JUDICIAL ARBITER GROUP, INC. JAG Case No. 2022– 1608A

In Re the Arbitration of:

Holly Smith and Ben Smith,

Claimants,

v.

Hephaistos Enterprises, Inc. d/b/a Liscott Custom Homes, Ltd.,

Respondent.

CLAIMANTS' CLOSING ARGUMENT, PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Claimants Holly Smith and Ben Smith ("Claimants" or the "Smiths") by and through their attorneys, West Huntley Gregory PC, hereby submit their Closing Argument, Proposed Findings of Fact, Conclusions of Law and Judgment.

I. SUMMARY

This action arises out of the construction of a residence ("Project") in Summit County, Colorado identified as Lot 5 Block 16 Whispering Pines Ranch Sub # 8, with a street address of 101 Mule Deer Court, Dillon, CO 80435 ("Property"). Claimants are the owners of the Project, and Respondent Hephaistos Enterprises, Inc. d/b/a Liscott Custom Homes, Ltd. ("Respondent" or "Liscott") was the vendor of the modular units and general contractor for the Project.

An arbitration hearing was conducted via Zoom on October 2-5, 9, and 18 with Judge Naves ("Arbitrator") presiding. At the arbitration hearing, Claimants offered evidence in support of their claims. Numerous exhibits were offered into evidence[1], and the Arbitrator heard the testimony of Claimant Ben Smith, Edward L. Fronapfel ("Fronapfel") of SBSA, LLC, Darwin L. Cooprider ("Cooprider") of Charles Taylor Adjusting & Technical Services, Dana Tompkins ("Tompkins") of Heritage Homes of Nebraska, Inc., Drew Schneider ("Schneider") of Insight Engineering, Roger Mathew ("Mathew") of Infinity Certified Welding & Fabrication, Inc.,

[1] A complete list of the exhibits received by the Arbitrator during the proceedings is attached hereto as **Appendix A**.

Brittany Niggeler ("Niggeler") of CTL/Thompson, Inc., Garrett Spiker ("Spiker") of MJ Doors & More LLC, Michael Shambarger ("Shambarger") of FirstBank, Sam McGlamery ("McGlamery") and Ted Isbell ("Isbell") of Vertex Companies, Rob Cowley ("Cowley") for Respondent, and Shona Osborne ("Osborne").

II. CLOSING ARGUMENT

Over the course of six days of testimony, Claimants presented a complete and detailed timeline of events depicting a project that was mired in Liscott's missteps and utter lack of management from day one. Claimants have proven by a preponderance of the evidence that Liscott breached the agreements it made with the Smiths in myriad ways, but most importantly by failing to meet the standard expressly set forth in its General Contracting Agreement ("GC Contract") that "the work will be performed in a reasonable and workmanlike manner and will conform to industry standards and will be in compliance with all codes, laws, ordinances, rules or requirements of any governmental agency." Exhibit 2, para. 6. The GC Contract, also promised that "all materials and equipment furnished under the contract shall be new and in conformance with the Contract Documents." *Id*.

Ben Smith described in his testimony the defects he and his wife began to uncover in their home in late April 2022 once it was brought to their attention by Garrett Spiker, the panoramic door subcontractor, that the middle of their living room floor was two inches lower than the rest of the floor. Once Spiker presented this information to Liscott, Rob Cowley attempted to prevent the Smiths from discovering this troubling problem.

Ed Fronapfel, a highly esteemed expert in structural engineering explained in great detail, the significant defects he and his colleague Darwin Cooprider discovered at the Property, derived from personal observations, photos, and videos, as set forth in his report. *See* Ex. 104, CTETS Report. Liscott's failures led to significant damages as outlined in detail in Cooprider's testimony and as provided in his Opinion of Costs of Repair. *See* Ex. 106.

In addition to the damages described by Cooprider, we heard testimony from Fronapfel, Dana Tompkins, president of Heritage Homes, and even Respondent's expert witness, Sam McGlamery, that called into question whether the modular units ("Modules") have maintained their structural integrity due to Liscott's shocking failure to set and marry the Modules flush both vertically and horizontally, thus causing "racking" in the Modules, as described by Fronapfel. The structural integrity of the Modules was further compromised by the sinking and subsequent raising of the Modules, putting great amounts of stress on the framing and fasteners. Fronapfel also testified that the Modules as delivered by Heritage appeared to be compliant in all material respects with IRC Code 2018, but after months of incompetent work by Liscott, the units no longer met IRC Code 2018. Accordingly, the Smiths submit to the Arbitrator that they are indeed entitled to damages to replace the Modules that are now defective.

Critically, the Smiths contracted with Liscott for the purchase of new modular units from Heritage Homes, as well as a completed home with a certificate of occupancy, constructed in a reasonable and workmanlike manner. Rather than receiving what they bargained for, the Smiths

have been provided with a structure riddled with defects, lacking in structural integrity, that can now only be completed by deconstructing it down to the foundation and starting over again.

Once the defects, such as the poorly installed structural steel beam and unlevel foundation were acknowledged by Liscott, they failed to correct these defects in a reasonable and workmanlike manner or according to the Contract Documents. In fact, we heard testimony from both Fronapfel and Tompkins that the time to correct the foundation and ensure the homes were properly set was on day one, the day the modular units were set. Either Liscott failed to recognize this significant defect, or it disregarded the defect and forged forward without addressing it, and without disclosing this material detail about the Project to the Smiths.

