Yes.

24 Q. And you found the absence of those
25 engineered caulk joints such that, in your

1 opinion, water has been allowed to intrude around
2 those?

3 A. Yes. As I've said, I found two
4 conditions. It was either omitted or improperly
5 installed. Those are the two conditions I
6 observed on all the buildings in the community.

7 Q. And like the trim abutment, whoever
8 installed the brick would be responsible for it
9 being -- having abutted it too close to the
10 window?

11 A. Yes.

12 Q. Damage to the window frame, is that
13 something that you found relative to deformation
14 of the window because of brick bind or --

15 A. Yes.

16 Q. Okay. So that's damage to the window
17 frame due to other components surrounding it that
18 have deformed the window?

19 A. Yes.

20 Q. None of these conditions that are
21 described here are ones -- in the middle there
22 under Windows -- are ones that you blame on the
23 window installer, correct?

24 A. Correct.

25 Q. I believe your report is marked as

1 Exhibit 5; is that right?

2 MS. CHASE: Yes.

3 A. I didn't confirm it, but I believe
4 that's true.

5 Q. Turning to page 41 of your report, photo
6 61.

7 A. Okay.

8 Q. I believe you have previously testified
9 that this is Unit 10- -- this is a photograph of
10 Unit 101.

11 A. Correct.

12 Q. As well as the photos 62 and 63 on the
13 next page.

14 A. Yes. This continues on until page 46.

15 Q. And what you are documenting in these
16 photos is some evidence, you believe, of water
17 intrusion from above the windows?

18 A. Correct. And I misspoke. You're
19 correct. Unit 101 is only photos 61 through 63.

20 But, yes, documenting water intrusion
21 damage to the interior trim around the window.

22 Q. Okay. And then if we flip to photo 79
23 on page 52, and this is your beginning of section
24 Roman numeral III of your report concerning brick
25 veneer cladding.

1 A. Yes.

2 Q. These photos, 79, 80, and 81, and maybe
3 82 -- you tell me -- are also from Unit 101?

4 A. That's correct.

5 Q. And is that the same -- the window that
6 we see there the same window that we see in
7 photos 61, 62, and 63?

8 A. It is.

9 Q. Okay. So photos 61 through 63, you're
10 inside the unit, you say, Aha, I see some water;
11 we've got an issue here. Correct?

12 A. Yes.

13 Q. Photos 79, 80, 81, 82, you go outside,
14 you look at the window, you do some destructive
15 testing and you say, Aha, I think I found what's
16 causing this.

17 A. Yes. This is one of the contributing
18 factors to the problem inside.

19 Q. And so who would have installed the
20 peel-and-seal flashing that we see in photos 80
21 and 81 over top of the lintel?

22 A. I would assume the mason, but I don't
23 have any concrete evidence of that.

24 Q. And it does appear that that flashing
25 does come and lap on top of at least a portion of

1 the lintel, correct?

2 A. Yes.

3 Q. And you found the lintel to be
4 negatively sloped so that water actually runs
5 from side to side and then goes down into the
6 wall?

7 A. Correct.

8 Q. Fair to say that the window gets
9 installed before the masonry work and the lintel
10 that we see in photos 80 and 81 is in place?

11 A. To that elevation, yes.

12 Q. And this is an area where you believe
13 there's -- what we see in photos 80 and 81 are
14 conditions that are contributing to the water
15 intrusion that we saw in your earlier photos, 61
16 through 63?

17 A. Yes.

18 Q. And is that a condition that you believe
19 repeats itself at the project?

20 A. Yes. I think intrusive observations
21 bears that out.

22 Q. Why are you calling for the windows to
23 be replaced?

24 MR. FLOYD: Objection.

25 A. I'm recalling -- excuse me. I called

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 CHARLESTON COUNTY

4 DEPOSITION OF RUSSELL MEASE, PE
5 Volume 2

6 SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
7 ROBERT JOHN NUTLEY, Individually and on Behalf of
8 All Others Similarly Situated,

9 Plaintiffs,

10 vs. CASE NO. 2016-CP-10-03455

11 WINSOR SOUTH, LLC, and JEFFREY
12 M. THOMAS, Individually and on Behalf of a Class
13 of Construction Defendants:, SOUTHEASTERN
14 RECAPITALIZATION GROUP, LLC, WCM CONSTRUCTION,
15 LLC, JONATHAN J. THOMAS, AC HEATING AND AIR
16 CONDITIONING SERVICE, INC., ACME DOORS, INC.,
17 ALPHA OMEGA CONSTRUCTION GROUP, INC., ATLANTIC
18 CONSTRUCTION SERVICES, INC., BUCK LUMBER AND
19 BUILDING SUPPLY, INC., et al.,

20 Defendants.

21 DEPONENT: RUSSELL MEASE, PE
22 DATE: JANUARY 26, 2018
23 TIME: 9:06 AM
24 LOCATION: LUCEY LAW FIRM
25 MOUNT PLEASANT, SOUTH CAROLINA

26 REPORTED BY: DARAH L. NEKOLA, RPR, CSR(IA)
27 NCRA CERTIFIED REPORTER
28 CLARK & ASSOCIATES, INC.
29 CHARLESTON, SC 29415
30 843-762-6294
31 WWW.CLARK-ASSOCIATES.COM
32 Darahnekola@gmail.com

Clark and Associates Inc.



1 about the installation of the rowlocks?

2 A. Yes.

3 Q. Please describe your opinion about how
4 the brick veneer is installed next to the windows
5 and the doors.

6 A. Yes. We have two dissimilar materials.
7 We have the window units, and then we have the
8 brick veneer. The window manufacturer
9 requirements for MI Windows and Andersen Windows
10 say that you're supposed to leave a quarter-inch
11 gap between the window and the brick and provide
12 a proper sealant application.

13 That's also a standard within the BIA.
14 And as you can see in photo 94 and 95, we just
15 have a raw vinyl window meeting the brick. There
16 is no protection at all. It's just an open
17 joint. So that's the first problem I have
18 identified here.

19 But also, when you abut the brick veneer
20 to a window, you also have the opportunity to
21 deform the window because the brick is going to
22 move over its life.

23 The reason you want to leave gaps
24 between the windows and the brick is because when
25 a brick comes out of the kiln, it is as dry as

1 it's ever going to be in its entire life. And
2 when you put it on a building and expose it to
3 the elements, that clay is going to slowly absorb
4 moisture over time, and these brick are going to
5 grow. So we need to give space between these
6 elements so that we're not stressing the windows
7 from brick growth as well.

8 And one very disturbing finding is shown
9 on photo 100 and 101. This was on building 305.
10 They actually shimmed the lintel to the top of
11 the window. We could see wooden shims between
12 the window unit and the lintel. There's no way
13 the veneer should be supported in any way, shape,
14 or form by the window unit.

15 Q. So the installation of the brick next to
16 the windows and doors you contend does not have a
17 proper sealant. Did you observe that condition
18 on both Ryland buildings and Winsor South
19 buildings?

20 A. Yes. Now, I will point out, in photo
21 100, you can see there has been a smear of
22 sealant placed between the brick and the window
23 in that location.

24 But again, the brick is still abutted to
25 the window, and that prevents you from putting in

1 a proper sealant joint. This is just a finger
2 smear. It's not anything close to a proper
3 sealant application. And you still have the
4 opportunity of stressing the window because
5 you're still abutted to the brick.

6 Q. As the first housekeeping matter, can
7 you identify the unit depicted in photograph 94
8 through 102 for us?

9 A. Sure. 94 is 506. Same with 95. 96 is
10 unit 705, along with 97, 98, and 99.

11 Q. All 705?

12 A. Yes. 100 through 102 are all 305.

13 Q. Thank you. Did you observe any water
14 entering the system as a result of the brick
15 being installed next to the windows or doors?

16 A. I will just quickly go back to unit 603
17 since I have those pictures available. But you
18 can see in RTM4407, the same condition exists.
19 There's been a surface smear of sealant between
20 the brick and the window frame.

21 Q. In the top right-hand corner?

22 A. Yes.

23 Q. Thank you.

24 A. But again, this is an area where we saw
25 water intrusion in the wall, and certainly, this

1 is a contributing factor.

2 Q. And what sort of joint should have been
3 there between the window and that brick?

4 A. There needs to be a space of a minimum
5 of a quarter inch. That's the standard with the
6 window manufacturers, and it's a standard with
7 the sealant manufacturers, with the ASTM sealant
8 application guide.

9 All those say the same thing. You have
10 a minimum of a quarter inch. And we should see
11 sealant that's bonded between the window frame
12 and the brick veneer between that gap. That
13 gives you the space you need and allows for the
14 movement.

15 Q. To whom do you attribute the
16 responsibility for that joint not being there?

17 MR. ROGERS: Object to the form.

18 A. In this case, it has to be the mason. I
19 mean, the mason is placing the brick. So when
20 the brick touches something, that's because the
21 mason put it there.

22 But -- and again, I have not said this
23 yet in this deposition, we always have to look
24 back to the general contractor for everything
25 that is done on any of these projects because

1 they are the licensed individuals who have pulled
2 the permit from the state, and they primarily
3 have two jobs.

4 Number one, they're there to organize
5 people and materials to do the job, and the
6 second thing is quality control. That's why they
7 have a license. They're supposed to understand
8 and know how things are to be constructed.
9 They're supposed to know how to read plans and
10 specs and to ensure that things are done
11 properly.

12 So in any of these things that we
13 discuss, there's always the general oversight of
14 the general contractor on any project.

15 Q. And aren't general contractors able to
16 rely upon specific trades to be experts in their
17 specific fields?

18 MR. FLOYD: Object to the form.

19 MS. STEPHENS: Objection.

20 MS. DUPRE: Objection.

21 MR. ROGERS: Objection.

22 A. I always go to my favorite quote when I
23 talk about this, and that was Mr. Ronald Reagan.
24 He says, yes, you can trust, but you must verify.
25 So we do trust our subs, but we need to verify

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 CHARLESTON COUNTY

4 DEPOSITION OF RUSSELL MEASE, PE
5 Volume 3

6 SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
7 ROBERT JOHN NUTLEY, Individually and on Behalf of
8 All Others Similarly Situated,

9 Plaintiffs,

10 vs. CASE NO. 2016-CP-10-03455

11 WINSOR SOUTH, LLC, and JEFFREY M. THOMAS,
12 Individually and on Behalf of a Class of
13 Construction Defendants, SOUTHEASTERN
14 RECAPITALIZATION GROUP, LLC, WCM CONSTRUCTION,
15 LLC, JONATHAN J. THOMAS, AC HEATING AND AIR
16 CONDITIONING SERVICE, INC., ACME DOORS, INC.,
17 ALPHA OMEGA CONSTRUCTION GROUP, INC., ATLANTIC
18 CONSTRUCTION SERVICES, INC., BUCK LUMBER AND
19 BUILDING SUPPLY, INC., et al.,

20 Defendants.

21
22 DEPONENT: RUSSELL MEASE, PE
23 DATE: MAY 22, 2018
24 TIME: 9:24 AM
25 LOCATION: Young Clement Rivers
 25 Calhoun Street
 Charleston, South Carolina

26 REPORTED BY: DARAH L. NEKOLA, RPR, CSR(IA)
27 NCRA CERTIFIED REPORTER
28 CLARK & ASSOCIATES, INC.
29 CHARLESTON, SC 29415
30 843-762-6294
31 WWW.CLARK-ASSOCIATES.COM
32 Darahnekola@gmail.com



1 porch or not, you would still believe that there
2 would be problems with the decks due to the lack
3 of slope and issues with waterproofing, correct?

4 A. Yes.

5 Q. And irrespective of whether there was
6 this piece of wood under the screened porch, you
7 would still be calling for repairs and removal
8 and replacement of the decks?

9 A. Yes.

10 Q. And it's fair to say you don't know who
11 installed that piece of wood?

12 A. I do not.

13 Q. I also represent another company
14 called -- well, let me just go -- stick with
15 Screens Plus.

16 Have you ever heard of the company
17 Screens Plus?

18 A. No.

19 Q. You don't have any opinion about their
20 general reputation or the quality of their work,
21 do you?

22 A. I do not.

23 Q. Okay. I also represent a company called
24 Hurley Services that would have worked on or is
25 alleged to have worked on the Ryland side of the



1 project; whereas, Screens Plus only worked on the
2 Winsor side of the project.

3 As I understand it, your criticism
4 relative to window installation on the Ryland
5 side of the project relates to a document that
6 was produced to us last night, this MI window --
7 I believe you referred to it as a cut sheet --
8 that's been marked as Exhibit 100.

9 A. Yes.

10 Q. And concerning that sheet, there's a
11 reference there that says, Caulk under mounting
12 fin entire perimeter before fastening.

13 And that detail and statement on the
14 Exhibit 100 is the basis of your opinion that
15 there's something wrong with the installation of
16 the windows as to the MI windows?

17 A. Yes.

18 Q. What's your basis for determining that
19 there is not caulk installed under the perimeter
20 fin?

21 A. Well, last night I went through my
22 pictures and looked at every window fin that was
23 exposed during our investigation and the
24 defense's investigation, and there's no evidence
25 at all of sealant behind the nailing fin.

1 If sealant is placed behind the nailing
2 fin, you always see it in the nail holes, and
3 quite often behind the perimeter as it is
4 squeezed out behind the fin. And there was no
5 evidence of that in any of the windows that were
6 exposed.

7 Q. Did you -- as to the Ryland buildings,
8 did you actually remove any window from a rough
9 opening?

10 A. No.

11 Q. With regard to the Ryland buildings, did
12 the defense remove any window from a rough
13 opening?

14 A. I don't believe so.

15 Q. Okay. So your -- the basis for your
16 opinion about the lack of sealant having been
17 applied around the -- behind the nailing fin is
18 that in pictures that you saw, you didn't see it
19 either having been forced out from behind the
20 nailing fin or through nail holes -- through
21 holes in the fin?

22 A. Correct.

23 Q. Am I correct that the jamb fins and head
24 fins that would have been exposed during any
25 testing would have had peel-and-seal tape over

1 them?

2 A. Yes, generally.

3 Q. And so that peel-and-seal tape would
4 have covered up the holes in the fins as well as
5 the perimeter of the fins themselves?

6 A. Yes, in those areas.

7 Q. So is it fair to say that the -- really
8 the areas that you're talking about not seeing
9 any evidence of sealant is at the sills of the
10 windows?

11 A. Predominantly, yes.

12 Q. Is it also true that -- and I know
13 you're going to say that the MI window talks
14 about the sealant being installed all the way
15 around the perimeter, but that many window
16 manufacturers instructions and, indeed, best
17 practices these days, call for no sealant to be
18 installed behind the nailing fin at the sills of
19 the windows.

20 A. That is the case. However, the code
21 very clearly states that you must install the
22 windows per the manufacturer's instructions.

23 And a lot of times the sealant behind
24 the nailing fin is important for the performance
25 of the window meeting all the testing for air

1 infiltration. A lot of manufacturers require
2 that sealant application around the windows to
3 seal the window to the wall to meet the
4 standards.

