

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF YORK ) NINTH JUDICIAL CIRCUIT  
CASE NUMBER: 11-CP-46-4552

FAIRWAY TOWNES OWNERS'  
ASSOCIATION, INC.,

Plaintiff,

vs.

NVR, INC., STONECUTT, LLC, LAKE  
BUILDERS, INC., HANS  
CONSTRUCTION COMPANY, INC.,  
McGEE BROTHERS COMPANY, INC.,  
ALPHA & OMEGA CONSTRUCTION  
COMPANY, MI WINDOWS AND DOORS,  
INC., JUAN A. JIMENEZ D/B/A AJJ  
ROOFING CONSTRUCTION, LLC,  
ALBERTO RAMOS D/B/A OLDY  
CONSTRUCTION, VICTOR OLIVIA-  
CLEMENTE D/B/A MARRANA  
CONSTRUCTION, ANDRES ABELINO  
GAVARRETE SERRANO A/K/A ANDRES  
GAVARRETE D/B/A ANDRES  
GAVARRETE CONSTRUCTION,  
QUETZA CONSTRUCTION COMPANY,  
AND ALFANSO CONSTRUCTION,

Defendants.

LAKE BUILDERS, INC.,

Third-Party Plaintiff,

vs.

JAMES THOMPSON d/b/a JAMES  
THOMPSON CONSTRUCTION, RON  
MEYERS CONSTRUCTION, INC., AMY  
MORENO d/b/a XTREME FRAMING, JOSE  
MORENO, JORGE TORRES d/b/a JAT  
CONSTRUCTION,

Third-Party Defendants,

**THIRD  
AMENDED COMPLAINT  
(Jury Trial Demanded)**

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DAVID H. HARRIS  
C.C. CP. 2.05  
YORK COUNTY, SC

EXHIBIT

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Plaintiff, Fairway Townes Owners' Association, Inc., avers as follows:

**PARTIES, CAPACITY AND JURISDICTION**

1. Plaintiff Fairway Townes Owners' Association, Inc. is a non-profit South Carolina corporation having its principal place of business in York County, South Carolina. (hereinafter "HOA, Inc."), and pursuant to documents prepared by the Developers below, is charged with the management and maintenance of Fairway Townes, a 177 unit townhome development in York County ("the Project").

2. Defendant NVR, Inc., upon information and belief, is a Virginia corporation, doing business in South Carolina, located at 11700 Plaza America Drive, Suite 500, Reston, Virginia, 20190, and acted as the General Contractor, or Builder of the Project.

3. Defendant Stonecutt, LLC, (hereinafter "Developer"), is a South Carolina corporation having its principal place of business in York County, South Carolina, and acted as the Land Developer of the Project.

4. Defendant Lake Builders, Inc., (hereinafter "Subcontractor"), upon information and belief, is a corporation organized under the laws of the State of North Carolina, and was the framing Subcontractor on the Project.

5. Defendant Hans Construction Company, Inc., (hereinafter "Subcontractor"), upon information and belief, is a corporation organized under the laws of the State of North Carolina, and was the vinyl siding Subcontractor on the Project.

6. Defendant McGee Brothers Company, Inc., (hereinafter "Subcontractor"), upon information and belief, is a corporation organized under the laws of the State of North Carolina, and was the masonry Subcontractor on the Project.

7. Defendant Alpha & Omega Construction Company, (hereinafter "Subcontractor"), upon information and belief, is a corporation organized under the laws of the State of North Carolina, and was the shingle roofing Subcontractor on the Project.

8. Defendant MI Windows and Doors, Inc., (hereinafter "MI Windows"), is a window manufacturer which manufactured and sold the windows installed at Fairway Townes. It, upon information and belief, is incorporated in multiple states, none of which are South Carolina, and has and currently is doing business in South Carolina.

9. Defendant Juan A. Jimenez d/b/a AJJ Roofing Construction, LLC, (hereinafter "Subcontractor"), upon information and belief, was a roofing Subcontractor on the Project, performing said work as AJJ Roofing Construction, LLC, a Limited Liability Company organized under the laws of the State of North Carolina.

10. Defendant Alberto Ramos d/b/a Oldy Construction, (hereinafter "Subcontractor"), was a roofing Subcontractor on the project, performing said work as Oldy Construction, a Corporation organized under the laws of the State of North Carolina.

11. Defendant Victor Olivia-Clemente d/b/a Marrana Construction, (hereinafter "Subcontractor"), was a roofing Subcontractor on the project, performing said work as Marrana Construction, which, upon information and belief, is a foreign company.