Surprisingly, Cowley admitted during his testimony that he knew the foundation was not plumb or level early in the project and also knew the structural steel beam was not compliant with the Contract Documents. Rather than inform the Smiths or address these obvious construction defects, he continued on with the Project making it significantly more difficult and costly to properly correct these defects months down the line. The Smiths submit Cowley never intended to tell the Smiths about these defects, and that Cowley did not anticipate the Smiths would find out on their own, at least until the Project was complete and Liscott was long gone. Either event would be a breach of Liscott's standard of care, as well as a clear violation of the implied duty of good faith and fair dealing.

This lack of attention to detail derived from very poor, or in some cases, even non-existent oversight, is present throughout the entire Project. For example, we heard testimony from the Smiths' neighbor, Shona Osborne, that she witnessed three men, who were completely unsupervised, attempt to install the garage trusses, which were more than thirty feet long by hand, without a crane or special equipment. In the end, the three men dropped and broke one of the trusses. Ben Smith was never informed that this occurred, and shockingly Smith himself was the one who ultimately informed Rob Cowley the trusses had been broken.

In turn, Liscott essentially brushed it off and blamed the broken trusses on the weather, when in fact, most of the trusses were broken when Liscott clumsily attempted to yank the trusses out of the ice that had formed on top of them due to Liscott failing to tarp the trusses appropriately, and another was broken when it was dropped by careless workers. The defects in this project, typified by the above illustration of how the trusses were treated from their storage to their installation, are shocking failures to heed "Building 101" type principles. The missteps at every turn make it appear Liscott employed subcontractors on the Smith job who had absolutely zero building experience. Again, a clear breach of Liscott's standard of care.

As it has done from the beginning of this dispute, Liscott did very little during the course of the arbitration hearing to rebut or deny the defects the Smiths have alleged. Indeed, Liscott's own retained experts, McGlamery and Isbell, agreed with Fronapfel and Cooprider, regarding a majority of the defects found at the Property. Moreover, the Smiths have proven that throughout the course of the Project, Liscott was either unaware of their poor workmanship or was actively concealing it from the Smiths. This left Liscott with a rather hollow defense that even though the work was defective, it was not yet complete so Liscott should be left off the hook.

There is nothing in the GC Contract, however, that requires the Smiths to allow Liscott an opportunity to cure, let alone multiple opportunities to cure. The Smiths, rather astutely and, quite reasonably came to the conclusion after seeing the ham-fisted way in which Liscott re-leveled the home in late May 2023, and determined Liscott could not be trusted to continue "repairing" the Property's defects. Thus, the Smiths terminated the Contract due to Respondent's substantial breaches. Liscott has effectively acknowledged its breach of the Contract by presenting little defense to the defects alleged by the Smiths, thus the only remaining matter to determine is the amount of damages the Smiths are owed.

The Smiths acknowledged in Ben Smith's testimony they were responsible for landscaping, fencing, installation of the driveway, garage insulation, garage drywall, and basement drywall. Cooprider's Opinion of Cost of Repairs included the cost of landscaping in the amount of $50,000, which the Smiths acknowledge should not be included in their damages calculation. Ex. 106, p. 16. Accordingly, the Smiths submit their cost of repair damages in the amount of $1,599,389.70.[2]

In addition, pursuant to the testimony of Fronapfel, Tompkins, Ben Smith, and even Vertex, that the structural integrity of the Modules cannot be guaranteed, the Smiths submit they are entitled to damages to replace the Heritage Modules with new modules in the amount of $573,141.82, which equals the total cost of the original Modules. *See* Ex. 163, pp. 1 and 3.[3]

The Smiths have also proven, through the testimony of Ben Smith and Shambarger, substantial loss of use damages. Smith testified it will likely take eighteen months to repair and rebuild the Property. Accordingly, and conservatively, as reflected in Smith's 6th Supplemental Disclosures, attached as Exhibit 8 to their Trial Brief, the Smiths are requesting damages for loss of use throughout the time period beginning January 1, 2022 through October 1, 2024. During this time period, the Smiths will have paid $156,414.99 in mortgage payments for a home they will not be able to occupy.[4] The Smiths have also proven through testimony and Ex. 99, that their home has diminished in value due to Liscott's defects in the amount of at least $334,215.00.

Accordingly, the Smiths are entitled to actual damages in the amount of $2,663,161.40.

In the alternative, the Smiths submit they are entitled to damages in the amount of the value of their Property if their home had been completed. The Smiths presented testimony through Ben Smith, as well as public records from the Summit County Assessor, depicting a consistent value of the neighboring properties on their cul-de-sac. *See* Ex. 103. Accordingly, the Smiths submit their Property would be worth $2,400,000 if Liscott had fully performed their

[2] Ex. 106, p. 17, reflects a Subtotal in the amount of $992,494. Claimants arrived at their adjusted damages amount for Costs of Repairs by reducing the subtotal amount by $50,000 and making the appropriate percentage calculations as provided by Cooprider, for Project General Conditions (8.5%), Umbrella Liability, General Liability and Building Permit (5.95%), Overhead (10%), Profit (10%), Contingency (10%), and Design Fee (12%).

[3] While Tompkins testified the modular units needed to replace the Smiths' units have almost certainly increased since they were purchased in 2021, the Smiths are merely asking for the cost of the original Modules.

[4] According to Shambarger and Ben Smith's testimony, the Smiths' monthly mortgage payment to First Bank is $4,855.63.

contractual duties. Thus, the alternative measure of the Smith's damages pursuant to CDARA would be $2,400,000.