5 You do have to be concerned about the
6 lack of weep at the base of the window; but,
7 again, we are forced to follow what the
8 manufacturer requires.

9 Q. Okay. And so when you say "lack of
10 weep," it could be that the installation of
11 sealant behind the sill fin and flange of the
12 window could actually serve to trap water that
13 infiltrated in through or around the window at
14 the sill location?

15 A. I mean, there is that potential. But,
16 again, per the code, we don't get to make that
17 call. We have to follow the manufacturer's
18 instructions.

19 Q. Can you definitively rule out that
20 there -- that there is a complete absence of --
21 or can you -- I'm sorry. Just let me strike
22 that.

23 Can you definitively opine that there's
24 a complete absence of caulk behind the nailing
25 fins of the windows installed on the Ryland

1 buildings?

2 A. I have no evidence of it. I was able to
3 see the window corners at the jamb-sill
4 intersection. That's another area where I would
5 typically see sealant exposed from behind the
6 fin.

7 And, again, I have no evidence that
8 there's any sealant behind these windows, and I
9 believe that to be the case.

10 Q. Based on your review of the photographs?

11 A. Correct. And, you know, I was there on
12 the property, so the photographs are just
13 documentation of what I saw.

14 At the time, I was not aware of this
15 document that we have as Exhibit 100, so I wasn't
16 specifically looking for that. But I've looked
17 at a lot of windows, and sealant, when it's used,
18 is typically visible because it gets all over
19 everything.

20 So the fact that I looked through all of
21 my pictures and didn't see one stitch of sealant
22 on anything leads me to believe clearly that
23 there hasn't been any installed on the backs of
24 the fins. It's sticky, messy stuff that gets on
25 almost everything.

1 Q. You said earlier that sealant may be
2 required by some manufacturers behind the sill
3 fin in order to prevent air infiltration,
4 correct?

5 A. Yes.

6 Q. Is excessive air infiltration something
7 that you are complaining about relative to the
8 656 Coleman project?

9 A. No.

10 Q. You did remove one or more windows from
11 the rough opening on the -- relative to the
12 Winsor buildings, correct?

13 A. We removed the one fixed window in Unit
14 405.

15 Q. Aside from the sealant issue that we've
16 just been discussing, based on your, you know,
17 review of this MI window cut sheet marked as
18 Exhibit 100, is it -- is it still your testimony,
19 sealant aside, that the window installer,
20 relative to the Ryland buildings, still followed
21 a general protocol that's acceptable in the
22 industry?

23 MR. FLOYD: Objection.

24 A. Yes, that's true. As I've said many
25 times, I would love to see the specific

1 instructions by the manufacturer, but he did
2 follow general protocols.

3 Q. If we look at -- I believe this is
4 Exhibit 11 that we have blown up on the screen
5 here.

6 Exhibit 11 is a spreadsheet that you
7 prepared, giving an overview of the various
8 deficiencies that you found at the project and
9 stating the location where you found them,
10 correct?

11 A. Yes. At the time of development of this
12 document. I've done more since.

13 Q. And kind of in the middle of that,
14 under -- is a section entitled Windows, and I
15 have three categories there: Damage to window
16 frame, trim abutted to window, and window abutted
17 to brick; is that correct?

18 A. Yes.

19 Q. And I believe we talked at length during
20 the course of your deposition that -- let's just
21 start with the trim abutted to window.

22 That would be a condition that you would
23 blame on whatever trade installed the trim?

24 A. Yes. It has to be held off of the
25 window. You can't make the window smaller.

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 CHARLESTON COUNTY

4 DEPOSITION OF TERRY ROSAMOND
5 As 30(b)(6) representative of
6 BUILDERS FIRSTSOURCE

7 SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
8 ROBERT JOHN NUTLEY, Individually and on Behalf of
9 All Others Similarly Situated,

10 Plaintiffs,

11 vs.

12 CASE NO. 2016-CP-10-03455

13 WINSOR SOUTH, LLC, and JEFFREY M. THOMAS,
14 Individually and on Behalf of a Class of
15 Construction Defendants: SOUTHEASTERN
16 RECAPITALIZATION GROUP, LLC, WCM CONSTRUCTION,
17 LLC, JONATHAN J. THOMAS, AC HEATING AND AIR
18 CONDITIONING SERVICE, INC., ACME DOORS, INC.,
19 ALPHA OMEGA CONSTRUCTION GROUP, INC., ATLANTIC
20 CONSTRUCTION SERVICES, INC., BUCK LUMBER AND
21 BUILDING SUPPLY, INC., et al.,

22 Defendants.

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DEPONENT: TERRY ROSAMOND

DATE: APRIL 16, 2019

TIME: 10:09 AM

LOCATION: LUCEY LAW FIRM
 MOUNT PLEASANT, SOUTH CAROLINA

REPORTED BY: VALERIE G. MELKUS, RPR
 NCRA REGISTERED PROFESSIONAL
 REPORTER
 CLARK & ASSOCIATES, INC.
 CHARLESTON, SC 29415



1 TERRY ROSAMOND,
2 having been first duly sworn, was examined and
3 testified as follows:

4 EXAMINATION

5 BY MR. FULLER:

6 Q. Good morning, sir.

7 A. Good morning.

8 Q. Thanks for coming in today. My name is
9 Collin Fuller. I represent the homeowners and
10 the association in the 656 Coleman matter. Are
11 you familiar with the townhomes at 656 Coleman?

12 A. Yes, I am.

13 Q. And you are the designee for Builders
14 FirstSource, correct?

15 A. Correct.

16 Q. And are you the person who is best able
17 to answer questions about the work that Builders
18 FirstSource did on the 656 townhomes?

19 A. I think so.

20 Q. And would you state your full name for
21 the record, please?

22 A. Terry Eugene Rosamond.

23 Q. At the time that Builders FirstSource
24 was working on the 656 townhomes, were you
25 employed by BFS?

1 where do you hold it?

2 Q. That makes sense.

3 A. And you're out on a ladder 20 feet in
4 the air and you're trying to hold a window that's
5 got caulk on all three or four sides, and you're
6 trying to put it in an opening.

7 Q. So we can agree looking at item 4 that
8 there should be sealant behind the nailing fin on
9 all sides, correct?

10 MR. HUGHES: Object to the form.

11 A. No. I do not agree with that.

12 Q. So you don't believe that the installer
13 had an obligation to follow the installation
14 instructions?

15 A. I think these installation
16 instructions -- there's better practices that
17 have been implemented since 2007.

18 Q. What practices are that?

19 A. Creating a sill pan to allow for any
20 water infiltration to drain out of the wall; and
21 therefore, you would not caulk the bottom flange.

22 Q. Is that what the installer was
23 instructed to do for these windows?

24 A. I feel certain he was.

25 Q. Who would have instructed him to do

1 that?

2 A. Probably Bill Crabtree or Rooster.

3 Q. They would have instructed him to do
4 that in lieu of following the installation
5 instructions?

6 A. Yes.

7 Q. And did Bill specifically tell you that
8 he had that conversation?

9 A. No, he has not.

10 Q. Did you ask him?

11 A. No, I haven't asked him.

12 Q. Same question as to Rooster.

13 A. No.

14 Q. So you're guessing?

15 MR. FREEMAN: Object to form.

16 MR. HUGHES: Same objection.

17 A. I'm not guessing. I just think that's
18 what they would have told -- because that was
19 more of a standard practice in 2012 than in 2007.

20 Q. And you don't dispute -- like we looked
21 at earlier, you don't dispute that the code
22 requires the installer to follow the inspector's
23 installation instructions, do you?

24 A. There again, if there have been
25 modifications or better practices established



1 standards during that time -- codes are written,
2 and they don't address every application in the
3 field. And when -- the manufacturers over the
4 years have improved installation practices. And
5 if the best practice at the time they were being
6 done did not require that, then I wouldn't think
7 you would want to do that.

8 MR. FREEMAN: I'd like to just have
9 a standing objection to this line of questioning.
10 You haven't established the set of instructions
11 that you've provided and marked as that exhibit
12 are the applicable -- as you marked as
13 Exhibit 885 are the applicable instructions in
14 2012. You haven't laid that foundation, so I'd
15 object to the form of this whole line of
16 questioning about this.

17 MR. HUGHES: To the extent
18 necessary, we are voicing identical objections.

19 MR. FULLER: Okay. Can we go off
20 the record?

21 (Off-the-record discussion.)

22 Q. Sir, you told me that you're going on
23 your 19th year with Builders FirstSource,
24 correct?

25 A. Correct.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
ROBERT JOHN NUTLEY and SYLVIA PLAYER
HORRES, both individually, and on behalf of all others
similarly situated,

Plaintiffs,

vs.

WINSOR SOUTH, LLC AND JEFFREY M. THOMAS;
SOUTHEASTERN RECAPITALIZATION GROUP,
LLC; WCM CONSTRUCTION, LLC; JONATHAN J.
THOMAS; AC HEATING AND AIR CONDITIONING
SERVICE, INC.; ACME DOORS, INC.; ALPHA
OMEGA CONSTRUCTION GROUP, INC.; ATLANTIC
CONSTRUCTION SERVICES, INC.; BUCK LUMBER
AND BUILDING SUPPLY, INC.; BUILDERS
FIRSTSOURCE, INC.; BUILDERS FIRSTSOURCE-
ATLANTIC GROUP, LLC; BUILDERS
FIRSTSOURCE-FLORIDA, LLC A/K/A BUILDERS
FIRSTSOURCE-FLORIDA DESIGN CENTER, LLC;
BUILDERS FIRSTSOURCE-SOUTHEAST GROUP,
LLC; CHARLOTTE FLOORING, INC.; DIRIA TAWI
PAINTING, INC.; EAST COAST WALL SYSTEMS,
INC.; FOGEL SERVICES, INC.; G&S HOME
REMODELING, LLC; GUARANTEED FRAMING,
LLC; J. MORA BRICK & BLOCK MASON, LLC;
LAND/SITE SERVICES, INC.; LANDMARK
CONSTRUCTION COMPANY, INC.; LUTZEN
CONSTRUCTION, INC.; NEW HORIZON SHUTTERS,
INC. A/K/A NEW HORIZON SHUTTERS
INTERNATIONAL, LLC; PJ SANCHEZ MASONRY,
LLC; SCREENS PLUS, INC.; SIMONS CONSTRUCTION
COMPANY, LLC; STUCCO BY DESIGN, LLC; FINE
BUILDERS, LLC; SPEEDTRUSS, INC.; ARGENTINO
JOSE CAMPOS D/B/A AS CONSTRUCTION; JAVIER
MORALES MERINO; NOVAC CONSTRUCTION,

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2016-CP-10-3455

**PLAINTIFFS' NINTH AMENDED
NOTICE OF DEPOSITIONS OF
DEFENDANTS**



- 2) **Alfonso Rodriguez Vasquez, Sr. (Ryland Subcontractor)**
Date: Wednesday, April 10, 2019
Time: 10:00 a.m.
Location: Lucey Law Firm, Mount Pleasant, SC
- 3) **Builders FirstSource, Inc., Builders FirstSource-Atlantic Group, LLC, Builders FirstSource-Southeast Group, LLC, and Builders FirstSource-Florida, LLC * (Ryland Subcontractor)**
Date: Tuesday, April 16, 2019
Time: 10:00 a.m.
Location: Lucey Law Firm, Mount Pleasant, SC
- 4) **Alpha Omega Construction, Inc.* (Ryland Subcontractor)**
Date: Thursday, April 18, 2019
Time: 10:00 a.m.
Location: Lucey Law Firm, Mount Pleasant, SC
- 5) **Jorge Diaz (Winsor South Subcontractor)**
Date: Tuesday, April 23, 2019
Time: 10:00 a.m.
Location: Lucey Law Firm, Mount Pleasant, SC
- 6) **Sunrise Siding, LLC* (Ryland Subcontractor)**
Date: Tuesday, May 7, 2019
Time: 10:00 a.m.
Location: Lucey Law Firm, Mount Pleasant, SC

Organizations listed above are being noticed as a Rule 30(b)(6) deposition (designated above with an asterisk). The Organization must designate and produce to testify on the organization's behalf the witness who can testify with reasonable particularity about the matters set forth in the accompanying Areas of Inquiry that are known or are reasonably available to the Organization. If more than one witness is designated, you shall set forth for each witness designated the matters on which he or she will testify.

All deponents/designees are instructed to bring any and all information in their care, custody or control relating to the construction of the townhomes located at 656 Coleman Boulevard in the City of Mount Pleasant, State of South Carolina (hereinafter, "The Homes or "the 656 Coleman Homes"). All deponents/designees are hereby notified in accordance with

Rule 30, SCRCP, that they may be questioned about any and all of the documents produced in discovery or at the deposition.

JUSTIN O'TOOLE LUCEY, P.A.

BY:



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Charleston, South Carolina
March 22, 2019

GENERAL AREAS OF INQUIRY FOR 30(b)(6) DEPOSITION
(All Defendants)

Your company must designate and produce to testify on your company's behalf the witness who can testify with reasonable particularity about the following matters that are known or are reasonably available to the organization. If more than one witness is designated, you shall set forth for each witness designated the matters on which he or she will testify.

1. Your company's construction operations in South Carolina from June 30, 2005, through the date of this deposition.
2. The planning, design, testing, bid activity, marketing, and sales for the homes constructed in Mount Pleasant, South Carolina, at 656 Coleman Boulevard (referred to herein as "the 656 Coleman Homes" or "the Homes").
3. Your company's contracts with engineers, architects, surveyors, designers, developers, general contractors, subcontractors, sub-subcontractors, inspectors, manufacturers, distributors, and/or suppliers relating to the construction of the 656 Coleman Homes and the scope of work and responsibility under each contract.
4. Your company's scope of work and the work it performed during the development and construction of the 656 Coleman Homes and any warranty or repair work it performed after a certificate of occupancy was issued for any of the 656 Coleman Homes.
5. The creation, modification, and use of all plans, sketches, blueprints, renderings, project design documents, project manual, directions, specifications, as built drawings, shop drawings, product use and/or installation instructions, RFIs, submittals, architect changes, field changes, contracts, contract changes, change orders, accounting records, invoices, draw requests, purchase orders, lien waivers and approvals granted to these documents and/or communications (including e-mails) with any entity regarding the design, development, or construction of the 656 Coleman Homes (hereinafter collectively referred to as "Construction Documents"), and the work performed to implement same.
6. Your company's policies and procedures for creating and retaining Construction Documents, warranty requests/records, service records, accounting records, sales records, and property records.
7. Any Construction Documents or materials your company created, provided or received relating to the 656 Coleman Homes.
8. Any deviations from the Construction Documents during the construction of the 656 Coleman Homes and:
 - a. The scheduling and coordinating of trades, and documents related thereto;

- b. Inspections, supervision, quality control, testing and/or project administration for construction of the 656 Coleman Homes, including pre-construction site inspections and inspections of work performed and/or products installed and all documents relating to same;
 - c. Accounting records for the job, including the general ledger, invoices, draw requests, and delivery tickets;
 - d. Any temporary labor or staffing used during construction; and
 - e. Final inspection(s) performed, including any inspections your company conducted for purposes of issuing a warranty.
- 9. Your knowledge of the causes of the construction defects, deficiencies, and related damage at the 656 Coleman Homes identified in RTM Engineering's Construction Deficiencies Investigation Report dated January 5, 2017, and any evidence and/or testimony you may have or may be aware of that contradicts the findings in this document.
- 10. Your knowledge of the causes of the construction defects, deficiencies, and related damage at the 656 Coleman Homes identified in RTM Engineering's Emergency Scope of Repairs, Life Safety Letter (Unit 502), photographs, and notes produced in discovery and any evidence and/or testimony you may have or may be aware of that contradicts the findings in these documents.
- 11. Your knowledge of the causes of the construction defects, deficiencies, and related damage at the 656 Coleman Homes identified in Maddox Engineering's Preliminary Report for Investigation and Evaluation dated April 27, 2018, and any evidence and/or testimony you may have or may be aware of that contradicts the findings in this document.
- 12. The qualifications of your company or any of the other defendants to design, construct, and/or repair the 656 Coleman Homes.
- 13. Your company's relationship with the manufacturer and/or distributor of the product(s) installed at the 656 Coleman Homes and knowledge of their qualifications to design and/or manufacture the product(s) installed.
- 14. Your company's knowledge and use of the technical product information, literature, warranties, and/or installation instructions in effect for the products installed at the 656 Coleman Homes.
- 15. Your company's organizational structure and staffing at the time of construction, including its management, site staffing, identification of project and assistant project managers, site and assistant site supervisors for the 656 Coleman Homes and the qualifications of each, identification of all individuals in their chain of command, the scope of responsibility of each staff member/employee, the person

responsible for record keeping on site, and any changes in the organizational structure and senior management as of the date of this deposition.