12. Defendant Andres Abelino Gavarrete Serrano a/k/a Andres Gavarrete d/b/a Andres Gavarrete Construction, (hereinafter "Subcontractor"), was a roofing Subcontractor on the project, performing said work as Andres Gavarrete Construction, which, upon information and belief, is a foreign company.

13. Defendant Quetza Construction Co., (hereinafter "Subcontractor"), upon information and belief, is a foreign company, and was a roofing Subcontractor on the project.

14. Defendant Alfonso Construction, (hereinafter "Subcontractor"), upon information and belief, is a foreign company, and was a roofing Subcontractor on the project.

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

#### **FACTUAL ALLEGATIONS**

16. This action involves construction defects at the Planned Unit Development complex located in York County, South Carolina, which is commonly known as Fairway Townes, for which the Plaintiff has the maintenance and management responsibility.

17. The buildings at issue consist of forty-one (41) separate buildings containing 177 two-story townhomes constructed between 2005 and 2007. The buildings are wood framed with OSB sheathing, and the exterior cladding consists of a combination of vinyl siding and brick veneer. The main roofs are finished with laminated asphalt composition shingles, and some units feature standing seam metal roofs at first floor bay windows and garages.

18. Pursuant to the Declaration of Covenants, Conditions, and Restrictions for Fairway Townes, filed with the York County Land Records Office at Book 07115, Page 00319, the HOA, Inc., is charged with, among other things, the duty to repair and maintain the building envelopes and roofs as exterior common elements.

19. Due to water intrusion and leaking problems reported at the Project, a forensic investigation was performed on the subject buildings to determine whether there existed construction deficiencies and/or unsatisfactory performance conditions within the building envelopes and roofs.

20. Pursuant to the forensic investigation which included destructive testing, the Plaintiff has learned that the subject buildings have significant construction defects, such that extensive repairs and replacement will be necessary for all building envelopes and roofs, that

these defects include defects in vinyl siding, masonry, asphalt roofs, metal roofs, and window installation.

21. The defects and deficiencies are pervasive throughout the Project and have resulted in continuous exposure to harmful conditions, including moisture and water intrusion that has damaged or will damage, portions of the common elements of the buildings. This damage has occurred both during construction and continuously thereafter until the present.

22. Furthermore, the water intrusion and moisture exposure is the unexpected, accidental result of the negligence of the Defendants and has resulted in and caused damages to the Plaintiff. These damages have occurred as consequences of the Defendants' negligence, are as a consequence of an occurrence or multiple occurrences, and have continued throughout from initial construction until the present day, and are continuing. The Defendants, jointly and severally, failed to perform their work in accordance with applicable building codes and industry standards and failed to properly oversee and/or supervise their employees, agents, and subcontractors.

23. The Windows are defective and fail to properly perform in at least the following ways:

(a) The Windows permit water intrusion, water penetration, and leaks which result in damage that includes but is not limited to premature wood rot;

(b) The Windows are designed and manufactured by Defendant with the same adhesive-coated foam glazing tape between the glass and vinyl designed to prevent water intrusion. Defendant improperly installed the foam sealant tape, as recommended or required by the foam sealant tape manufacturer. Due to Defendant's improper manufacture, design, and

installation, the adhesive-coated foam glazing tape prematurely fails and results in water intrusion, water penetration, and leakage at or around the glazing beads of the Windows;

(c) The Windows are designed and manufactured by Defendant with the same poorly designed, inadequate and defective weep system that is not capable of efficiently and effectively discharging water thereby permitting water intrusion, water penetration and leakage into the main structure;

(d) The Windows are designed and manufactured by Defendant with the same defective dam configuration at the windowsill which is incapable of being adequately sealed to prevent water intrusion, water penetration, and leakage;

(e) Defendant improperly relied on other sealants in or over sill joints that are not capable of preventing long-term water intrusion; and

(f) Defendant designed, manufactured, distributed, and sold Windows that are not of sufficient depth to fill a typical wall opening in which the Windows are installed. As a result, Defendant sells “jamb extensions”<sup>1</sup> for the Windows or permits window installers to attach their own jamb extension to the Windows. Defendant attaches the jamb extension to the Windows by using screws that pierce the sill frame and other portions of the frame, resulting in water intrusion and improper sash function.

24. These inherent defects existed at the time of manufacture and at the point of sale of the Windows to purchasers, and failure due to these defects occurs during the normal and ordinary use of the Windows.

25. Upon information and belief, the construction defects and deficiencies exist in the common elements of all buildings, and the extent of the damages and defects cannot be fully assessed or repaired without removing extensive components of the buildings.

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<sup>1</sup> A jamb extension is a piece of wood or composite wood that is used to widen the frame of a window.