III. PROPOSED FINDINGS OF FACT

The Arbitrator finds that it has jurisdiction over the matter, and venue is proper pursuant to C.R.C.P. Rule 98. The Arbitrator additionally finds, and the testimony at trial showed, as follows:

A. THE AGREEMENTS

a. The Purchase Agreement

In June of 2020, Claimants entered into a Purchase Agreement ("Purchase Agreement") with Respondent. The Purchase Agreement sets out that Claimants were to purchase a modular home from Heritage Homes ("Heritage") and that Respondent would perform certain tasks related thereto.[5] The Purchase Agreement, received as **Exhibit 1**, made Respondent responsible for, among other things:

> Placing home/building unit(s) on foundation using a crane or other methods necessary, using lag bolts and attaching home to the customer-provide sill plates as recommended by manufacturer installation guide. Roof cap installation per drawing unless otherwise noted.
>
> Crane service to set home/building unit(s) onto customer provided foundation/sill plates/beam.
>
> Attachment of the home/building unit(s) to the foundation per the factory set manual. A licensed set crew will be used by Respondent.
>
> Installation of the marriage line drywall, tape/texture and painting of these areas.
>
> Repairing drywall cracks that may have occurred during transport and set as necessary.
>
> Interior touch-up paint as necessary.
>
> Install interior doors, interior trim, not installed by the factory, but shipped with the home/building as necessary.
>
> Adjust all factory installed interior and exterior doors to make sure they are

[5] As discussed by Tompkins and Cowley in their testimony, Liscott was an approved distributor of Heritage Homes and Liscott was paid directly by the Smiths for the purchase of the Modules. Liscott paid Heritage by separate agreement.

working properly once on the foundation.

Adjust, if required, any windows to make sure they are operating properly, once home/building unit(s) are on the foundation.

Installation of roof cap shingles. Owner understands that installation of shingles in cold weather (55 degrees Fahrenheit or colder) may prohibit shingles from adhering properly per manufacturer's installation guidelines.

Install factory supplied Smart Lap Painted siding on modular units at the belly band areas and areas not installed by the Factory.

Ex. 1.

b. The Contractor Agreement

Thereafter, in December of 2020, Claimants signed a General Contractor Agreement (the "GC Agreement")[6] with Respondent. The GC Agreement, received as **Exhibit 2**, which was prepared by Respondent, provides that Respondent will be responsible for:

> Site work for new home, foundation, New Custom System Built home installation, garage, water and sewer tie ins, porches, walkways, inspections, labor and equipment to provide a Final CO. All GC work will be detailed on the schedule of values provided on the invoice, the [schedule of values] will be contractual. These numbers are estimates and subject to change during construction.
>
> Ex. 2, para. 2.

Respondent was also responsible for obtaining State, County, and HOA approved building plans; securing of permits; site clearing and preparation; excavation; grading; concrete work (foundation, garage floor, deck footings, patio, entry ways); construction of a garage, deck, entry ways, roof over the patio and dormer on the main roof; properly abutting, leveling, and joining all sections of the home; interior and exterior painting and touch-up paint as necessary; installation of interior flooring provided by Heritage; welding and installation of structural steel supports for the home; plumbing; HVAC; electrical; trash; and toilets. *Id*. at 4.

Between the Purchase Agreement and GC Agreement, once Claimants purchased the home from Heritage, Respondent was responsible for completing all of the prep work necessary to receive and erect the structure, setting and connecting the pieces of the home, and performing all interior and exterior work needed to make the home livable, including building a garage and several porches on the exterior of the home (collectively, the "Project"). *See* Ex. 1 and Ex. 2. In

[6] The GC Agreement and Purchase Agreement are referred to collectively herein as the "Contract".

essence, Respondent was responsible for delivering a completely finished home that passed all inspections needed for a Certificate of Occupancy ("CO") from the Summit County building department.

With respect to the quality of work to be performed, the GC Agreement provides that "Contractor warrants that the work will be performed in a reasonable and workmanlike manner and will conform to industry standards and will be in compliance with all codes, laws, ordinances, rules or requirements of any governmental agency."[7] Ex. 2, para. 6.

According to Ben Smith's testimony, Claimants contracted with Respondent because agents of the company held themselves out as experts in the modular home industry and represented that they had a longstanding relationship with Heritage. Per the Contractor Agreement, Claimants agreed to pay Respondent $1,034,441.82 to provide them with a turn-key home. *Id*. The payment to Respondent was independent of the $260,000 lot purchase paid by Claimants in July of 2018. *See* Ex. 99, Assessor par sheet for 101 Mule Deer Court.

The Contractor Agreement was a fixed-fee, or "lump-sum", agreement with the expectation that any overages would be addressed via written change orders that would be discussed with and approved by Claimants. *See* Ex. 165, Respondents' Answers to Interrogatory No. 6, pp. 11-12. These change orders were to be approved in advance in writing by Claimants. Ex. 2, para. 5.

According to testimony provided by Shambarger, and many received exhibits, Claimants obtained a loan in the amount of $985,000 for the majority of the expected Project costs. *See* Ex. 138. According to Ben Smith's testimony, the Smiths understood they would be required to provide cash to pay any costs of the Project in excess of $985,000. The original budget, or total allowable costs, for the Project was $1,406,883, according to Shambarger.