16. The effect of your company's, or any of the other Defendants', non-compliance with manufacturer's installation instructions on any warranty.
17. Any post-construction work performed at the 656 Coleman Homes, including inspections, repairs, and/or testing, since the first Certificate of Occupancy until the date of this deposition.
18. Your company's warranty on the 656 Coleman Homes, if any, and any other warranties provided by the developer/general contractor defendants, subcontractors, sub-subcontractors, and suppliers.
19. Your company's knowledge of all warranty claims at the 656 Coleman Homes, related documentation, and the remedy provided.
20. Your company's work on any other projects with any of the Defendants to this lawsuit.
21. All applications for liability insurance, certificates of liability insurance, and liability insurance policies maintained by your company.
22. Your company's pleadings and discovery responses.
23. The identity and scope of activity of all affiliates, subsidiaries, parent corporations, and/or successor entities that assisted with, paid for, financed, and/or contributed to the construction of the 656 Coleman Homes and your Company's contracts, agreements and arrangements with these entities.
24. Your company's relationship with the architect and/or engineers that designed or participated in modifications at the 656 Coleman Homes and your knowledge of their qualifications to provide said design and/or approve the work to be performed/product(s) to be installed at the 656 Coleman Homes.
25. Any meeting minutes and/or reports generated during construction of the 656 Coleman Homes.
26. Any project close-out and/or punch list work related to the 656 Coleman Homes.
27. The preparation of mock up(s) prior to or during construction, a description of the mock-up, its components, its location, and the names of the individuals involved in preparing, modifying, and/or approving such mock-up(s).

CERTIFICATE OF SERVICE

I, Lee Weiland, an employee of the law offices of Justin O'Toole Lucey, P.A., attorney for the Plaintiffs, hereby certifies that on March 22, 2019, I have served the below-listed counsel and parties in this action with a copy of the foregoing by mailing and/or emailing a copy of same to the following address:

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*Attorney for Alfonso Rodriguez Vasquez, Sr. and
AR Services Co.*

By: Lee Weiland
Lee Weiland

Charleston, South Carolina

Main Menu : Commercial Contractors

Note: All fields are not required for searching

Company/Last Name: Hurley

First name:

License number:

City:

State Abbreviation:

Classification:

All

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Your search returned: 0 record(s).

- CLICK ON THE LICENSE# BELOW TO DISPLAY VERIFICATION INFORMATION FOR THAT RECORD.
- PLEASE SCROLL DOWN FOR "STATUS" CLARIFICATIONS.
- A GENERAL CONTRACTOR AND A MECHANICAL CONTRACTOR MAY HAVE THE SAME LICENSE NUMBER; HOWEVER, THEY ARE IN NO WAY CONNECTED WITH ONE ANOTHER.
- COMMERCIAL CONTRACTOR'S MAY ALSO PERFORM RESIDENTIAL WORK

License#	Status	Type	Last	First	Suffix	Business	City	State

Search Tip:

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- When SEARCHING by license number, ENTER NUMBERS ONLY. do not enter G or M.
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- Do not use any punctuation marks when searching a "Company name"
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Status Clarification:

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- APPROVED: Applicant/Licensee is in final stages of becoming ACTIVE.
- PENDING: before accepting any jobs FROM THIS ENTITY, you must first contact this board at (803) contractor is within a 90-day grace period and can still work; otherwise, they can only do work that is unregulated UNTIL THEY BECOME "ACTIVE": No License Required by SC Contractor's Licensing Board (pdf)
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- LAPSED: This license is lapsed/cancelled; the contractor cannot bid, pull permits, or do any regulated contracting work above the \$5,000 contract limit. See work/jobs that are unregulated here: No License Required by SC Contractor's Licensing Board (pdf)



- **SUSPENDED:** The license has been suspended by the board until further notice. No work or permits can be pulled during this time.

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Questions / Contact InformationSouth Carolina Contractor's Licensing Board

Phone: (803) 896-4686

Fax: (803) 896-4814

PO Box 11329

Columbia, S.C. 29211-1329

South Carolina Contractor's Licensing Board EmailSouth Carolina Department of Labor, Licensing & Regulation

Main Menu : Commercial Contractors

Note: All fields are not required for searching

Company/Last Name: Hurley Services	First name:
License number:	City:
State Abbreviation:	
Classification: All ▼	
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Main Menu : Residential Builders

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Last Name: Mendes	First name:
License number:	City:
Company name: Hurley Services	
License Type: All ▼	
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Status Clarification:

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- **APPROVED:** Applicant/Licensee is in final stages of becoming ACTIVE.
- **PENDING:** License has not been issued, cannot do work over \$200.00.
- **INACTIVE:** Licensee cannot work until license is in an active status.
- **LAPSED:** This license is lapsed/cancelled; the licensee cannot perform any work over \$200.00
- **SUSPENDED:** The license has been suspended by the board until further notice. No work or permits can be pulled during this time.
- **Cease and Desist:** The license has been issued a Cease and Desist order by the board. No work can be performed or permits can be pulled at this time in excess of \$200.00.

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South Carolina Residential Builders Commission

Phone: (803) 896-4696
 Fax: (803) 896-4814
 PO Box 11329
 Columbia, SC 29211-1329

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Builders Firstsource-Southeast Group, LLC

Plaintiff,

V

MI Windows And Doors, INC.; ECC
Contracting, LLC; Hurley Services, LLC;
and Charleston Exteriors, LLC,

Defendant,

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL CASE NO. 2018-CP-08-02547

**AMENDED ORDER GRANTING
CHARLESTON EXTERIORS,
LLC'S AND ECC CONTRACTING,
LLC'S MOTION FOR SUMMARY
JUDGMENT**

This matter came before the Court on Friday, October 18th on the Motion for Summary Judgment of the Defendant Charleston Exteriors, LLC seeking dismissal of the Plaintiff's causes of action for breach of contract, negligence, breach of warranties, and indemnity. Present and participating in the argument were the movants counsel, C. Clay Olson, Esquire of Harper Little, PLLC and the Plaintiff was represented by Witt Cox, Esquire of Howell Gibson & Hughes.

ECC Contracting filed a similar, if not identical motion which was also heard. Counsel for ECC, Heyward Grimball, Esquire of Richardson Plowden was in attendance to advocate and advance the arguments of ECC Contracting. The ECC Motion for Summary Judgment was heard concurrently with the Charleston Exteriors motion. The Court hereby rules on both Charleston Exteriors, LLC's Motion for Summary Judgment as well as ECC's Motion for Summary Judgment.

BACKGROUND

The Plaintiff, Builders First Source Southeast Group, Inc. ("BFS") is a supplier of building materials and components, as well as a provider of construction services for new construction and remodeling projects. BFS provided materials and services at a construction



project known as the “Abbey at Spring Grove” which is located in Moncks Corner, South Carolina.

The Abbey at Spring Grove (the “Abbey”) is a 69-home residential community situated in Berkeley County, South Carolina. The Abbey was developed by Lennar Carolinas¹. To be precise, the Abbey is a portion, or phase, of the larger Spring Grove Plantation development.

A lawsuit was filed in 2014 by Patricia Damico on behalf of herself and other owners within the Abbey at Spring Grove. *See Patricia Damico and Lenna Lucas, individually and behalf of all other similarly situated v. Lennar Carolinas, LLC, et al., Case No. 2014-CP-08-02424 (the “Underlying Class Action”)*. The underlying matter was amended on more than one occasion as the Plaintiff asserted exterior window claims on November 23rd, 2015.

On November 25th, 2015, Lennar Carolinas answered the Amended Complaint and asserted Third-Party claims against several of its contractors and suppliers. Among these Third-Party Defendants was Builders First Source who signed its responsive pleading on December 15th, 2015 and filed it on December 21st, 2015.

The case before the Court was filed on December 21st, 2018 in Berkeley County, South Carolina. The allegations made against Charleston Exteriors, LLC are derived from allegations made by the Plaintiff Damico and Lennar in the underlying lawsuit. Specifically, the Plaintiff and Lennar Carolinas have alleged that BFS was negligent in the installation of windows at the Abbey; that BFS breached its subcontract agreement with Lennar by virtue of the allegations made by the Plaintiff against Lennar; that BFS breached express and implied warranties as alleged in the underlying lawsuit; that Lennar is entitled to both contractual indemnification or, alternatively, equitable indemnification from BFS due to the claims made in the underlying

¹ Lennar Carolinas is not a party to this litigation. Lennar is a Defendant in the matter styled Damico v. Lennar Carolinas, LLC.

lawsuit. As a consequence of these claims made in the underlying lawsuit, BFS has brought this lawsuit alleging that Charleston Exteriors and ECC breached their subcontract with BFS, that Charleston Exteriors and ECC breached certain implied and/or express warranties with BFS; that BFS is entitled to contractual/equitable indemnification from Charleston Exteriors and ECC; and that Charleston Exteriors and ECC were negligent in the installation of the windows at the Project.

FINDINGS OF FACT

1. Builders First Source "BFS" was on actual notice of potential claims against Charleston Exteriors, LLC on December 15, 2015. There can be no other conclusion with regard to this issue upon reviewing the Answer of Builders First Source dated December 15th, 2015. See Exhibit "A"

2. BFS has not submitted a Memorandum of Law to rebut Charleston Exteriors argument that BFS was on notice of a potential claim against Charleston Exteriors on or before December 15th, 2015.

3. Uncontroverted testimony from the hearing, coupled with a review of the D'amico record shows that at no time did BFS attempt to amend its pleadings in the underlying suit against Charleston Exteriors, LLC.

4. BFS began defending the underlying lawsuit on or before December 15, 2015.

5. BFS began incurring costs and attorneys fees when it began to defend this case on or before December 15, 2015.

6. The Subcontract Agreements entered into by ECC and Charleston Exteriors with BFS contain language concerning indemnity and the prospect of these Defendants being forced to indemnify BFS for the negligence of BFS.

7. The contractual indemnification language referenced in Paragraph 6 is both confusing and contradictory at times. The language fails to clearly and unequivocally explain that these Defendants are obligated to indemnify BFS for BFS's negligence.

8. BFS failed to present any evidence suggesting that this lawsuit seeks damages for any acts or omissions which are separate or distinct from the underlying lawsuit. The Court concludes that the claims made in this lawsuit are wholly derivative of those brought in the Damico litigation.

9. BFS entered into a Master Subcontractor Agreement with Charleston Exteriors on October 17th, 2012.

LEGAL STANDARD APPLICABLE TO RULE 56 MOTIONS

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; see *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 487 S.E.2d 187 (1997)). "Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent may not simply rest on the mere allegations contained in the pleadings." *Grant v. Mount Vernon Mills*, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* at 151. Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984). "[W]hen plain, palpable, and

indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Hedgepath v. AT&T*, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

A. THE CLAIMS OF THE PLAINTIFF FOR NEGLIGENCE, BREACH OF CONTRACT, AND BREACH OF WARRANTIES ARE TIME BARRED

South Carolina recognizes the “discovery rule” when considering an action to be time barred. Under the discovery rule, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto. *Burgess v. American Cancer Society*, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989). Also, *Abba Equip., Inc. v. Thomason*, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999) The statute of limitations for negligence, breach of contract, and breach of warranties is three years. Compelling portions of the record in the underlying matter were presented by the Defendants which illustrates that the Plaintiff was on direct and actual notice of its potential claims against Charleston Exteriors and ECC on December 15th, 2015. Subsequently, more than three years went by before this lawsuit was filed on December 21st, 2018. These causes of action fail for being untimely.

B. DISGUISED INDEMNITY CLAIMS

Although the Court has already determined that claims of BFS for negligence, breach of contract, breach of warranties (“Non-Indemnity Claims) are each barred by the three-year statute of limitations, the Court will consider the Defendants’ additional argument. The Defendants have alleged that the Non-Indemnity claims must fail pursuant to the “Stoneledge Defense” which bars claims that are disguised indemnification claims cloaked within separate

causes of action.² Upon hearing the oral arguments and reviewing memoranda presented to the Court, it is evident that the Plaintiff's Non-Indemnity claims do not exist outside of the derivative Damico lawsuit. They must, therefore, fail.

The allegations in this case make no separate or unique contention(s) which are in addition to the allegations made by Lennar and the Plaintiff in the *Damico* matter. Builders First Source has failed to provide any admissible record evidence that it sustained any separate or independent damages outside the scope of the Damico lawsuit. *See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not "suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit," trial court "properly granted summary judgment on [general contractor's] breach of contract and breach of warranty cross-claims because they are not independent causes of action from [the general contractor's] equitable indemnity claim");

C. MASTER SUBCONTRACT AGREEMENT INDEMNITY PROVISIONS ARE NEITHER CLEAR NOR EQUIVOCAL

The Defendants seek Summary Judgment as to Builders First Source's contractual indemnification claim on the ground that it violates South Carolina rules of contract construction. Section 5 of the Master Subcontract Agreement is confusing at best and deceptive at worst.

Section 5 contains two Paragraphs. The first paragraph seems to suggest that BFS may only seek indemnification for damages.....

ONLY TO THE EXTENT CAUSED.IN WHOLE OR-IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR

² Counsel for ECC and Charleston Exteriors presented memoranda and oral arguments consistent with the reasoning in a recent S.C. appellate case which is known as "Stoneledge" and is specifically cited as *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 776 S.E.2d 434, 439 (S.C. Ct. App. 2015)

INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.