26. The fortuitous events complained of herein, included repeated exposure to substantially the same harmful conditions, were the result of faulty workmanship completed by the subcontractors Defendants hired by the General Contractor. These events were not intended or foreseen, were an accident, and resulted in property damage after operations were completed by the General Contractor.

27. Plaintiff is responsible for the maintenance of the common elements and has been damaged, and will continue to be damaged by, among other things, the negligent and defective construction, development, and sale by the Defendants. Furthermore, as a direct and proximate result and consequence of the numerous construction defects and problems caused by Defendants, Plaintiff will be required to spend substantial sums of money for the investigation, repair, and reconstruction of all of the common elements of the Project.

**FOR A FIRST CAUSE OF ACTION**  
**Negligence, Gross Negligence,**  
**Recklessness and/or Wantonness**  
**(General Contractor and Subcontractors)**

28. Plaintiff incorporates into this cause of action the allegations in the paragraphs above as fully as if repeated verbatim herein.

29. Defendant General Contractor and Subcontractors owed a duty to Plaintiff to exercise that degree of skill necessary to ensure that the Project was built in conformity with the customary and ordinary standards of the building and construction industry and all applicable building codes and to otherwise deliver the buildings free of construction defects.

30. The deficiencies and defects which exist at the Project are the proximate and direct result of the negligence, gross negligence, recklessness and/or wantonness of the General Contractor and Subcontractors in one or more of the following particulars:

- (a) in failing to properly construct the Project by deviating from the plans and



specifications and/or by failing to employ practices and methods of construction conforming with accepted industry standards; and/or using defective materials; and/or installing materials not in accordance with the plans and specifications, or in violation of manufacturer's instructions;

- (b) in failing to properly supervise the subcontractors and/or other trades in order to ensure that all work proceeded in accordance with the plans and specifications and also in conformance with the customary and ordinary standards of the construction industry;
- (c) in accepting non-conforming and/or defective materials and labor;
- (d) in accepting and performing deficient and/or defective workmanship and/or materials without proper inspection to ensure the work was correct and in conformity with industry standards and in accordance with the plans and specifications and manufacturer's instructions;
- (e) in constructing the Project in violation of applicable building codes; and
- (f) in failing to adequately construct a waterproofing system, building envelope and/or veneer on the buildings such as to allow water to infiltrate and damage the components of the buildings.

31. The deficiencies in the defective construction have, among other things, allowed water to intrude into the buildings resulting in rot, deterioration and damage to the components of the buildings in the Project.

32. As a direct and proximate result and consequence of negligence, gross negligence, recklessness and/or wantonness of the General Contractor and Subcontractors, Plaintiff has suffered, and will continue to suffer, injuries and damages, including, but not limited to, an amount equal to the repair, maintenance and reconstruction costs required, and to be required, over the expected life of the Project. Furthermore, as a result of the numerous construction defects and problems caused by the General Contractor and Subcontractors, Plaintiff has spent, and will continue to spend, substantial sums of money for the assessment, repair and reconstruction of major portions of the common elements of the Project.



33. The deficiencies have allowed water to intrude into the buildings causing rot, deterioration and damage to components of the buildings.

34. As a direct and proximate result and consequence of the negligence, gross negligence, recklessness and/or wantonness of Defendants, Plaintiff has suffered, and will continue to suffer, injuries and damages, including, but not limited to, an amount equal to the repair, maintenance and reconstruction costs required, and to be required, over the expected life of the Project. Furthermore, as a result of the numerous construction defects and problems caused by Defendants, Plaintiff has spent, and will have to continue to spend, substantial sums of money for the assessment, repair and reconstruction of major portions of the common elements of the Project.

**FOR A SECOND CAUSE OF ACTION**  
**Breach of Fiduciary Duty**  
**(Developer Stonecutt)**

35. Plaintiff incorporates into this cause of action the allegations in the paragraphs above as fully as if repeated verbatim herein.

36. Defendant Stonecutt, as Developer, owed fiduciary duties to the Plaintiff, including a duty to turn over the common elements of the Project in good condition or to provide the Plaintiff with the funds necessary to repair the common elements.

37. Defendant breached this duty to Plaintiff by failing to turn over common elements in good condition, and by failing to provide the funds necessary to repair the common elements of the Project.

38. As a direct and proximate result and consequence of Developer's breaches of its fiduciary duties, Plaintiff has suffered, and will continue to suffer, damages, including, but not limited to, an amount equal to the repair, maintenance and reconstruction costs required, and to

be required, over the expected life of the Project. Furthermore, as a result of the numerous construction defects and problems caused by Developer, Plaintiff has spent, and will continue to spend, substantial sums of money for the assessment, repair and reconstruction of major portions of the common elements of the Project.