Before the Project began, the Smiths had paid $260,000 in cash for the purchase of the land and provided $142,883.45 in cash to First Bank for the anticipated cash required to complete the Project. Ex. 138. Additionally, the Smiths paid Liscott $36,000 in cash prior to the start of the Project. The evidence presented shows that the Smiths had adequate funds to support the Project as the anticipated costs were represented by Liscott.

B. PROJECT HISTORY

Respondent performed certain work on the site that had to be completed before the four pieces of the home could be delivered and joined. This work included digging and pouring concrete for the foundation, grading the site, and backfilling the foundation. Cowley admitted he personally did much of the dirt work at the Property. According to the testimony of Ben Smith and Fronapfel, Cowley did not adequately backfill the foundation in "twelve-inch lifts" as

[7] This clause reflects Liscott's contractual standard of care and will be referred to herein as the "Standard of Care Clause".

required by IRC 2018, the CTL Thompson Soils Engineering Report ("Soils Report"), or the plans as provided by Drew Schneider, with Insight Engineering. *See* Ex. 95, Insight Plans, p. 33; *see also* Ex. 98, Soils Report. Moreover, Cowley admitted Liscott never contacted CTL Thompson throughout the Project to examine the condition of the soils, the backfill, or the integrity of the foundation work or the footings, as recommended in the Insight Plans and the Soils Report. *See* Ex. 95 and Ex. 98.

In late fall of 2021, Respondent told the Claimants that the site was ready for the home to be set. Shortly thereafter, in October of 2021, Heritage delivered the four Modules of the home to the Property. Respondent, through a subcontracted crew, placed the four sections of the home on the foundation and began work on the interior and exterior of the structure. It should be noted, several photos depicting the setting of the home in progress were received in Ex. 96, one of which on page 155 very clearly depicts the unlevel condition of the foundation present on the day the home was set.

The Project then began at a seemingly normal pace for the week or two following the setting of the home, then according to Ben Smith's testimony, things effectively stalled, with very little work being done and crews appearing on site sporadically. As of late October 2021, Respondent had yet to locate or connect the sewer from the sewer main to the home. This connection is required to have functional sanitation and is a requirement in order obtain a certificate of occupancy ("CO") from the Summit County Building Department. Though Claimants had already paid Respondent several thousand dollars to locate and connect the sewer, Respondent was unable to find the main line and stated that since they couldn't find the sewer main connection, Claimants would be responsible for hiring an outside company to locate this pipe.

After Claimants hired a company to locate the sewer main, Respondent then stated it would need an additional $15,500 to complete the sewer installation. Knowing the sewer connection was required in order to obtain a CO, Claimants begrudgingly paid Respondent. Despite making this additional payment, the Project continued to fall behind schedule.

The Arbitrator heard conflicting testimony from Cowley and Smith regarding whether Liscott or the Smiths were responsible for getting the utilities run to the Property. Smith consistently stated Liscott was responsible for getting all utilities hooked up to the Property, and Liscott's actions throughout the Project reflected that understanding. Cowley attempted to deflect responsibility and testified that Liscott was merely assisting the homeowners to get their utilities hooked up, especially the sewer line. Cowley's testimony was not credible, however, as the GC Agreement expressly states Liscott's scope of work included "water and sewer tie ins". Ex. 2, para. 2. In addition, the GC Contract includes a line-item charge for "HVAC, Plumbing and Electrical Hookups". Ex. 2, p. 4.

By February of 2022, it was apparent to Claimants that Respondent was not going to meet the initial promised completion date because the Project was far behind schedule. When confronted about the delays in progress, Respondent attempted to avoid blame and represented

that it was prioritizing the Project and trying to complete it by March 31, 2022. Ex. B, pp. 1389-90. The revised March 2022 completion date was critical to Claimants because the property they were renting during the construction of the home was being sold and, as a result, they would be losing their lease. Claimants conveyed this housing concern to Respondent on many occasions. March of 2022 came and went with Respondent remaining far from completing the Project. Not only was Respondent falling further behind its promised schedule, on several occasions, Respondent threatened to stop work if it wasn't paid for certain aspects of the Project, even though it had not started those aspects of the home. Claimants once again made these additional payments out of fear that they would otherwise be left homeless with no contractor to finish the Project. *See* Ex. 163.

By April 2022, it became apparent to Claimants that one of the reasons the Project languished was because Respondent was not getting workers on site and, on the rare occasions that it did, there was no supervision of the work. In many instances, different groups of workers would arrive to work on certain areas of the home that had been worked on by a different group of workers previously. The lack of consistency in the workers constructing the home resulted in many tasks being started but then dismantled by another group of workers and redone. The lack of significant progress made it clear that it would take Respondent many more months to complete the Project.

Because their home remained incomplete and their rental lease expired, Claimants and their two teenage children were forced to move into the loft above Mr. Smith's shop until the CO for the Property was obtained. *See* Ex. 102.

By the end of April 2022, the Smiths had discovered there were significant defects related to the Property that Liscott had not disclosed to them, due to a noble gesture by Garrett Spiker, with MJ Doors. *See* Ex. 11. Following Spiker's revelation that the Property was out of level, the Smiths conducted a "walk-through" with Cowley, and were provided a "punch-list" of items Liscott had identified as either defective or incomplete. *See* Ex. 161.

In an effort to document the defects and unfinished items for which Claimants had already paid, Claimants, through their legal counsel, prepared an initial CDARA Notice dated May 5, 2022, which was attached to Claimant's Trial Brief as Exhibit 3, and a supplemental CDARA Notice dated June 10, 2022, attached to Claimant's Trial Brief as Exhibit 4. Eventually, given the unending delays and growing list of defects, Claimants removed Respondent from the Project in mid-June, 2022, according to the testimony of Ben Smith.