Below this lengthy paragraph is an almost identically constructed paragraph which is slightly altered to indicate that BFS may seek indemnification from Charleston Exteriors for damages caused by the negligence of any person or entity. Specifically, the second paragraph suggests a duty to indemnify BFS.....

REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES.

The Court can only conclude that the Master Subcontract Agreement is not what our courts had in mind when setting precedent regarding “anti-indemnity” clauses in contracts. Typically, courts will construe an indemnification contract *"in accordance with the rules for the construction of contracts generally."* *Campbell*, 313 S.C. at 453, 438 S.E.2d at 272. However, when an indemnity clause purports *"to relieve an indemnitee from the consequences of its own negligence,"* our case law requires strict construction of the clause. *Laurens*, 355 S.C. at 111, 584 S.E.2d at 378-79. *"Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms."* *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). See *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018) see also *Murray v. Texas Co.*, 172 S.C. 399, 402, 174 S.E.2d 231, 234 (1934) (finding “broad and comprehensive” language was insufficient to prove the contract relieved a party from its own negligence).

BFS has failed to persuade the Court that its indemnity clause(s) in either subcontract meet the elevated standard of being a clear and unequivocal statement which leaves no question

as to BFS seeking indemnification for its own negligent acts or omissions. BFS has failed to demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contractual indemnity claims.

As South Carolina precedent requires that the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal when seeking to be indemnified for its own negligence, the Court rules that the specific language from the Master Subcontractor Agreement is confusing, conflicting, and neither unclear or unequivocal. The Defendants' Motions for Summary Judgment as to the contractual indemnity claims is hereby granted.

D. BUILDERS FIRST SOURCE'S CONTRACTUAL INDEMNIFICATION CLAIM IS ALSO BARRED PURSUANT TO THE RELEVANT STATUTE OF LIMITATIONS

The contractual indemnity claim(s) made by Builders First Source against ECC and Charleston Exteriors have also been challenged pursuant to the statute of limitations. As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant. *Choate v. United States*, 233 F. Supp. 463 (D.C. Okla. 1964) *First Gen. Servs. v. Miller*, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). Our courts, however, have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *See Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330 (Ct. App. 2015). In this case, BFS has pled that it is "entitled to full

contractual and common law indemnification for and against Liability”. *See Complaint, Paragraph 34.*

The Court draws further distinction in this case because the relief prayed for in the BFS complaint seeks consequential damages for attorney’s fees. Specifically, the Complaint against ECC and Charleston Exteriors states that, “...BFS has been subjected to liability and has incurred consequential damages in having to expend attorney’s fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.” *See Complaint, Paragraph 33; See also Paragraph 34* (“...entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorney’s fees, costs, and other expenses incurred in defending the underlying action... ”)

BFS began to incur liability for attorney’s costs and fees – damages it seeks in this litigation when its Answer was drafted and served. BFS’s Answer was executed and served more than three years prior to the filing of the present action. Thus BFS’s claims for “contractual and common law indemnification against Liability” are barred by the three year statute of limitations. SC. Code § 15-3-530 et seq.

The facts before the Court are distinguishable from the *First General Services* case in that BFS is seeking indemnification for damages which have begun to accrue more than three years prior to filing and, as a result, the Court is inclined to agree with the Defendants that consequential damages, as defined by the Complaint, began to accrue prior to December 15th, 2015 and, therefore, these damages cannot be recovered as Builders First Source discovered them more than three years prior to the filing of its lawsuit against Charleston Exteriors and ECC.

IT IS ORDERED that the Defendants Charleston Exteriors, LLC and ECC Contracting,

LLC's Motion for Summary Judgment is granted as to the following causes of action only:

- a. Negligence
- b. Breach of Contract
- c. Breach of Warranties
- d. Contractual Indemnity

IT IS ORDERED that these causes of action are hereby dismissed with prejudice and this ruling should serve precedent in the Damico matter as well.

THIS COURT FINDS THAT two claims remains which are subject to the Motion to Consolidate brought simultaneously by Builders First Source. The claims are for equitable indemnification and contribution. The Court finds that these claims are subject to consolidation with the related D'Amico matter which remain stayed until further notice or order.

IT IS FURTHER ORDERED that the cause of action for equitable indemnification involves a question for the jury and the Motion for Summary judgment is, therefore, denied as to that cause of action. The Plaintiff's Contribution claim survives as it was not before me as part of this motion for summary judgment.

AND IT IS SO ORDERED this ____ day of __, 2020, at ____, South Carolina.

Clifton B. Newman Presiding Judge



Berkeley Common Pleas

Case Caption: Builders Firstsource-Southeast Group, Llc VS Mi Windows And
Doors, Inc. , defendant, et al
Case Number: 2018CP0802547
Type: Order/Summary Judgment

So Ordered

s/ Clifton B. Newman, 2127

Electronically signed on 2020-02-01 21:45:57 page 11 of 11

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Six Fifty Six Owners Association, Inc., et al,
Plaintiffs,

vs.

Winsor South, LLC; et al.,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL CASE NO. 2016-CP-10-03455

**CHARLESTON EXTERIORS
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

TO: STEPHEN P. HUGHES, ESQ. AND THE LAW FIRM OF HOWELL, GIBSON & HUGHES, PA

You will please take notice that the undersigned, as counsel for the Defendant Charleston Exteriors (“Charleston Exteriors”) submits the following in support for its Motion for Summary Judgment: against Co-Defendant Builders FirstSource-Southeast Group, LLC (“BFS”). The grounds for this motion will be detailed in the balance of this memorandum, which incorporates the Memorandum already filed by Hurley Services. *See Exhibit A.* In addition to all grounds asserted by Hurley Services (“Hurley”), this Defendant will show that it was party to a matter previously adjudicated in Berkeley County, South Carolina¹ which involved identical parties, causes of action, and identical subject matter as to BFS contractual indemnity claim.² Therefore, Charleston Exteriors will rely on *both* collateral estoppel and *res judicata*, in addition to each argument contained in the Memorandum in Support of Motion for Summary Judgment filed by Hurley Services.

FACTUAL/PROCEDURAL BACKGROUND

This litigation arises out of alleged construction defects at Six Fifty-Six Coleman Boulevard,

¹ The lawsuit referenced Builders FirstSource Southeast Group, LLC v. ECC Contracting LLC, MI Windows and Doors, Inc., Hurley Services, LLC, Charleston Exteriors LLC 2018-CP-08-02547

² The subject matter in reference is the Master Vendor Agreement which is the basis for BFS contractual indemnity cause of action.

a twelve-building townhome community in Mount Pleasant, SC (“the Project”). Charleston Exteriors was a subcontractor to Builders First Source on one of the twelve buildings at the project. Charleston Exteriors scope of work was limited to the installation of windows.

On May 17th, 2017, Builders First Source (“BFS”) served its Third-Party Complaint on Charleston Exteriors, LLC. The claims made by BFS against Charleston Exteriors arise from the latter’s role as a subcontractor at the Project in 2013. BFS also named Hurley Services as a Third-Party Defendant under identical legal theories. Hurley installed windows for the remaining eight buildings in which BFS was involved.

BFS has alleged that Hurley and Charleston Exteriors are liable for damages under theories of contractual and equitable indemnity, breach of warranties, breach of contract, and negligence. According to BFS, Charleston Exteriors executed the “Master Subcontractor Agreement” dated May 14, 2012 (hereafter “Master Agreement” or “Vendor Agreement”). *Exhibit B*. The Master Agreement at issue here is a BFS contract form bearing “Version – 5/17/06.”³ BFS seeks to recover from Charleston Exteriors under the terms of the Master Agreement. As such, the Master Agreement is at issue in this matter.

Charleston Exteriors would reference the multiple contradictory and confusing indemnification provisions included in the Master Agreement. These provisions have been provided, verbatim, in the Hurley memorandum. For reasons provided below, Charleston Exteriors would show that the terms of the Master Agreement are unenforceable due to their failure to meet the “clear and unequivocal” standard set forth by S.C. Courts in Here, there are no "clear and unequivocal" terms in the Master Agreement stating that Charleston Exteriors shall be

³ This version of the Master Agreement is also the same version at issue in Defendant Charleston Exteriors, LLC’s motion for summary judgment and the same version which was already deemed neither clear nor unequivocal by Judge Newman in the preceding Order.

responsible for BFS negligence. While BFS might assert that its negligence is of a similar character to that of Charleston Exteriors, the provision is unenforceable as written in a matter involving concurrent liability. *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).

The moving party will also show that claims for negligence, breach of contract and contribution are merely “veiled” or “disguised” claims for indemnification. The claims are not independently viable claims under South Carolina law and, therefore, fail to state a claim as a matter of law. The claims arise and are brought by BFS “only when it faced potential liability for damages and incurred fees and costs defending against a lawsuit,” those claims are “nothing more than claims for equitable indemnity.” *Stoneledge v. Builders FirstSource-Southeast Grp.*, 413 S.C. at 637, 776 S.E.2d at 438; *Stoneledge v. Clear View Constr.*, 413 S.C. at 622, 776 S.E.2d at 430. BFS has not stated a claim independent of its indemnity theory as they make no additional allegations or claims and are merely derivative claims which flow down from the contract at issue.

LEGAL STANDARD

Summary judgment is appropriate if the circuit court finds “there is no genuine issue as to any material fact” Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, “the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329–30 (2009). The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. *Manley v. Manley*, 291 S.C. 325, 329 (Ct. App. 1987). “[S]ummary judgment is [used] to expedite disposition of cases [that] do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452 (2001). Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving

party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571 (Ct. App. 2001). Summary judgment should be granted when there is a failure of the nonmoving party to make a showing sufficient to establish the existence of an essential element of that party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Argument

1. Builders First Source Claims are Barred by Res Judicata or, in the alternative, Collateral Estoppel

The claims made by BFS present issues which have already been ruled upon by a neighboring court of competent jurisdiction in a matter captioned *Builders First Source v. MI Window & Door, et al.* This lawsuit was brought in Berkeley County by BFS, who named Charleston Exteriors as a Defendant based on alleged construction defects at a project known as *The Abbey*. Judge Newman granted Charleston Exteriors Motion for Summary Judgment in that matter. *See Amended Order Granting Motion For Summary Judgment attached as Exhibit D*

Charleston Exteriors would show that the lawsuit before this court, and the Berkeley County lawsuit ("Newman Decision"), involve the exact same issues, parties and contractual indemnification provisions at issue in this case. The Newman Decision should be controlling precedent as to the subject matter at issue because, despite involving two separate construction projects, both this matter and the Newman Decision hinge on the viability of Builders First Source's Master Vendor Agreement.

"When claims arising out of a particular transaction or occurrence are adjudicated, res judicata bars the parties to that suit from bringing subsequent actions on either the adjudicated issues or any issues that might have been raised in the first suit." *Plott v. Justin Ent.*, 374 S.C. 504,

511, 649 S.E.2d 92, 95 (Ct. App. 2007). Res judicata requires proof of three elements: 1) a final, valid judgment was entered on the merits of the first suit; 2) the parties to both suits are the same; and 3) the subsequent action involves matters properly included in the first action. *Id.* Each of the three required elements are present before the Court as the Newman Order constitutes a final, valid judgment on the merits. The parties are identical. Finally, this action involves the viability of contractual indemnification language which has already been adjudicated by the Newman decision.

Similarly, Collateral estoppel, or issue preclusion, prohibits a court from adjudicating an issue that was "actually litigated and determined by a valid and final judgment" in a prior suit. *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008). Collateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same. *Id.* It applies only if "the precluded party has had a full and fair opportunity to litigate the issue in the first action." *Id.*

In this case, as well as lawsuit which produced the Newman Decision, the language of the Vendor Agreement is directly at issue. That same confusing collection of paragraphs which reference indemnification were considered by Judge Newman in that case. Judge Newman ruled in a thorough Order Granting Summary Judgment and again in his Amended Order Granting Summary Judgment as follows:

"BFS has failed to persuade the Court that its indemnity clause(s) in either subcontract meet the elevated standard of being a clear and unequivocal statement which leaves no question as to BFS seeking indemnification for its own negligent acts or omissions. BFS has failed to demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contractual indemnity claims." *See Amended Order Granting Summary Judgment, Page 7-8.*

Following the Order, BFS brought a timely Motion to Alter and Amend pursuant to Rule 59(e), SCRCP. *See Exhibit C*. The Motion to Alter or Amend was denied. Thus, BFS should now be collaterally estopped from litigating these same issues in this Court. For this reason, res judicata and collateral estoppel bar all claims before this Court.

2. Plaintiff's Claims for Breach of express and implied warranties, breach of contract, and negligence are merely claims for indemnity in disguise.

BFS has only alleged cross-claims against Charleston Exteriors and BFS's other subcontractors as a result of the claims against it filed by the Plaintiffs for alleged construction deficiencies at the Project. Claims conditioned on liability to third parties are considered claims for indemnity "in disguise". See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not "suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit," trial court "properly granted summary judgment on [general contractor's] breach of contract and breach of warranty cross-claims because they are not independent causes of action from [the general contractor's] equitable indemnity claim"). See also Holland v. Hucks Pool Co., Inc., No. 4:15-cv-00141-RBH, 2016 WL 6157491 (D.S.C. Oct. 24, 2016) ("[The contractor's] breach of contract/warranty crossclaim is not viable as a cause of action separate from its equitable indemnity crossclaim.... [The contractor's] allegations indicate it did not sustain its own damages as a result of any breach of contract or warranty by [the subcontractor].... Accordingly, the Court will grant [the subcontractor's] motion for summary judgment as to [the contractor's] breach of contract/warranty crossclaim....").

In other words, there are no separate claims or allegations made outside of the contractual obligations owed by Builders First Source to Ryland. Thus, BFS's claims should be dismissed.

3. **BFS's claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal, are contrary to public policy, and, thus, they fail as a matter of law.**

South Carolina caselaw is clear that while contractual indemnity can be enforced according to its terms, such an agreement must specifically and unequivocally contemplate that an indemnitor agrees to indemnify an indemnitee from damages resulting from the indemnitee's own bad acts or negligence.

South Carolina courts have long recognized "that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 490, 763 S.E.2d 19, 20 (2014) (citing *Laurens Emergency Med. Specialists*, 355 S.C. at 111, 584 S.E.2d at 379)

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the exacting standard of being clear and unequivocal in the event of the indemnitees' concurrent negligence; indemnification clauses that do not meet this standard are against public policy. *See Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 819 S.E.2d 166, 172 (S.C. App. 2018), *reh'g denied* (Oct. 18, 2018) (*affirming trial court's grant of summary judgment in favor of subcontractor dismissing contractual indemnity cross-claims of contractor based on application of the clear and unequivocal standard*).

The Master Agreement, attached as Exhibit B, was the same Agreement from the Newman Decision. There are multiple indemnity provisions in that contract and these indemnity provisions are unclear, conflict in certain respects, and violate South Carolina law. As a result, the Master Agreement's indemnity provisions are unenforceable.