39. As a direct and proximate result of the Defendant's negligence, breach of fiduciary duties, and breach of implied warranties, Plaintiff has suffered, and will continue to suffer, injuries and damages, including, but not limited to, an amount equal to the repair, maintenance and reconstruction costs required, and to be required, over the expected life of the Project. Furthermore, as a result of the numerous construction defects and problems caused by the Defendant, Plaintiff has spent, and will continue to spend, substantial sums of money for the assessment, repair and reconstruction of major portions of the common elements of the Project.

**FOR A THIRD CAUSE OF ACTION**  
**Breach of Implied Warranties**  
**(General Contractor and Subcontractors)**

40. Plaintiff incorporates into this cause of action the allegations in the paragraphs above as fully as if repeated verbatim herein.

41. Defendant General Contractor and Subcontractors warranted all workmanship performed and materials furnished on the Project.

42. Defendant General Contractor and Subcontractors warranted that all materials and methods used in the construction of the Project were of high quality and that their work would be free from defects and completed in a good and workmanlike manner.

43. Defendant General Contractor and Subcontractors breached their respective warranties by constructing the Project in a defective manner in one or more of the following particulars:

- (a) in failing to properly construct the Project by deviating from the plans and specifications and/or by failing to employ practices and methods of construction conforming with accepted industry standards; and/or using defective materials; and/or installing materials not in accordance with the plans and specifications, or in violation of manufacturer's instructions;
- (b) in failing to properly supervise the subcontractors and/or other trades in order to ensure that all work proceeded in accordance with the plans and specifications and also in conformance with the customary and ordinary standards of the construction industry;
- (c) in accepting non-conforming and/or defective materials and labor;
- (d) in accepting and performing deficient and/or defective workmanship and/or materials without proper inspection to ensure the work was correct and in conformity with industry standards and in accordance with the plans and specifications and manufacturer's instructions;
- (e) in constructing the Project in violation of applicable building codes; and
- (f) in failing to adequately construct a waterproofing system, building envelope and/or veneer on the buildings such as to allow water to infiltrate and damage the components of the buildings.

44. As a direct and proximate result and consequence of the General Contractor and Subcontractors' breaches of their express and implied warranties, Plaintiff has suffered, and will continue to suffer, injuries and damages, including, but not limited to, an amount equal to the repair, maintenance and reconstruction costs required, and to be required, over the expected life of the Project. Furthermore, as a result of the numerous construction defects and problems caused by the General Contractor and Subcontractors, Plaintiff has spent, and will continue to spend, substantial sums of money for the assessment, repair and reconstruction of major portions of the common elements of the Project.

**FOR A FOURTH CAUSE OF ACTION**  
**Negligence**  
**(Window Manufacturer)**

45. Plaintiff incorporates into this cause of action the allegations in the paragraphs above as fully as if repeated verbatim herein.

46. At all times, Defendant MI Windows is and has been engaged in the business of designing, manufacturing, distributing, marketing and selling the Windows throughout the United States, including the state of South Carolina.

47. Defendant MI Windows had a duty to Plaintiff to design, manufacture, and sell single-hung vinyl windows that were free of defects.

48. Defendant MI Windows had a duty to properly test the Windows and the Windows' components to ensure the Windows and components were free from defects and complied with industry standards.

49. Defendant MI Windows had a duty to disclose to purchasers, including Plaintiff, material facts concerning the Windows, including but not limited to the defects present in the Windows, the failure of the Windows to properly perform, and the existence of negative field reports concerning these defects and failures.

50. Defendant MI Windows failed to use reasonable care and failed to comply with the minimum industry standards in the design, manufacture, and sale of the Windows to purchasers, including Plaintiff.

51. Defendant MI Windows breached its duties to Plaintiff by:

(a) failing to use reasonable and ordinary care and failing to comply with minimum industry standards in the design, manufacture, and sale of the Windows to purchasers, including Plaintiff;

(b) failing to properly test the Windows and The Window components to ensure the Windows did not contain any defects and complied with minimum industry standards prior to the marketing, distribution, and sale of the Windows to purchasers, including Plaintiff; and

(c) failing to disclose to purchasers, including Plaintiff, material facts, including but not limited to the defects present in the Windows, the failure of the Windows to properly perform, and the existence of negative field reports concerning these defects and failures.

52. Defendant MI Windows' conduct was negligent, careless, willful, reckless, and wanton.

53. Plaintiff has been damaged as a direct and proximate result of the negligence, carelessness, willfulness, recklessness, and wantonness of Defendant MI Windows' acts and omissions as described herein.