To date, a CO has never been issued and according to Ben Smith's testimony, which the Arbitrator found credible, Claimants and their family have never resided and do not currently reside in the defective structure. Claimants and their family continue to live in the loft above Mr. Smith's business.

C. RESPONDENT'S CONSTRUCTION

The Arbitrator found the testimony of Fronapfel and the CTETS Report collectively to be a compelling and credible representation of the defects found at the Property. *See* Ex. 104. Accordingly, the Arbitrator accepts and approves the findings of Fronapfel in the CTETS Report and the attribution to Liscott of the myriad defects identified by CTETS.

There were additional examples of Respondent's lack of Project supervision provided through witness testimony, primarily Ben Smith and Osborne, but even Cowley's testimony reflected a lack of awareness and attention to the Project. Cowley testified there was no project manager or site supervisor other than him, and he was likely on site at least 60 times throughout the course of the Project. Cowley's testimony, however, was not credible and Cowley provided no additional evidence to support such an assertion. Moreover, the condition of the Project and the lack of supervision can be seen in examples such as the haphazard appearance of the site throughout the Project and construction materials being left outside and exposed to the elements, resulting in them becoming buried under mud and snow that rendered them broken or useless.

In conversations with Claimants prior to being removed, Respondent took the position that the house was largely defect free and that any remaining issues were the result of the home settling. Heritage confirmed for Claimants that this statement was not true. *See* Ex. 66. Because Respondent refused to take ownership of its mistakes or otherwise attempt to rectify same, Claimants had no choice but to remove Respondent from the Project.

The decision to terminate Liscott was then reinforced even further when Liscott's chosen structural engineer, Schneider, provided a detailed report identifying sixteen defects related to the Property that needed to be remedied. Ex. 60. In an effort to mitigate their damages and be able to move into their home, Claimants diligently set out to obtain bids and retain the services of replacement contractors to begin the process of repairing Respondent's defects and finishing the incomplete items. *See* Exhibits 56, 58, 62, 63, 65, 71, 72, 73, 74, 76, 77, 79, 80, and 81, Contractor Invoices. These efforts are still ongoing.

Claimants' replacement contractors and engineer discovered the following additional issues, about which the Smiths were not previously aware:

a. The top section of the home was supposed to be, but was not, secured to the bottom section with 3/4-inch OSB board around the entire perimeter;
b. The protective wrap on the garage was installed improperly with staples, which voided any warranty;
c. The compaction of the back fill at the foundation was not done correctly;
d. The footings for the two entry ways and the patio were placed on poorly compacted fill, which caused cracking in the footings and made them sink; and
e. The foundation walls were only dampproofed instead of being waterproofed per the Project plans.

Ex. 104.

D. RESPONDENT'S DRAW REQUESTS

Claimants obtained a construction loan in the amount of $985,000 from First Bank. The Project was intended to be a fixed-price contract. Despite this initial understanding between the parties, numerous change orders were presented to the Smiths after the fact, and none appear to have ever been provided to or signed by the Smiths in advance. As a result of these change orders, Respondent charged Claimants an additional $135,934.92, which is in addition to the $50,000.00 contingency that was built into the Contractor Agreement and spent by Respondent.

The extent of these cost overruns is striking, especially in light of the reality that Liscott was merely completing a home that was largely already built by Heritage Custom Homes. Despite making all payments demanded by Respondent through Draw 12, Claimants never received any receipts, invoices or other documentation evidencing that these claimed change orders (and related increase in project costs) were necessary or even incurred. Ex. 163.

For example, on Draw 12, Respondent represented to Claimants that the rough-in inspections were complete when, in actuality, there were many items that were missing or incomplete that prevented the inspector from approving the rough-in work. At the time when Claimants removed Respondent from the Project, there were many categories of work that were either paid in full or almost completely paid for with little to no actual work done. Contrary to the change order provision in the Contractor Agreement, Respondent unilaterally determined that certain additional expenditures were appropriate, and subsequently, sent Claimants a bill demanding payment for these increased sums.

By the time Respondent was removed, Respondent had been paid more than 98% of the fixed-price contracted sum while according to Fronapfel, Cooprider, and Smith's testimony, the Project was less than 60% completed and riddled with defects that would need to be remedied completely before any additional progress could be made. *See* Ex. 163.

Given the complete lack of transparency from Respondent and legitimate concern that money had been misappropriated, Claimants requested from Respondent in their May 5, 2022 CDARA Letter and in written discovery requests in this case all financial documents related to the Project. Respondent maintains the position that it has no obligation to provide any financials given the fixed-fee structure of the deal.

Respondent has been paid for work and materials that have not been incorporated into the Project. It was Respondent's burden at arbitration, pursuant to Colorado's Trust Fund Act, to account for the proper disposition of the funds disbursed from the construction loan and additional amounts paid by Claimants. Liscott presented no such evidence and continues to refuse both the Arbitrator and the Smiths any insight whatsoever into how Liscott spent the funds it received for the Project. *See* Ex. 165, pp. 11-12; and Cowley's Testimony.

IV. CONCLUSIONS OF LAW

Claimants asserted claims for breach of contract of the Purchase Agreement, breach of contract of the Contractor Agreement, unjust enrichment, and violation of the Trust Fund Statute against Respondent.