As counsel for Hurley has eloquently stated in its Memorandum in Support, the Master Agreement contains multiple paragraphs which seem to conflict one another on several occasions. As perfectly stated in the Hurley memo, “the terms are confusing at best, contradictory at times, and arguably misleading.” *See Hurley Memorandum in Support of Motion for Summary Judgment.*

Upon reading the same Master Agreement and striking down BFS’s indemnity clauses, Judge Newman determined that the indemnification provisions “are confusing at best and deceptive at worst.” *Id.* at 6. It is the hope of Charleston Exteriors that this Court will share the opinion of the Newman Order.

If, however, this Court wishes to look beyond the Newman Order, perhaps it might consider the opinion of BFS as to its own agreement. In its Motion to Alter or Amend, **Builders First Source admitted that the vendor agreement at issue fails to meet the clear and unequivocal standard.**

“This Court’s December 6, 2019 Order correctly finds that the indemnity language at issue does not meet the elevated standard of being clear and unequivocal and thus the Plaintiff cannot maintain indemnification claims for Plaintiff’s negligence.” *See Motion to Reconsider, P 3. (Exhibit C)*

This admission, coupled with the Newman Decision, the arguments of Hurley Services, and this memorandum’s furtherance of each will hopefully provide compelling guidance to all.

WHEREFORE for the foregoing reasons, Charleston Exteriors respectfully requests this Court enter an Order dismissing BFS’s cross-claims and granting summary judgment in Charleston Exteriors’s favor. Charleston Exteriors reserves the right to supplement this motion and present additional arguments.

-SIGNATURE ON THE FOLLOWING PAGE-

Respectfully submitted,

s/ C. Clay Olson

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**ATTORNEYS FOR CHARLESTON
EXTERIORS SERVICES, LLC**

Charleston, South Carolina
March 3, 2020

EXHIBIT A

HURLEY SERVICES, LLC'S
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Six Fifty Six Owners Association, Inc., et al,
Plaintiffs,

vs.

Winsor South, LLC; et al.,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL CASE NO. 2016-CP-10-03455

**HURLEY SERVICES, LLC'S
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

TO: STEPHEN P. HUGHES, ESQ. AND THE LAW FIRM OF HOWELL, GIBSON & HUGHES, PA, COUNSEL OF RECORD FOR DEFENDANT BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC

You will please take notice that the undersigned, as counsel for the Defendant Hurley Services, LLC, ("Hurley") submits the following in support for its Motion for Summary Judgment: against Co-Defendant Builders FirstSource-Southeast Group, LLC ("BFS").

FACTUAL/PROCEDURAL BACKGROUND

This litigation arises out of alleged construction defects at Six Fifty Six Coleman Boulevard, a twelve-building townhome community in Mount Pleasant, SC ("the Project"). BFS is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. See BFS Answer to Third Amend. Compl., ¶7; Terry Rosamond Deposition, p.8, l.8-22, p.44, l.2 - p.45, l.22-25, p.65, l.1-18, attached as Exhibit 1; BFS License statement, attached as Exhibit 2. It is undisputed that BFS holds an unlimited commercial general contractor's license (License No. 112969) with the South Carolina Labor Licensing & Regulation ("SC-LLR"), and Terry Rosamond is BFS's representative that serves as the "qualifying party" for such licensure in this state. Id. Defendant BFS supplied and installed windows and doors as a subcontractor of the Ryland Group for only the "Ryland Phase" buildings



at the Project, which consists of nine (9) buildings that were constructed in 2013 and 2014. It is undisputed that BFS furnished the windows, related flashings, and caulk and provided superintendents to oversee such installation for the Ryland Phase buildings at the Project.

BFS filed a third-party complaint in the present litigation on May 9, 2017 asserting third-party claims against Hurley for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. Hurley was ultimately made a direct defendant by Plaintiffs and BFS then asserted cross-claims against Hurley in lieu of it previously asserted third-party claims, but on all the same causes of action and grounds. BFS's operative cross-claims are contained in BFS's Answer to Plaintiffs' Third Amended Complaint filed on January 24, 2019. BFS's cross-claims allege that BFS is entitled to be indemnified in the amount which BFS "may pay in satisfaction" of Plaintiffs' claim "plus BFS [sic] costs for defense, inclusive of attorneys' fees, without regard for the fault of either Hurley or BFS. See BFS Answer to Third Amend. Compl., ¶¶ 126, 131, 135, 139, & 143.

Plaintiffs' expert engineer Russell Mease, P.E. of RTM Engineering, LLC investigated the Project for construction deficiencies. He prepared a comprehensive 146-page report concerning his findings and was deposed on multiple occasions about his investigation of the Project. Mease testified that the windows and doors at Ryland Phase buildings of the Project were installed into the buildings' framing in accordance with "a protocol that's acceptable in the industry." Deposition of Russell Mease, P.E., Vol. 1, p.121, l.20 – p.122, l.3; Vol. 3 p.601, l.3 – p.606, l.21, together attached as Exhibit 3. Mease's opinions concerning defects and damages surrounding window installations at the Ryland Phase buildings related to the work of other trades such as the brick mason and siding subcontractor as well as the lack of supervision by the general contractor. Deposition of Russell Mease, P.E., Vol. 2, p.209, l.3 – p.213, l.14; attached as Exhibit 4. Mease

testified as to only one criticism with regard to the installation of the windows into the rough openings of the Ryland Phase buildings. Despite never removing a window from a rough opening in the Ryland Phase, Mease contended that he did not see evidence of caulk underneath the nailing fin at the sills of the windows he examined, however, he could not say unequivocally that the caulk was missing. Deposition of Russell Mease, P.E., Vol. 3, p.594, l.23 – p.601, l.2; attached as Exhibit 5. Mease admitted that the omission of caulk from behind the sill nailing fin to allow for drainage of moisture was consistent with best practices that existed at the time of construction and presently, but he was relying upon a 2007 Florida test “cut sheet” from the window manufacturer that referenced caulk behind the perimeter of the nailing fin. Id. Notably, this single criticism concerning caulking is not mentioned in Mease’s 146-page report and Plaintiffs’ expert did not attribute damage at the Project to this condition, only a concern about the prospect of air infiltration which he had not investigated. Id.

BFS’s corporate witness, Terry Rosamond, testified during a 30(b)(6) deposition in this action that best practices applicable at the time the Ryland Phase buildings were constructed called for the omission of caulk underneath a window’s sill nailing fin so that any incidental moisture could exit or weep from the window assembly, and he noted window manufacturers’ installation instructions have evolved over time to recognize this practice which promotes the drainage of water out of the wall. Deposition of Terry Rosamond for BFS, p.8, l.8-22, p.168, l.7 – p.170, l.7; attached as Exhibit 6; see also 30(b)(6) Deposition Notice attached as Exhibit 7. Rosamond, serving as a designee for BFS, further testified that BFS’s subcontractors at the Project installed the windows in accordance with these best practices per the instructions of BFS’s superintendents, which instructions included the omission of caulk behind the sill fin. Id.

Hurley is alleged to have installed windows and doors at the Project as a subcontractor to BFS in 2013 and 2014. It is undisputed that Hurley has never held any licenses of any kind relative to construction with the SC-LLR and the absence of such licensure is a matter of public record. See Exhibit 8. According to BFS, Hurley executed a BFS “Master Subcontractor Agreement” dated May 14, 2012 (hereafter “Master Agreement”). See Exhibit A filed with the Notice of Motion. The Master Agreement at issue here is a BFS contract form bearing “Version – 5/17/06.”¹ BFS seeks to recover from Hurley and BFS’s subcontractors in indemnity under the terms of the applicable BFS Master Agreement.

Section 5 of the Master Agreement contains multiple indemnity clauses. The first such indemnity provision states:

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFENDANT AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY’S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, **ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR’S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR** OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR’S INSURANCE REQUIREMENTS ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

¹ This version of the Master Agreement is also the same version at issue in Defendant Charleston Exteriors, LLC’s motion for summary judgment.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES") FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTORS, OR ANY OF ITS SUBCONTRACTORS, **REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES**, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND **THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES**. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD

HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

Yet another indemnity provision found in Section 8 of the Master Agreement states as follows:

TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, **ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS.** IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR; THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND, EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR.

See Exhibit A, emphasis added in bold.

Following extensive discovery and multiple sessions and days of mediation, Hurley, BFS, and BFS's other subcontractor (Charleston Exteriors, LLC) have settled with Plaintiffs. BFS did not extinguish any liability whatsoever of its subcontractors in its settlement with Plaintiffs. The

only remaining claims pending against Hurley in this litigation are BFS's cross-claims seeking indemnification.

LEGAL STANDARD

Summary judgment is appropriate if the circuit court finds "there is no genuine issue as to any material fact" Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, "the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 329–30 (2009). The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. Manley v. Manley, 291 S.C. 325, 329 (Ct. App. 1987). "[S]ummary judgment is [used] to expedite disposition of cases [that] do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452 (2001). Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571 (Ct. App. 2001). Summary judgment should be granted when there is a failure of the nonmoving party to make a showing sufficient to establish the existence of an essential element of that party's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Argument

1. Plaintiff's Claims for Breach of express and implied warranties, breach of contract, and negligence are merely claims for indemnity in disguise.

BFS has only alleged cross-claims against Hurley and BFS's other subcontractor as a result of the claims against it filed by the Plaintiffs for alleged construction deficiencies at the Project. Claims conditioned on liability to third parties are considered claims for indemnity "in disguise".

See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not “suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit,” trial court “properly granted summary judgment on [general contractor’s] breach of contract and breach of warranty cross-claims because they are not independent causes of action from [the general contractor’s] equitable indemnity claim”). See also Holland v. Hucks Pool Co., Inc., No. 4:15-cv-00141-RBH, 2016 WL 6157491 (D.S.C. Oct. 24, 2016) (“[The contractor’s] breach of contract/warranty crossclaim is not viable as a cause of action separate from its equitable indemnity crossclaim.... [The contractor’s] allegations indicate it did not sustain its own damages as a result of any breach of contract or warranty by [the subcontractor].... Accordingly, the Court will grant [the subcontractor’s] motion for summary judgment as to [the contractor’s] breach of contract/warranty crossclaim....”). Thus, BFS’s cross-claims should be dismissed and Hurley’s Motion for Summary Judgment should be granted in these respects.

2. BFS’s claims for contractual indemnity are based on contractual provisions that do not comply with South Carolina law, are neither clear nor unequivocal, are contrary to public policy, and, thus, they fail as a matter of law.

a. The Master Agreement’s indemnification clauses are confusing, contradictory, and contrary to South Carolina’s legal standards.

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the standard of being clear and unequivocal when seeking to recover for an indemnitee’s concurrent negligence; indemnification clauses that do not meet this standard are against public policy. See Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 819 S.E.2d 166, 172 (S.C. App. 2018), reh'g denied (Oct. 18, 2018) (affirming trial court’s grant of summary judgment in favor of subcontractor dismissing contractual indemnity cross-claims of contractor based on application of the clear and unequivocal standard). There is

one Master Agreement between BFS and Hurley at issue in this matter, a copy of which is attached to Hurley's Motion as Exhibit A. There are multiple indemnity provisions in that contract; those indemnity provisions are unclear, conflict in certain respects, and violate South Carolina law. As a result, the Master Agreement's indemnity provisions are unenforceable.

A review of the Master Agreement's numerous indemnification clauses reveals that there is nothing clear and unequivocal about them. This smorgasbord of indemnification reflects that, in terms of indemnity, BFS took a 'throw everything in the kitchen sink' approach to drafting the contract, presumably under the theory that if one clause fails another may stand. On one hand, BFS Master Agreement contemplates indemnification of all attorneys' fees incurred in the defense of the BFS as well as all amounts paid in settlement or to satisfy demands – each without any regard to the fault of the subcontractor or any reference to the negligence of BFS; in other areas the Master Agreement refers to indemnification in favor of BFS regardless of the sole or concurrent negligence of BFS; and yet other provisions qualify indemnification to the extent the loss is caused in whole or part by the negligence of Subcontractor. The terms are confusing at best, contradictory at times, and arguably misleading. As such, the Master Agreement's indemnity clauses are unenforceable as a matter of law.

b. The Master Agreement's indemnification provision for BFS's sole negligence violates Section 32-2-10 of the SC Code of Laws and, thus, is against public policy and unenforceable.

The Master Agreement's provision that requires indemnification of BFS regardless of its "sole negligence" violates Section 32-2-10 of the SC Code of Laws, and, therefore, the Master Agreement's entire indemnity section fails for this reason alone (but for other reasons as well). That offending clause cannot be blue-penciled out of the indemnity section by the Court. See Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 694 S.E.2d 15, 18 (S.C. 2010) (recognizing

that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy). Section 32-2-10 provides: “Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately **caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable.**” SC Code Ann. § 32-2-10 (Emphasis added). The Master Agreement plainly includes indemnification terms that require indemnification regardless of BFS’s sole negligence. For this reason alone, this Court should grant Hurley’s Motion for Summary Judgment on grounds that the indemnification clauses of the Master Agreement are unenforceable as a matter of law.

c. BFS is seeking to recover in indemnity for its concurrent or sole negligence.

BFS is seeking through its cross-claims to recover in indemnity from Hurley regardless of BFS’s concurrent, if not sole, negligence. BFS is a licensed contractor that supplied the subject windows and provided turn-key installation of the windows for Ryland Group; such installation work was performed by unlicensed subcontractors, including Hurley. “Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee’s license group and license classification or subclassification; provided, the licensee provides supervision. **The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.**” SC Code Ann. § 40-11-27(E) (Emphasis added). Thus, as a matter of law, BFS had an obligation to supervise the

work of its subcontractors and BFS is by statute responsible if the subcontractors committed any violation of the building code (if any).

BFS's corporate designee testified at 30(b)(6) deposition that BFS's superintendents instructed the subcontractors to install the windows without caulk behind the sill fin - the manner of installation that Plaintiffs' expert engineer Mease criticized at deposition. Therefore, based on the undisputed facts, BFS is seeking to recover in indemnity for its concurrent negligence and arguably for its sole negligence. The allegations of BFS's cross-claims also do not restrict BFS's recovery in indemnity to losses to the extent caused by the subcontractor's negligence; the allegations are, like the Master Agreement's indemnity clauses, much broader. The Master Agreement's indemnification clauses fail to meet South Carolina's applicable rules of construction, including, without limitation, the clear and unequivocal standard, that apply in this context. Furthermore, the Master Agreement is violative of Section 32-2-10 of the SC Code of Laws which prohibits indemnification for claims based on the indemnitee's sole negligence.

d. The Honorable Judge Clifton Newman has recently granted summary judgment to co-defendant Charleston Exteriors, LLC finding that this same BFS Master Agreement is unenforceable as a matter of law.