**FOR A FIFTH CAUSE OF ACTION**

**Breach of Implied Warranties of Merchantability and Fitness for a Particular Purpose  
S.C. Code Ann. §§ 36-2-313, 36-2-314, and 36-2-315  
(Window Manufacturer)**

54 Plaintiff incorporates into this cause of action the allegations in the paragraphs above as fully as if repeated verbatim herein.

55. At all times, Defendant MI Windows is and has been engaged in the business of designing, manufacturing, distributing, marketing and selling the Windows throughout the United States, including the state of South Carolina.

56. At all times, Defendant MI Windows is and has been a merchant and seller of the Windows, and Defendant MI Windows sold the Windows to the Plaintiff's vendor, NVR.

57. Every Window sold by Defendant MI Windows, including all Windows sold to NVR and then to Plaintiff, expressly affirms, promises, warrants, and represents that the Windows were appropriate for their intended use and were free from defects.

58. Defendant MI Windows expressly and impliedly warranted to Plaintiff that all of the Windows were merchantable and fit for their ordinary, particular, and intended use and purpose as a single-hung vinyl window.

59. However, the Windows sold by Defendant MI Windows to Plaintiff are not appropriate for their intended use, are not free from defects, are not merchantable, and are unfit for their ordinary, particular, and intended use and purpose.

60. The Windows sold by Defendant MI Windows to Plaintiff contain defects, as described herein, that allow water intrusion, water penetration, and leakage.

61. The Windows sold by Defendant MI Windows to Plaintiff are not merchantable or fit for their ordinary, particular, and intended use and purpose as a single-hung vinyl window. The Windows contain defects, as described herein.

62. Defendant MI Windows breached its express and implied warranties to Plaintiff that the Windows were merchantable at the time of delivery, thus depriving Plaintiff of the product they bargained for – a single-hung vinyl window free of defects.

63. Defendant MI Windows breached its express and implied warranties to Plaintiff that the Windows were fit for their ordinary, particular, and intended use and purpose as a single-hung vinyl window at the time of delivery.

64. Defendant MI Windows breached its express and implied warranties to Plaintiff that the Windows were free from defects.

65. By virtue of the defect and Defendant MI Windows' knowledge of the defect as alleged herein, Defendant MI Windows has received notice of the breaches of the express and implied warranties.

66. By virtue of previously filed lawsuits concerning the defects as alleged herein, Defendant MI Windows is on notice of the breaches of the express and implied warranties.

67. The element of privity, if found to be applicable, exists vis-à-vis Defendant MI Windows and Plaintiff because: (i) Defendant MI Windows has had direct written communications with Plaintiff with regard to the Windows via standardized warranty forms; and (ii) Defendant MI Windows has entered into contracts with Plaintiff in connection with the assurance of the warranties at issue.

68. As a direct and proximate result of Defendant MI Windows' breaches, Plaintiff has suffered monetary loss.

**FOR A SIXTH CAUSE OF ACTION**  
**Unfair Trade Practices**  
**(Window Manufacturer)**

69. Plaintiff incorporates into this cause of action the allegations in the paragraphs above as fully as if repeated verbatim herein.

70. The Plaintiff and Defendant MI Windows are "persons" within the meaning of S.C. Code § 39-5-10(a).

71. Defendant MI Windows by developing, selling and marketing the windows at issue at Fairway Townes were engaged in commerce within the meaning of S.C. Code § 39-5-10(b).

72. Defendant MI Windows' actions, described hereinabove, constitute unfair and deceptive practices within the meaning of S.C. Code § 39-5-20(a).

73. Defendant MI Windows' acts are capable of repetition, and, upon information and belief, have been repeated, and in fact are the subject of National Class Action litigation.

74. Defendant MI Windows' conduct affects the public interest of South Carolina.



75. Defendant MI Windows knew, or reasonably should have known, that its conduct violated the Unfair Trade Practices Act.

76. As a direct foreseeable and proximate result of Defendant MI Windows' unfair and deceptive practices, the Plaintiff has suffered an ascertainable loss of money and property.

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

WHEREFORE, Plaintiff prays for a judgment against Defendants, jointly and severally, for all damages, including actual, consequential and punitive damages, together with interest, attorney's fees and costs, and such other and further relief as the Court deems appropriate, and for treble damages and attorneys' fees against Defendant MI Windows and Doors, Inc. pursuant to S.C. Code § 39-5-10, et seq.

Plaintiff hereby demands a trial by jury.

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Dated: March 13, 2013