A. Claimants' Breach of Contract & Unjust Enrichment Claims

The elements of a breach of contract claim are as follows:

(1) the existence of a contract;
(2) performance by the plaintiff or some justification for nonperformance;
(3) failure to perform the contract by the defendant; and
(4) resulting damages to the plaintiff.

W. Distrib. Co. v. Diodosio, 841 P.2d 1053, 1058 (Colo. 1992).

During the arbitration hearing, and in Respondent's Response to the Arbitration Demand, Respondent admitted that the Purchase Contract and GC Agreement constitute valid, binding and enforceable agreements. Respondent also admitted during the arbitration hearing that the Smiths paid Liscott more than the $1,034,441.82 amounts required pursuant to the Contract, indeed the total amount the Smiths paid was $1,061,797.78. Ex. 163, Draw 13, p.1.

Liscott also admitted a majority of the defects alleged by the Smiths, either through Cowley's testimony, the testimony of Sam McGlamery and Ted Isbell, and the Vertex Report itself. *See* Ex. G, Vertex Report. Vertex agreed with CTETS the many defects were present, including but not limited to the following points;

1. Liscott did not have moisture and density testing done by CTL (p. 9);
2. Insight listed 16 issues with the home, 13 of which are related to the structure or foundation (p. 10);
3. The north basement wall is out of plumb a maximum of 4 inches, and it was initially constructed out of plumb (p. 11);
4. the north wall being our-of-plumb is the cause of the steel beam not fully bearing in the pocket in the basement concrete wall (p. 11);
5. there are portions of the top of the north basement wall that "dip" down (p. 12);
6. Regarding the low spots at the top of the north wall we agree an alternative to plywood shims should be used (p. 12);
7. The 2 x 12 band board had not been installed p. 15);
8. There was a 1 ½ inch gap at the lower modules and a 2-inch gap at the upper modules (p. 16);
9. Backfill had settled causing deck footings to settle (p. 17);
10. Concrete splitting occurred at the top of the patio stem wall (p. 17);
11. Negative grading was present (p. 18);
12. the gap between the modules could have resulted in a change to the run of the stairs that may have required modifications to the stairs (p. 19);
13. siding trim installation is incomplete and/or requires correction (p. 23);
14. 3/8-inch crown staples were used rather than one inch crown staples in the WRB

installed at the garage (p. 24);

15. There are multiple locations where inadequate clearances between siding or trim and sheet metal flashing exist (p. 25);
16. There is flashing missing at window and fenestration heads (p. 26-27, and in Isbell's testimony);
17. Soffit and trim installation was incomplete (p. 27);
18. Windows were broken and the panoramic door installation needs to be adjusted (p. 28);
19. No exterior stone veneer has been installed (p. 29);
20. Inconsistent drip edge materials had been installed (p. 31);
21. Door jambs of varying depths among door openings had been installed by Liscott (p. 34);
22. There was evidence of settlement of the gas line and meter (p. 43); and
23. There were no floor drains installed in the garage.

Ex. G.

Liscott's only defense to those admitted defects are that Liscott was not yet done with the project.[8] However, neither the Purchase Agreement nor the GC Contract provided Liscott with a right to repair, or attempt to repair, defective work and the Standard of Care Clause controls. Therefore, Liscott has essentially admitted its breach by failing to provide a defense to at least a majority of the defects. Moreover, through the testimony of Smith and Fronapfel, the arbitrator finds that the Smiths have provided credible evidence to support their theory of defects in this matter, which are not only material, but extensive.

As a result, the only element remaining for the Arbitrator's determination of the Claimants' breach of contract claims is the extent and calculation of damages that should be awarded the Claimants for Liscott's breach of contract.

Scope of CDARA and Damages

As noted above, Claimants presented lay and expert testimony, photos, videos, and expert reports[9] detailing the extensive list of defects caused by Respondent. While unsuccessful attempts to repair a few defects were made by Liscott, such as the main structural steel support beam and garage trusses, it appears none of those defects were adequately repaired or corrected by Respondent. Instead, Claimants were left to hire other contractors to attempt to correct and repair

[8] Liscott, through both Vertex and Cowley, attempted to introduce testimony at the Hearing alleging that the steel beam connections as completed by Cowley in late May 2022 were "temporary" in nature, and should not be treated as permanent attempts at a repair. *See* Ex. G, p. 13 ("The welded connections were always considered to be temporary"). To the contrary, the Smiths presented a text exchange between Ben Smith and Cowley where Cowley unequivocally confirms to Smith that installation of the steel beam was "ready and done". Ex. 159.

[9] The bulk of these defects were also previously identified in the Smiths' initial CDARA Notice and amended CDARA Notice.

Respondent's defects.

CDARA defines an "action" as "a civil action or an arbitration proceeding for damages, indemnity, or contribution brought against a construction professional to assert a claim . . . for damages or loss to, or the loss of use of, real or personal property or personal injury caused by a defect in the design or construction of an improvement to real property." C.R.S. § 13-20-802.5(a).

CDARA defines a "claimant" as "a person . . . who asserts a claim against a construction professional that alleges a defect in the construction of an improvement to real property." C.R.S. §13-20-802.5(3). And a "construction professional" is an architect, contractor, subcontractor, developer, builder, builder vendor, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, or observation of the construction of any improvement to real property. C.R.S. § 13-20-802.5(4). CDARA's legislative declaration states that it applies to "actions claiming damages, indemnity, or contribution in connection with alleged construction defects." C.R.S. §13-20-802.