Significantly, the Honorable Clifton Newman recently found this same version of the BFS Master Agreement to be unenforceable as a matter of law because the indemnification clauses are not clear and unequivocal and they violate South Carolina's rules of contract construction. See Exhibit 9; Amended Order Granting Charleston Exteriors, LLC and ECC Contracting, LLC's Motions for Summary Judgment in the matter of Builders FirstSource-Southeast Group, LLC v. MI Windows & Doors, Inc., Case No. 2018-CP-08-02547 (S.C.Com.Pl. Feb. 3, 2020). In striking down BFS's Master Agreement's indemnity clauses, Judge Newman determined that the indemnification provisions "are confusing at best and deceptive at worst." Id. at 6. Indeed, one

of the two BFS Master Agreements found unenforceable by Judge Newman in favor of co-defendant Charleston Exteriors, LLC in the prior action is same version of the Master Agreement at issue for Hurley in this motion. The BFS Master Agreement with Hurley is equally unenforceable for all the same reasons identified in the order entered by Judge Newman and if the indemnity clauses therein fail in any respect they fail as a whole.

e. South Carolina’s legal contract construction rules support striking the BFS Master Agreement’s indemnification clauses in their entirety.

“[F]or a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement.” Id. quoting Davis v. Greenwood Sch. Dist., 50, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). “A contract is read as a whole document....” McGill v. Moore, 672 S.E.2d 571, 574 (S.C. 2009). The intention of the parties to a contract is gathered primarily from the contents of the writing itself, or, as otherwise stated, “from the four corners of the instrument” alone. McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945). Any uncertainty as to the meaning of any term “should be resolved against the party who prepared the contract”, which here, is BFS. Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 687 S.E.2d 714, 718 (S.C. App. 2009). “[W]ords cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.” Id.; see also ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011) (“It is not the function of the court to rewrite contracts for parties.”). Accordingly, South Carolina courts will not “blue pencil” an agreement and rewrite a contract’s terms to make it comply with the law. Poynter Invs., Inc. v. Cent. Builders, supra, 694 S.E.2d at 18 (S.C. 2010). Under South Carolina law, contracts “must stand or fall on their own terms.” Id. If part of the contract’s covenant fails, the agreement is unenforceable. Id.

In this case, the indemnification clauses set forth in the BFS Master Agreement must fall altogether. If one or more of the indemnification clauses fails, they all fail. And the Court cannot rewrite the contract to save the legally defective indemnity clauses. The Master Agreement's indemnification clauses are unenforceable as a matter of law. Thus, the Court should grant Hurley's Motion for Summary Judgment.

3. BFS should be collaterally estopped from enforcing the indemnification provisions of the Master Agreement because it litigated – and lost – the same issues in prior litigation before Judge Clifton Newman.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct.App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App. 1984). The offensive use of collateral estoppel was first adopted by this State in Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984).

To invoke collateral estoppel, a party need not have also been a party in the prior action; the law only requires that the party *against* whom estoppel is applied have been a party to that action and had a full and fair opportunity to litigate the issue in the prior action. South Carolina Property Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). In other words, the modern application of collateral estoppel permits parties to invoke collateral estoppel even in the absence of “mutuality.” Id.

Here, the contract terms have been actually litigated, directly determined in the prior action, and the issues were essential to the judgment, such that collateral estoppel should apply to the issues surrounding the enforceability of BFS's indemnification provisions.

The issues that Hurley raises in this Motion with respect to the Master Agreement, the indemnification provisions contained therein, and BFS's claims for indemnity have been litigated in a prior action: Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc. et al., case number 2018-CP-08-02547, filed in the Berkeley County Court of Common Pleas (the "Prior Action").

The Master Agreement and indemnity provisions that BFS now wishes to assert against Hurley involve the same agreement and indemnity provisions that were at issue in the Prior Action. BFS has already litigated the issue of the enforceability of its indemnification provisions; so it should not be permitted to now relitigate the same exact issue on the same exact form contract. In granting the subcontractor defendant's motions for summary judgment in the Prior Action, Judge Newman specifically considered the provisions of the same indemnification clauses present here and found "the specific language from the Master Subcontract Agreement is confusing, conflicting, and neither clear nor unequivocal." Lastly, Judge Newman's determination of the unenforceability of the indemnification provisions in the Prior Action was essential to the final order reached therein. See Exhibit 9

BFS had the opportunity, and did in fact, litigate the issue of the enforceability of the indemnification clause in its Master Agreement in the Prior Action. Where the "illegality of the contract has been actually litigated and directly determined in the prior action and that issue was essential to the judgment," the application of collateral estoppel is appropriate. South Carolina

Property Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). Accordingly, this Court should grant Hurley's Motion for Summary Judgment and apply principles of collateral estoppel to invalidate BFS's indemnification clauses and dismiss its cross-claims.

WHEREFORE for the foregoing reasons, Hurley respectfully requests this Court enter an Order dismissing BFS's cross-claims and granting summary judgment in Hurley's favor. Hurley adopts and incorporates by reference any additional arguments presented by co-defendant and co-moving party, Charleston Exteriors, LLC, as if fully set forth herein. Hurley reserves the right to supplement this motion and present additional arguments and evidence at the hearing before the Court.

Respectfully submitted,

s/ Ian W. Freeman

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LLC**

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Office: 66 Hasell St., Charleston, SC 29401

Telephone: 843.227.2200

ATTORNEYS FOR HURLEY SERVICES, LLC

Charleston, South Carolina
March 3, 2020

EXHIBIT B

VENDOR AGREEMENT



PLAINTIFF'S
EXHIBIT

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exhibitstick.com

**BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT**

THIS MASTER SUBCONTRACTOR AGREEMENT (this “Agreement”) is entered into effective as of 10/17, 2012, between **Builders FirstSource – Southeast Group, LLC**, a Delaware limited liability company, address: 2001 Bryan Street, Suite 1600, Dallas, Texas 75201, telephone: _____, fax: _____, Contact: _____, e-mail: _____@bldr.com (“Contractor”), and Charleston Exteriors, LLC. address 610 Black Oak Blvd, Summerville, SC 29485, telephone: 843-771-1494, fax: 843-771-1495, Contact: Eddie Taylor, e-mail: etaylor@charlestonexteriors.com (“Subcontractor”).

SECTION 1. Introduction.

a. **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the “Work”) from time to time for Contractor on any project (the “Project”). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor’s customer (the “Owner”). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the “Contract Documents”) and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor’s only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

b. **Work Orders.** It is contemplated under this Agreement that Subcontractor may perform Work on multiple projects at multiple locations. The description, completion date, special conditions, and cost of Work to be performed on a Project will be set forth in the written purchase order or work order (together, “Work Order”) delivered by Contractor to Subcontractor relating to that Project. Such Work Order(s)


Subcontractor

Contractor

are incorporated herein by reference as if fully set forth. The Work described in Work Orders must be performed under the terms of this Agreement.

c. **Term.** This Agreement shall be for an initial term of three (3) years. Upon the expiration of such initial term or any renewal term, this Agreement shall automatically renew for subsequent one (1) year periods unless either party gives written notice to the other party that it is electing to terminate this Agreement at the end of the then current term. Such written notice of intent to terminate must be given at least sixty (60), but not more than one hundred twenty (120), days prior to the end of the then current term. The provisions of Sections 3, 4, and 5 shall survive termination of this Agreement. If Contractor terminates this Agreement, Contractor will pay to Subcontractor sums due for the Work performed to the date of termination, as provided in Section 8.

d. **Notice.** Any notice or communication hereunder or in any agreement entered into in connection with the transactions contemplated hereby must be in writing and given by depositing the same in the United States mail, addressed to the party to be notified, postage prepaid, and registered or certified with return receipt requested, or by delivering the same in person or by facsimile transmission. Such notice shall be deemed received on the date on which it is hand-delivered or received by facsimile transmission or on the third business day following the date on which it is so mailed. For purposes of notice, the addresses of the parties shall be as set forth on the front page of this Agreement. Any party may change its address for notice by written notice given to the other parties in accordance with this Section.

SECTION 2. Materials and Workmanship.

Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

a. **Scope of Work; Knowledge of Site; Plans and Specifications.** Subcontractor shall take all action necessary to familiarize itself and its employees, agents, and subcontractors with the scope and requirements of the Work, the existing site conditions, and any work to be performed by others that may affect the performance of the Work. Subcontractor shall confirm that the Contract Documents are correct and immediately notify Contractor of any errors and/or omissions.

b. **Change Orders.** Contractor may make any changes to the nature or scope of the Work; provided, however, that any changes resulting in a change in price must be agreed to in writing by Subcontractor and Contractor prior to the Work being performed. Subcontractor shall be notified of changes by written change order. Subcontractor shall not perform any extra work without written authorization by Contractor.

c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

d. **Safety and Environmental.**


Subcontractor

Contractor

(1) **Compliance with Laws.** Subcontractor will carefully check the drawings, plans, and specifications for conformity with all local, state, and Federal laws, codes, rules, and regulations bearing on the Work (the "Law") before commencing the Work. Unless Contractor or Owner otherwise agrees in writing, before commencement of the Work Subcontractor will obtain at its sole cost and expense all permits necessary for the Work. Subcontractor will comply with product manufacturer's specifications and will give all notices and comply with all Law bearing on the Work, including by way of enumerations and not limitation, safety, health, and environmental rules and regulations established by or pursuant to Federal, state, and local safety and environmental laws. Subcontractor at all times will furnish to its agents and employees a safe place of employment. If Subcontractor observes any violation of Law, it will immediately report such violation to Contractor in writing. Subcontractor will be responsible for any fines, charges, in-kind training or supplies, or penalties related to the Work, including, without limitation, fines, charges, and/or penalties related to the operation of equipment, the Subcontractor's performance of the Work, the handling of materials, or any other function that is in violation of the Law. All workmanship and materials will conform to Law and, if the Subcontractor performs or permits the performance of any Work not in compliance with Law, it will immediately cause such Work to be redone and bear all costs in connection therewith. The Work, as performed, will meet with the approval of, and pass any inspection of, any governmental authority having jurisdiction thereof. If the Work is being constructed under specifications of the Federal Housing Administration or the Veterans Administration, the Work will meet the requirements of these governmental agencies. No Work will be deemed complete until final inspection is made and approval is received from every governmental authority whose approval is required.

(2) **The Occupational Safety and Health Administration ("OSHA") and the Environmental Protection Agency ("EPA").** Regulations have been promulgated by OSHA and EPA ("Regulations") that require all contractors and subcontractors to exchange Material Safety Data Sheets ("MSDS") and share information about precautionary measures necessary to protect all workers on a building project.

Subcontractor agrees as follows:

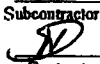
(A) Subcontractor will fully comply with the Regulations and will cooperate with Contractor and/or Owner and all subcontractors of Owner in order to assure compliance with the Regulations.

(B) Subcontractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Project.

(C) TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL CLAIMS, DAMAGES, LIABILITIES, AND CAUSES OF ACTION THAT ARISE FROM THE FAILURE OF SUBCONTRACTOR TO COMPLY WITH THE REGULATIONS.

(D) Subcontractor will assist Contractor in complying with the Regulations.

(E) Subcontractor will not use any chemicals in its performance of the Work for


Subcontractor

Contractor

Contractor or incorporate any chemicals into materials or products supplied to Contractor or to the Project unless Subcontractor has given Contractor prior written notice of the existence and the possible exposure to such chemical, has delivered an MSDS to Contractor, and has received a written consent of Contractor to use such chemicals.

(3) **Subcontractor's Safety Program.** Subcontractor's safety program must specifically address, among other safety issues, scaffolding, fall hazards, trenching, and shoring, as may be applicable. For "hard hat" jobs, approved safety helmets and hard soled shoes must be worn at the Project at all times. Safety glasses must be worn when power equipment is used. Subcontractor shall erect and maintain all reasonable safeguards for safety and protection, including, but not limited to, necessary signage, protective barriers, and other warnings against hazards. Subcontractor shall furnish all flagmen, barricades, and other items required for public safety and right-of-way maintenance required by the installation of the Work. Safety vests shall be worn in the public right-of-way.

(4) **Default.** If Subcontractor fails to immediately comply with safety and environmental requirements after verbal or written notice from Contractor, Contractor may correct the violation and deduct the cost from any Partial Payment or final payment in addition to all other remedies available to Contractor, including, without limitation, consequential damages. Subcontractor shall pay any fines assessed to Owner or Contractor due to the acts, omissions, or negligence of Subcontractor. If construction at the Project in whole or in part is delayed or halted by any governmental authority as a result of Subcontractor's Work, Subcontractor shall pay to Contractor as liquidated damages, and not as a penalty, the amount of \$200 per hour for a minimum ten (10) hour day until construction at the Project can be safely resumed.

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. If Subcontractor fails to perform under this warranty, the party entitled to performance or Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be


Subcontractor

Contractor

intended non-incident third party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

SECTION 4. Insurance.

At all times while performing the Work, and continuing thereafter until the expiration of the applicable statute of limitations for any claims, Subcontractor will maintain for the benefit of itself and Contractor (and Owner, when requested), the following minimum insurance coverage:

- a. **Workers' Compensation Insurance** - statutory limits in the state where each Project is located.
- b. **Employer's Liability Insurance** - \$1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.
- c. **Commercial General Liability** - \$1,000,000 per occurrence, \$1,000,000 products-completed operations aggregate, \$1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.
- d. **Business Auto Liability**, including hired and non-owned auto coverage - \$500,000 combined single limit.

Insurance policies shall (a) be issued by companies with a "Best's Rating A" and a "Financial Size Category of VIII", (b) be on an "occurrence" form, and (c) list Contractor and if requested, Owner, as additional insureds per Form CG 20 10 edition 11/85 or its equivalent on the General Liability and Automobile Liability Policies. For purposes of this additional insured requirement, the term "equivalent" means coverage for liability arising out of Subcontractor's Work performed for Contractor and includes both ongoing and products-completed operations coverage. The Workers' Compensation Policy shall include an Alternate Employer's Endorsement naming the Contractor. If Subcontractor utilizes any leased employees, Contractor must also be listed on an Alternate Employer's Endorsement on the Workers' Compensation Policy covering the leased employees.

Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this Section promptly after the date of this Agreement and thirty (30) days before the expiration date of each policy or at any time upon request of Contractor. A copy of the actual additional insured endorsement and Alternate Employer's Endorsement must be supplied with the certificate of insurance. If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or final payment), the required insurance on behalf of Subcontractor. The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement to the policy must be deleted. To the fullest extent permitted by law, any provision on the face of any certificate of insurance provided by Subcontractor that states anything to the effect that the certificate of insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such certificate of insurance. The insurance provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all insurance policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.

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Subcontractor

Contractor

[Version - 5/17/06]

SECTION 5. INDEMNITY.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, **BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.** THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION


Subcontractor

Contractor

OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

SECTION 6. Independent Subcontractor Status and Warranty to be Lawfully Entitled to Work in the United States of America.

Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of


Subcontractor

Contractor

construction of the Work. Further, Subcontractor warrants and agrees it will independently verify that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) shall be lawfully entitled to work under the laws of the United States of America.

SECTION 7. Default and Damages.

a. **Subcontractor's Default.** The following acts on the part of Subcontractor will, at Contractor's option, result in the immediate termination of this Agreement and all Work Orders, and dismissal of Subcontractor from each site.