CDARA defines recoverable actual damages to mean "the fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the reasonable cost to repair the alleged construction defects, whichever is less, together with relocation costs, and, with respect to residential property, other direct economic costs related to loss of use, if any, interest as provided by law, and such costs of suit and reasonable attorney fees as may be awardable pursuant to contract or applicable law." C.R.S. 13-20-802.5(2).

In addition, the plain language of the CDARA permits recovery of damages for inconvenience. *Hildebrand v. New Vista Homes II, LLC,*, 252 P.3d 1159,1172 (Colo. App. 2010). The builder bears the burden of proving that fair market value is less than plaintiffs' estimate of repair costs. *See, e.g., City of Westminster v. Centric – Jones Constructors,* 100 P.3d 472, 480 (Colo. App. 2003); *cf. Andrulis v. Levin Constr. Corp.,* 628 A.2d 197, 208 (1993) ("the burden of proving economic waste is on the party that … invokes the doctrine in an effort to limit ... damages"); *Hildebrand v. New Vista Homes II, LLC,*, 252 P.3d 1159, 1171 (Colo. App. 2010).

In *City of Westminster,* the court noted that the plaintiff would not receive an economic windfall from an award of all costs to rebuild the building to new specifications because the costs of rebuilding to the initial specifications would be substantially the same. *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 479 (Colo. App. 2003), *see also State Property & Buildings Commission v. H.W. Miller Construction Co.,* 385 S.W.2d 211 (Ky. 1964).

A party may plead breach of contract and unjust enrichment claims in the alternative. C.R.C.P. 8, *see also United Water and Sanitation District v. Geo-Con, Inc.,* 488 F.Supp.3d 1052, 1058 (D. Colo. 2020). The test for recovery under an unjust enrichment theory, as stated by the Colorado Supreme Court, requires a showing that: "(1) at plaintiff's expense, (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to

retain the benefit without paying." *Robinson v. Colorado State Lottery Division*, 179 P.3d 998, 1007 (Colo. 2008); *see also DCB Construction Co., Inc. v. Central City Development Co.*, 965 P.2d 115, 119-20 (Colo. 1998).

The arbitrator finds the Smiths' claim for unjust enrichment is precluded by the existence of an express contract that concerns the same subject matter as the claim for unjust enrichment. In this case, Claimants entered into a contract with Respondent. Respondent failed to perform all of the services required by the Contract, and more importantly, Respondent breached the material terms of the Contract related to the Standard of Care Clause. *See* Ex. 2, para. 6.

A breach that is material goes to the root of the matter or essence of the contract and renders substantial performance under the contract impossible. *Interbank Investments, L.L.C. v. Vail Valley Consol. Water Dist.*, 12 P.3d 1224, 1229 (Colo. App. 2000). Respondent is in breach of the Contract, and Claimants are entitled to an award of their damages for Respondent's breach of contract. Additionally, all further performance by the Smiths was excused by the breach. *Kaiser v. Market Square Discount Liquors*, 992 P.2d 636 (Colo. App. 1999), *cert. denied* (2000) (material breach by a party deprives that party of the right to demand performance by the other party).

B. Claimants' Trust Fund Violation Colo. Rev. Stat. § 38-22-127 Claim

Colorado's Trust Fund Statute, C.R.S. § 38-22-127, states as follows:

(1) All funds disbursed to any contractor or subcontractor under any building, construction, or remodeling contract or on any construction project shall be held in trust for the payment of the subcontractors, laborer or material suppliers, or laborers who have furnished laborers, materials, services, or labor, who have a lien, or may have a lien, against the property, or who claim, or may claim, against a principal and surety under the provisions of this article and for which such disbursement was made.

(2) This section shall not be construed so as to require any such contractor or subcontractor to hold in trust any funds which have been disbursed to him or her for any subcontractor, laborer or material supplier, or laborer who claims a lien against the property or claims against a principal and surety who has furnished a bond under the provisions of this article if such contractor or subcontractor has a good faith belief that such lien or claim is not valid or if such contractor or subcontractor, in good faith, claims a setoff, to the extent of such setoff.

(3) If the contractor or subcontractor has furnished a performance or payment bond or if the owner of the property has executed a written release to the contractor or subcontractor, he need not furnish any such bond or hold such payments or disbursements as trust funds, and the provisions of this section shall not apply.

(4) Every contractor or subcontractor shall maintain separate records of account for each project or contract, but nothing contained in this section shall be construed as requiring a contractor or subcontractor to deposit trust funds from a single project in a separate bank account

solely for that project so long as trust funds are not expended in a manner prohibited by this section.

(5) Any person who violates the provisions of subsections (1) and (2) of this section commits theft, as defined in section 18-4-401, C.R.S.

The primary purpose behind the Colorado Trust Fund Statute is to protect laborers and material suppliers and to ensure that they are paid for value that they add to property; however, the statute also serves the additional purpose of protecting homeowners from the risk of having to make double payment to clear mechanics' liens from their property. *In re Village Homes of Colo., Inc.*, 2009, 405 B.R. 479, 483 (Bankr. D. Colo. 2009). Proceeds from construction loans to finance a construction project likewise fall within the scope of the statute. *Yale v. AC Excavating, Inc*., 295 P.3d 470, 476 (Colo. 2013). The statute is not limited to construction loans but rather encompasses all funds disbursed on a construction project. *Id*.