- (1) Any delays of the Work caused by Subcontractor's failure or refusal to supply enough skilled labor or materials to meet Contractor's schedule.
- (2) Subcontractor's failure to promptly pay any labor, material suppliers, or lien claimants with respect to any Work.
- (3) Adjudication of Subcontractor to be bankrupt or insolvent either by Contractor or any court or governmental entity.
- (4) If Subcontractor or any of its employees, subcontractors, or agents (or employees, subcontractors, or agents of any subcontractor retained by Subcontractor to perform Work) consume, use, or are under the influence of alcohol or illegal drugs while on the site. (Subcontractor agrees to strictly enforce rules to this effect and to inform all employees, agents, and subcontractors that such rules will be strictly enforced.)
- (5) Failure of Subcontractor or its agents, subcontractors, or employees to (a) operate motorized vehicles or equipment in a safe and orderly manner, (b) comply with safe labor and material installation practices designated by Contractor or Owner or otherwise accepted by the industry, or (c) leave the Project site in a safe condition (as determined by Contractor in its sole discretion) during or after construction.
- (6) Subcontractor's failure to comply with the provisions of this Agreement regarding assignment or subcontracting.
- (7) Any other violations of the Contract Documents including, without limitation, this Agreement.

b. **Damages.**

(1) **No Damages for Delay.** Notwithstanding anything to the contrary in this Agreement and to the fullest extent permitted by law, Contractor will not be liable for any loss, claim, cost, liability, or damage incurred by Subcontractor, whether direct or indirect or whether related to efforts by Contractor to accelerate the Work, on account of any delay, disruption, hindrance, or any other impediment whatsoever, no matter by what, or by whom caused. Rather, the Cost of Work (defined in Section 8) is understood and agreed to include and cover all expenses and costs due to delays, disruptions, hindrances, or any other impediments regardless of their cause. Subcontractor agrees not to make, and hereby waives, any such claim for damages.

(2) **Subcontractor's Liability to Contractor upon Termination.** If this Agreement is terminated at Contractor's option as provided in this Section 7, Subcontractor will be liable to Contractor for all costs and damages incurred by Contractor due to Subcontractor's failure to


 Subcontractor

 Contractor

perform under this Agreement or other Contract Documents (including, without limitation, the amount by which the cost to complete the Project exceeds the cost of the Work), Subcontractor's failure to keep up the progress of the Work as required, or Subcontractor's failure to execute the Work as directed by Contractor. In addition to all costs and damages incurred by Contractor, Subcontractor shall be liable to Contractor for an additional amount equal to 25% of all costs and damages for Contractor's additional overhead and related costs.

c. **Reimbursement for Fines.** Subcontractor shall promptly reimburse to Contractor and shall indemnify, defend, and hold harmless Contractor regarding any fines or penalties incurred by Contractor or Owner as a result of the actions or inaction of Subcontractor or its employees, agents, or subcontractors, relating to performance of Work or otherwise, including, without limitation, their failure to abide by the requirements of Section 2(d).

SECTION 8. Payment to Subcontractor.

a. **Payment by Owner is Condition Precedent.** Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("**Cost of Work**") performed pursuant to Work Orders and that Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accepts Subcontractor's Work and Contractor receives payments from Owner for all payments to Subcontractor. It is expressly agreed that any basis for non-payment by Owner, including, without limitation, the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner.

b. **Partial Payments.** Partial payments ("**Partial Payments**") for portions of the Work that have been completed will be made by Contractor to Subcontractor as the Work progresses, but not more often than in accordance with Contractor's regular payment procedures. As a condition precedent to Partial Payments, Subcontractor must submit written applications that provide a description of the portion of the Work that has been completed during the payment period (including, without limitation, materials and supplies used therein if provided by Subcontractor), an estimate of the percentage of completion of the Work, a copy of each change order for the payment period, safety meeting sheets for the period of time since the last submission for payment, sheets indicating the number of hours worked by any employees of Subcontractor or any of its subcontractors ("**Employee Time Sheets**") for the period of time since the last submission for payment, evidence of payment, waivers (including, without limitation, lien waivers), and supplier affidavits in form satisfactory to Owner and Contractor, for itself, its subcontractors and material suppliers, and all other information Contractor is required to provide to Owner as a condition to Contractor's right to receive payment. Contractor reserves the right to modify such estimates in its sole and exclusive discretion and such modifications will bind Subcontractor for the purpose of Partial Payments. Partial Payments will be made to Subcontractor on or about the thirtieth day following approval of the application for payment by Contractor and receipt of payment by Contractor from Owner.

c. **Retainage.** Contractor will retain at least ten percent (10%) of each Partial Payment (the "**Retainage Amount**") or any greater amount Contractor chooses to retain in its sole discretion. Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payments or final payment.


Subcontractor

Contractor

d. **Grounds for Withholding Payments.** Contractor may withhold any Partial Payments or the final payment in whole or in part upon the occurrence of any breach of this Agreement by Subcontractor until a cure satisfactory to Contractor has been completed.

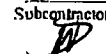
e. **Work Covered by Partial Payments.** All the completed Work covered by Partial Payments or final payment made to Subcontractor will thereupon become the sole property of Contractor, but this provision will not be construed as relieving Subcontractor from the sole responsibility for all Work upon which Partial Payments have been made, for the restoration of any damaged Work, for the correction of defective Work, or as a waiver of Contractor's right to require fulfillment of all of the terms of this Agreement. Payment to Subcontractor is specifically agreed not to imply acceptance by Contractor or Owner of any portion of the Work that fails to comply with the Contract Documents.

f. **Final Payment.** Final payment constitutes the entire unpaid balance of the Cost of Work minus any amounts retained. Final payment will be made by Contractor to Subcontractor upon satisfaction of the following conditions:

- (1) The Work is fully performed in accordance with the requirements of the Contract Documents, and Subcontractor is not in default under this Agreement or the Contract Documents;
- (2) Subcontractor has submitted satisfactory evidence of payments to, waivers by, and releases from all claims by, Subcontractor and any persons, firms, or corporations having performed work, labor, or services or furnished materials, equipment, tools, or supplies to Subcontractor for the Work (including, without limitation, lien waivers) if requested by Contractor;
- (3) Subcontractor has delivered to Contractor all as-built drawings, certifications, maintenance manuals, operating instructions, written guaranties, warranties, and bonds;
- (4) Subcontractor has provided safety meeting sheets and Employee Time Sheets for the period of time since the last submission for payment;
- (5) Owner, any general contractor, any lender, any architect, and Contractor have accepted the Work; and
- (6) Contractor has received payment from Owner.

g. **Release of Retainage.** Contractor will release any Retainage Amount thirty (30) days after all conditions precedent to Subcontractor's receipt of the final payment are met.

h. **Subcontractor's Agreement to Pay.** Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.


Subcontractor

Contractor

1. **INDEMNIFICATION FOR LIENS.** TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBRANCES, OR DEMANDS.

SECTION 9. Miscellaneous.

a. **Assignment and Successors.** Subcontractor may not assign or subcontract any portion of the Work or its other obligations or rights hereunder without the prior written consent of Contractor. If Subcontractor assigns or subcontracts any portion of the Work (with the prior written consent of Contractor), Subcontractor will require each such assignee or sub-tier subcontractor to comply with the Contract Documents, including, without limitation, the pertinent provisions of this Agreement (including, without limitation, Section 5) by written agreement, a copy of which must be provided to Contractor. Subcontractor hereby unconditionally guarantees the compliance of each such assignee or sub-tier subcontractor with this Agreement. Subject to the preceding provisions of this Section, this Agreement will be binding on and will inure to the benefit of the parties and their respective heirs, administrators, executors, successors, and permitted assigns.

b. **Acts of Affiliates.** For the purpose of this Agreement, any action of any agent, employee, subcontractor, director, officer, or invitee of Subcontractor or any of their agents, employees, subcontractors, officers, or invitees shall be deemed an act of Subcontractor. For the purposes hereof, any obligation or liability imposed on Subcontractor with regard to its employees or agents shall also be deemed an obligation or liability of Subcontractor with regard to employees or agents of its

subcontractors. Subcontractors of Subcontractor shall include any suppliers of Subcontractor other than Contractor.

c. **Offset.** In addition to any other right provided hereunder, Contractor shall be entitled to offset any amount owed to it by Subcontractor hereunder against any Partial Payments or final payment under this Agreement or any other agreement.

d. **Clean up.** Subcontractor will at all times keep the Project safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove all rubbish and waste produced by its operations or Work hereunder from the Project as well as all of its tools, equipment, machinery, and surplus materials no longer needed and leave the Project in a "broom clean" or equivalent condition and safe for Subcontractor's employees and subsequent contractors to perform their work, unless otherwise specified in writing. If Subcontractor fails to clean up, Contractor may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.

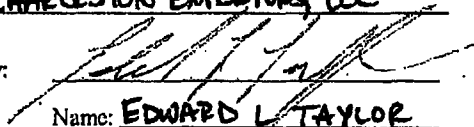
e. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.

f. **Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

EXECUTED to be effective as of the date first above written.

SUBCONTRACTOR:

CHARLESTON EXTERIORS, LLC

By: 

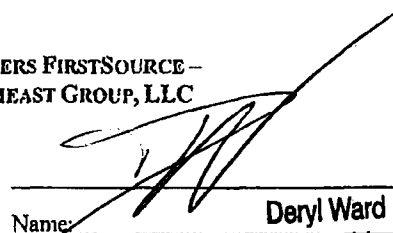
Name: EDWARD L. TAYLOR

Title: OWNER

46-4549180

Subcontractor Social Security No. or Federal I.D.
No.

BUILDERS FIRSTSOURCE -
SOUTHEAST GROUP, LLC

By: 

Name: Deryl Ward

Title: Vice President

EXHIBIT C

MOTION TO RECONSIDER

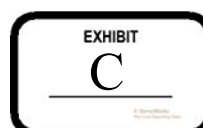
STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) CIVIL ACTION NO: 2018-CP-08-02547

Builders FirstSource-Southeast Group,)
LLC,)
) MOTION FOR RECONSIDERATION
Plaintiff,)
)
vs.)
)
MI Windows and Doors, Inc., ECC)
Contracting, LLC, Hurley Services,)
LLC, and Charleston Exteriors, LLC)
)
Defendants.)

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Builders FirstSource-Southeast Group, LLC, by and through the undersigned counsel, Howell, Gibson and Hughes, P.A., will appear before the Presiding Judge, Berkeley County Court of Common Pleas, on the tenth (10th) day after service hereof, or at such other time and place as may be directed by the Court, and then and there move for reconsideration and appropriate alteration and/or amendment of the Court's Order of December 6, 2019.

The within motion, made pursuant to the provisions of the statutory and common law of the State of South Carolina and Rules 52 and 59, South Carolina Rules of Civil Procedure, is premised upon the following considerations:

- a. The Court, in denying claims seeking contractual indemnity for the Defendants' own negligence, misconstrued relevant law as set forth by the Court of Appeals in the matter of



Concord and Cumberland;

b. The Court improperly determined that the relevant statute of limitations barred the Plaintiff's claims, notwithstanding the absence of any prior judgment in favor of the Plaintiff.

ARGUMENT

A. The Court, in granting summary judgment to the defendants, misconstrued the ruling of the Court of Appeals in *Concord and Cumberland*, which clearly authorized contractual indemnity claims for defendant's own negligence.

As confirmed during oral argument upon the Defendants' motions, the contracts at issue in this case contain indemnity provisions virtually identical to the indemnity provisions considered by the Court of Appeals in the matter of *Concord and Cumberland*, 424 S.C. 639, 645, 819 S.E.2d 166, 169–70 (Ct. App. 2018), *reh'g denied* (Oct. 18, 2018). Moreover, the parties to the instant action have agreed that the *Concord and Cumberland* ruling governs the Plaintiff's claims for contractual indemnity in this matter. Appropriate application of the *Concord and Cumberland* standards, to the contractual provisions at issue in the instant proceeding, clearly authorizes pursuit of contractual indemnity for damages caused by the **Defendants' own negligence** (as opposed to damages occasioned by the sole or current negligence of the Plaintiff), and, equally clearly, precludes summary judgement in favor of the Defendants.

This Court's December 6, 2019 Order correctly finds that the indemnity language at issue does not meet the elevated standard of being clear and unequivocal and thus the Plaintiff cannot maintain indemnification claims for Plaintiff's negligence. Nevertheless, pursuant to *Concord and Cumberland*, the

Plaintiff still has valid indemnification claims for Defendants' negligence. See *Concord and Cumberland*, 424 S.C. at 645, where the Honorable Clifton Newman found the subcontract's language did not clearly and unequivocally require Muhler to indemnify Superior for Superior's own negligence and limited indemnification to damages resulting from the work Muhler performed. Thus, the December 6, 2019 Order must be altered and amended accordingly such that the Plaintiff's claims for indemnification are limited to only those damages resulting from the work Defendants' performed. Therefore, the Defendants' motions for summary judgment with respect to the Plaintiff's claims for indemnification for the Defendants' negligence are denied.

B. The South Carolina Supreme Court has made it clear that claims for indemnification do not accrue until a judgment is entered.

The December 6, 2019 Order correctly finds that the *First General Services* ruling governs this matter with respect to the statute of limitations for indemnification claims. The South Carolina Supreme Court has made it clear that claims for indemnification do not accrue until a judgment is entered. See *First General Services* at 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). Because no judgement has been entered, the statute of limitations has not even begun, much less expired, on Plaintiff's indemnification claims, and thus the Defendants' motions for summary judgment must be denied. This Court's December 6, 2019 Order, determining that the statute of limitations had expired, notwithstanding the absence of any entry of judgment, is clearly contrary to authoritative Supreme Court ruling, and requires amendment of said order.

More importantly, the December 6, 2019 Order includes an omission of material fact with respect to the Plaintiffs' contractual indemnification claims. This omission of material fact serves as the only basis for the Court's "sharp distinction" from the *First General Services* case, and the sole basis for this courts' finding that the statute of limitations barred Plaintiff's indemnification claims for consequential damages. The December 6, 2019 Order states:

Specifically, the Complaint against ECC and Charleston Exteriors states that, "...BFS has been subjected to liability and has incurred consequential damages in having to expend attorney's fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolina, LLC in the underlying action." See *Complaint, Paragraph 33*.

December 6, 2019 Order p.7

The Court found that the above cited section from Paragraph 33 distinguishes this case from *First General Services* in that Plaintiff is seeking indemnification for consequential damages which began to accrue more than three years prior to filing the action. As a result, the Court ruled that the consequential damages cannot be recovered.

The December 6, 2019 Order is incorrect because Paragraph 33 of the Plaintiff's Complaint actually includes a qualifying statement to the Plaintiff's indemnification claims and is exactly on point with *First General Services*. As opposed to what the December 6, 2019 Order states, Paragraph 33 actually reads:

33. That to the extent, if any, that BFS may be held liable to the Plaintiffs and/or Lennar Carolinas, LLC, and/or to others in the underlying action, such liability would be a direct and proximate result of the wrongful acts,

omissions, negligence, and/or representations of ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC which have damaged BFS, as Builders FirstSource-Southeast Group, LLC, has been subjected to liability and has incurred consequential damages in having to expend attorneys fees and costs in defending against the claims of Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.

Plaintiff's Complaint pp.10, 11

It is critical that the allegation in Paragraph 33 be read in its entirety versus material words being omitted therein. The Plaintiff specifically includes the qualifying language "That to the extent, if any, that BFS may be held liable to the Plaintiffs and/or Lennar Carolinas, LLC, and/or to others in the underlying action,..." because that is what the parties agreed to under the contracts and that is what is allowed under the case law in South Carolina. Thus, the Plaintiff's indemnification claims are not distinguishable from those in *First General Services* and the December 6, 2019 Order must be altered and amended accordingly such that the statute of limitations does not bar the Plaintiff's consequential damages.

In brief summary, the December 6, 2019 Order, precluding contractual indemnity claims based upon the **Defendants' negligence**, is contrary to the specific ruling, addressing virtually identical contractual provisions, in the *Concord and Cumberland* matter. The Order also erroneously determined that the plaintiffs' claims were barred by the relevant statute of limitations, notwithstanding the absence of any prior judgment in favor of the Plaintiff. Both of the aforesaid considerations mandate denial of the Defendants' motions for summary judgment.

CONCLUSION

In conclusion, the December 6, 2019 Order must be altered and amended such that the Defendants' motions for summary judgment are denied with respect to Plaintiff's claims for indemnification for Defendants' negligence.

HOWELL, GIBSON & HUGHES, P.A.

By: s/William H. Cox, III
William H. Cox, III
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for Plaintiff

Beaufort, South Carolina

December 16, 2019

CERTIFICATE OF SERVICE

I certify that I served the foregoing Answer upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on 16th day of December, 2019.

By: s/William H. Cox, III
William H. Cox, III

EXHIBIT D

AMENDED ORDER GRANTING
CHARLESTON EXTERIORS, LLC'S
AND ECC CONTRACTING, LLC'S
MOTION FOR SUMMARY JUDGMENT

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Builders Firstsource-Southeast Group, LLC

Plaintiff,

V

MI Windows And Doors, INC.; ECC
Contracting, LLC; Hurley Services, LLC;
and Charleston Exteriors, LLC,

Defendant,

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL CASE NO. 2018-CP-08-02547

**AMENDED ORDER GRANTING
CHARLESTON EXTERIORS,
LLC'S AND ECC CONTRACTING,
LLC'S MOTION FOR SUMMARY
JUDGMENT**

This matter came before the Court on Friday, October 18th on the Motion for Summary Judgment of the Defendant Charleston Exteriors, LLC seeking dismissal of the Plaintiff's causes of action for breach of contract, negligence, breach of warranties, and indemnity. Present and participating in the argument were the movants counsel, C. Clay Olson, Esquire of Harper Little, PLLC and the Plaintiff was represented by Witt Cox, Esquire of Howell Gibson & Hughes.

ECC Contracting filed a similar, if not identical motion which was also heard. Counsel for ECC, Heyward Grimbail, Esquire of Richardson Plowden was in attendance to advocate and advance the arguments of ECC Contracting. The ECC Motion for Summary Judgment was heard concurrently with the Charleston Exteriors motion. The Court hereby rules on both Charleston Exteriors, LLC's Motion for Summary Judgment as well as ECC's Motion for Summary Judgment.

BACKGROUND

The Plaintiff, Builders First Source Southeast Group, Inc. ("BFS") is a supplier of building materials and components, as well as a provider of construction services for new construction and remodeling projects. BFS provided materials and services at a construction



project known as the “Abbey at Spring Grove” which is located in Moncks Corner, South Carolina.

The Abbey at Spring Grove (the “Abbey”) is a 69-home residential community situated in Berkeley County, South Carolina. The Abbey was developed by Lennar Carolinas¹. To be precise, the Abbey is a portion, or phase, of the larger Spring Grove Plantation development.

A lawsuit was filed in 2014 by Patricia Damico on behalf of herself and other owners within the Abbey at Spring Grove. *See Patricia Damico and Lenna Lucas, individually and behalf of all other similarly situated v. Lennar Carolinas, LLC, et al., Case No. 2014-CP-08-02424 (the “Underlying Class Action”)*. The underlying matter was amended on more than one occasion as the Plaintiff asserted exterior window claims on November 23rd, 2015.

On November 25th, 2015, Lennar Carolinas answered the Amended Complaint and asserted Third-Party claims against several of its contractors and suppliers. Among these Third-Party Defendants was Builders First Source who signed its responsive pleading on December 15th, 2015 and filed it on December 21st, 2015.

The case before the Court was filed on December 21st, 2018 in Berkeley County, South Carolina. The allegations made against Charleston Exteriors, LLC are derived from allegations made by the Plaintiff Damico and Lennar in the underlying lawsuit. Specifically, the Plaintiff and Lennar Carolinas have alleged that BFS was negligent in the installation of windows at the Abbey; that BFS breached its subcontract agreement with Lennar by virtue of the allegations made by the Plaintiff against Lennar; that BFS breached express and implied warranties as alleged in the underlying lawsuit; that Lennar is entitled to both contractual indemnification or, alternatively, equitable indemnification from BFS due to the claims made in the underlying

¹ Lennar Carolinas is not a party to this litigation. Lennar is a Defendant in the matter styled Damico v. Lennar Carolinas, LLC.

lawsuit. As a consequence of these claims made in the underlying lawsuit, BFS has brought this lawsuit alleging that Charleston Exteriors and ECC breached their subcontract with BFS, that Charleston Exteriors and ECC breached certain implied and/or express warranties with BFS; that BFS is entitled to contractual/equitable indemnification from Charleston Exteriors and ECC; and that Charleston Exteriors and ECC were negligent in the installation of the windows at the Project.

FINDINGS OF FACT

1. Builders First Source "BFS" was on actual notice of potential claims against Charleston Exteriors, LLC on December 15, 2015. There can be no other conclusion with regard to this issue upon reviewing the Answer of Builders First Source dated December 15th, 2015. See Exhibit "A"

2. BFS has not submitted a Memorandum of Law to rebut Charleston Exteriors argument that BFS was on notice of a potential claim against Charleston Exteriors on or before December 15th, 2015.

3. Uncontroverted testimony from the hearing, coupled with a review of the D'amico record shows that at no time did BFS attempt to amend its pleadings in the underlying suit against Charleston Exteriors, LLC.

4. BFS began defending the underlying lawsuit on or before December 15, 2015.

5. BFS began incurring costs and attorneys fees when it began to defend this case on or before December 15, 2015.

6. The Subcontract Agreements entered into by ECC and Charleston Exteriors with BFS contain language concerning indemnity and the prospect of these Defendants being forced to indemnify BFS for the negligence of BFS.

7. The contractual indemnification language referenced in Paragraph 6 is both confusing and contradictory at times. The language fails to clearly and unequivocally explain that these Defendants are obligated to indemnify BFS for BFS's negligence.

8. BFS failed to present any evidence suggesting that this lawsuit seeks damages for any acts or omissions which are separate or distinct from the underlying lawsuit. The Court concludes that the claims made in this lawsuit are wholly derivative of those brought in the Damico litigation.

9. BFS entered into a Master Subcontractor Agreement with Charleston Exteriors on October 17th, 2012.

LEGAL STANDARD APPLICABLE TO RULE 56 MOTIONS

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCF; see *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 487 S.E.2d 187 (1997)). "Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent may not simply rest on the mere allegations contained in the pleadings." *Grant v. Mount Vernon Mills*, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* at 151. Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984). "[W]hen plain, palpable, and

indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Hedgepath v. AT&T*, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

A. THE CLAIMS OF THE PLAINTIFF FOR NEGLIGENCE, BREACH OF CONTRACT, AND BREACH OF WARRANTIES ARE TIME BARRED

South Carolina recognizes the “discovery rule” when considering an action to be time barred. Under the discovery rule, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto. *Burgess v. American Cancer Society*, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989). Also, *Abba Equip., Inc. v. Thomason*, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999) The statute of limitations for negligence, breach of contract, and breach of warranties is three years. Compelling portions of the record in the underlying matter were presented by the Defendants which illustrates that the Plaintiff was on direct and actual notice of its potential claims against Charleston Exteriors and ECC on December 15th, 2015. Subsequently, more than three years went by before this lawsuit was filed on December 21st, 2018. These causes of action fail for being untimely.

B. DISGUISED INDEMNITY CLAIMS

Although the Court has already determined that claims of BFS for negligence, breach of contract, breach of warranties (“Non-Indemnity Claims) are each barred by the three-year statute of limitations, the Court will consider the Defendants’ additional argument. The Defendants have alleged that the Non-Indemnity claims must fail pursuant to the “Stonledge Defense” which bars claims that are disguised indemnification claims cloaked within separate

causes of action.² Upon hearing the oral arguments and reviewing memoranda presented to the Court, it is evident that the Plaintiff's Non-Indemnity claims do not exist outside of the derivative Damico lawsuit. They must, therefore, fail.

The allegations in this case make no separate or unique contention(s) which are in addition to the allegations made by Lennar and the Plaintiff in the *Damico* matter. Builders First Source has failed to provide any admissible record evidence that it sustained any separate or independent damages outside the scope of the Damico lawsuit. *See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not "suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit," trial court "properly granted summary judgment on [general contractor's] breach of contract and breach of warranty cross-claims because they are not independent causes of action from [the general contractor's] equitable indemnity claim");

C. MASTER SUBCONTRACT AGREEMENT INDEMNITY PROVISIONS ARE NEITHER CLEAR NOR EQUIVOCAL

The Defendants seek Summary Judgment as to Builders First Source's contractual indemnification claim on the ground that it violates South Carolina rules of contract construction. Section 5 of the Master Subcontract Agreement is confusing at best and deceptive at worst.

Section 5 contains two Paragraphs. The first paragraph seems to suggest that BFS may only seek indemnification for damages.....

ONLY TO THE EXTENT CAUSED. IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR

² Counsel for ECC and Charleston Exteriors presented memoranda and oral arguments consistent with the reasoning in a recent S.C. appellate case which is known as "Stoneledge" and is specifically cited as *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 776 S.E.2d 434, 439 (S.C. Ct. App. 2015)

INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.

Below this lengthy paragraph is an almost identically constructed paragraph which is slightly altered to indicate that BFS may seek indemnification from Charleston Exteriors for damages caused by the negligence of any person or entity. Specifically, the second paragraph suggests a duty to indemnify BFS.....

REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES.

The Court can only conclude that the Master Subcontract Agreement is not what our courts had in mind when setting precedent regarding “anti-indemnity” clauses in contracts. Typically, courts will construe an indemnification contract *"in accordance with the rules for the construction of contracts generally."* *Campbell*, 313 S.C. at 453, 438 S.E.2d at 272. However, when an indemnity clause purports *"to relieve an indemnitee from the consequences of its own negligence,"* our case law requires strict construction of the clause. *Laurens*, 355 S.C. at 111, 584 S.E.2d at 378-79. *"Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms."* *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). See *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018) see also *Murray v. Texas Co.*, 172 S.C. 399, 402, 174 S.E.2d 231, 234 (1934)(finding “broad and comprehensive” language was insufficient to prove the contract relieved a party from its own negligence).

BFS has failed to persuade the Court that its indemnity clause(s) in either subcontract meet the elevated standard of being a clear and unequivocal statement which leaves no question

as to BFS seeking indemnification for its own negligent acts or omissions. BFS has failed to demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contractual indemnity claims.

As South Carolina precedent requires that the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal when seeking to be indemnified for its own negligence, the Court rules that the specific language from the Master Subcontractor Agreement is confusing, conflicting, and neither unclear or unequivocal. The Defendants' Motions for Summary Judgment as to the contractual indemnity claims is hereby granted.

D. BUILDERS FIRST SOURCE'S CONTRACTUAL INDEMNIFICATION CLAIM IS ALSO BARRED PURSUANT TO THE RELEVANT STATUTE OF LIMITATIONS

The contractual indemnity claim(s) made by Builders First Source against ECC and Charleston Exteriors have also been challenged pursuant to the statute of limitations. As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant. *Choate v. United States*, 233 F. Supp. 463 (D.C. Okla. 1964) *First Gen. Servs. v. Miller*, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). Our courts, however, have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *See Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330 (Ct. App. 2015). In this case, BFS has pled that it is "entitled to full

contractual and common law indemnification for and against Liability”. *See Complaint, Paragraph 34.*

The Court draws further distinction in this case because the relief prayed for in the BFS complaint seeks consequential damages for attorney’s fees. Specifically, the Complaint against ECC and Charleston Exteriors states that, “....BFS has been subjected to liability and has incurred consequential damages in having to expend attorney’s fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.” *See Complaint, Paragraph 33; See also Paragraph 34* (“...entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorney’s fees, costs, and other expenses incurred in defending the underlying action... ”)

BFS began to incur liability for attorney’s costs and fees – damages it seeks in this litigation when its Answer was drafted and served. BFS’s Answer was executed and served more than three years prior to the filing of the present action. Thus BFS’s claims for “contractual and common law indemnification against Liability” are barred by the three year statute of limitations. SC. Code § 15-3-530 et seq.

The facts before the Court are distinguishable from the *First General Services* case in that BFS is seeking indemnification for damages which have begun to accrue more than three years prior to filing and, as a result, the Court is inclined to agree with the Defendants that consequential damages, as defined by the Complaint, began to accrue prior to December 15th, 2015 and, therefore, these damages cannot be recovered as Builders First Source discovered them more than three years prior to the filing of its lawsuit against Charleston Exteriors and ECC.

IT IS ORDERED that the Defendants Charleston Exteriors, LLC and ECC Contracting,

LLC's Motion for Summary Judgment is granted as to the following causes of action only:

- a. Negligence
- b. Breach of Contract
- c. Breach of Warranties
- d. Contractual Indemnity

IT IS ORDERED that these causes of action are hereby dismissed with prejudice and this ruling should serve precedent in the Damico matter as well.

THIS COURT FINDS THAT two claims remains which are subject to the Motion to Consolidate brought simultaneously by Builders First Source. The claims are for equitable indemnification and contribution. The Court finds that these claims are subject to consolidation with the related D'Amico matter which remain stayed until further notice or order.

IT IS FURTHER ORDERED that the cause of action for equitable indemnification involves a question for the jury and the Motion for Summary judgment is, therefore, denied as to that cause of action. The Plaintiff's Contribution claim survives as it was not before me as part of this motion for summary judgment.

AND IT IS SO ORDERED this ____ day of __, 2020, at ____, South Carolina.

Clifton B. Newman Presiding Judge



Berkeley Common Pleas

Case Caption: Builders Firstsource-Southeast Group, Llc VS Mi Windows And Doors, Inc. , defendant, et al

Case Number: 2018CP0802547

Type: Order/Summary Judgment

So Ordered

s/ Clifton B. Newman, 2127

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