Once trust funds are identified as having been disbursed to a contractor or subcontractor on a particular project, the burden to account for their proper disposition rests squarely on the contractor or subcontractor. *In re Walker*, 315 B.R. 595 (Bankr. D. Colo. 2004), affirmed in part, reversed in part and remanded 325 B.R. 598. Likewise, the record keeping need not apply payments to any particular invoice of a vendor, except that it must show that payment was made on one or more of the invoices due to the vendor on that particular project. *In re Gamboa*, 400 B.R. 784, 791-92 (Bankr. D. Colo. 2008).

Civil theft under C.R.S. § 18-4-401 occurs when a person knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception, and:

> (a) intends to deprive the other person permanently of the use or benefit of the thing of value;
>
> or
>
> (b) knowingly uses, conceals, or abandons the thing of value in such manner as to deprive the other person permanently of its use or benefit; or (c) uses, conceals, or abandons the thing of value intending that such use, concealment, or abandonment will deprive the other person permanently of its use and benefit; or (d) demands any consideration to which he is not legally entitled as a condition of restoring the thing of value to the other person." C.R.S. § 18-4-401. In any such action, the owner may recover two hundred dollars or three times the amount of the actual damages sustained by him, whichever is greater, and may also recover costs of the action and reasonable attorney fees; but monetary damages and attorney fees shall not be recoverable from a good-faith purchaser or good-faith holder of the property. C.R.S. § 18-4-405.

To succeed on a civil theft claim, a plaintiff has to establish that: (1) defendant knowingly obtained control over his property without authorization, and (2) defendant did so with the specific intent to permanently deprive him of the benefit of the property. Huffman v.

Westmoreland Coal Co., 205 P.3d 501, 509 (Colo. App. 2009). The burden of proof for awarding treble damages under the Colorado theft statute is the preponderance of evidence standard, rather than the higher burden used in criminal matters of beyond a reasonable doubt. *In re Dorland*, 2007, 374 B.R. 765 (Bankr. D. Colo. 2007). An award of treble damages is not discretionary once the fact of defendant's theft has been established. *In re Krupka*, 2004, 317 B.R. 432 (Bankr. D. Colo. 2004). "Actual damages" recoverable under the civil theft statute includes noneconomic damages as well as economic damages. *Gorsich v. Double B Trading Co., Inc.*, 893 P.2d 1357, 1363 (Colo. App. 1994), rehearing denied, certiorari denied. An award of attorney fees to a prevailing plaintiff on a civil theft claim is mandatory. *Steward Software Co. v. Kopcho*, 275 P.3d 702, 712 (Colo. App. 2010), rev'd on other grounds, 266 P.3d 1085 (Colo. 2011).

The Arbitrator finds, because Respondent has failed to produce any financial records or invoicing related to the Project, the testimony and evidence presented at the Hearing showed beyond a preponderance of the evidence that Respondent knowingly retained, deprived and cannot account for Project funds in the amount of $1,061,797.78.

Accordingly, Claimants shall be awarded treble damages and their attorney's fees pursuant to C.R.S. § 38-22-127 and C.R.S. § 18-4-401.

C. Respondent's Affirmative Defenses

Respondent raised the following affirmative defenses in its Answer. The Arbitrator finds these defenses to be without merit, as described below.

1. The alleged damages, if any, may have been proximately caused by the actions and failure to act of the Claimants, precluding or reducing any recovery.

2. The failure to take such reasonable steps as would have mitigated or minimized the alleged injuries and damages may preclude recovery on these injuries and damages.

3. Claimants' claims may be barred or limited, in whole or in part, by express terms, conditions, limitations, exclusions and disclaimers of the pertinent contract.

4. Claimants' claims may be barred, in whole or in part, by the doctrines of accord and satisfaction, acquiescence, release, ratification, unclean hands, prevention of performance, waiver and estoppel.

5. Claimants' claims may be barred, in whole or in part, by the economic loss rule.

6. Claimants' claims may be barred in whole or in part by Claimants' failure to comply with conditions precedent.

7. Claimants' claims may be barred, in whole or in part, due to spoliation of evidence.

8. Claimants' claims may be barred, in whole or in part, by Claimants' own breach of contract. This first breach by the Claimants provides a complete legal defense to any claims made under the contracts.

9. Claimants' claims may be barred, in whole or in part, by failure of consideration.

10. Claimants' damages, if any, may have been caused by superseding or intervening causes not attributable to Defendant.

11. Claimants' claims may be barred, in whole or in part, by Claimants' own unreasonable conduct or bad faith.

12. Certain of the items claimed by Claimants as defective or incomplete are subject to the contractual terms between the Claimants and the home builder/supplier, Heritage. To the extent that any of the Claimants claimed defects are subject to the warranty provided by Heritage, these are not the responsibility of the Respondent.

13. The Claimants entered into hold harmless agreements with the Respondent regarding numerous issues that are complained of in the Demand. The Claimants' claims in that regard must be denied and dismissed due to the terms of these agreements.

As set forth above, there is a basis for each of Claimants' claims against Respondent. The majority of Respondent's Affirmative Defenses related to Claimants' alleged breach of the Contracts. As noted above, the party in breach of the Contract is Respondent and not Claimants, therefore these defenses are inapplicable.

With respect to Claimants' alleged failure to mitigate their damages, Ben Smith testified that Claimants have made significant attempts to repair Liscott's defects. The evidence has shown, however, that the only way the Smiths can truly receive what they contracted for is to unzip and replace the Modules, and they have been unable to undertake such a significant process without more time and resources. *See Airborne, Inc. v. Denver Air Center, Inc.*, 832 P.2d 1086, 1091 (Colo. App. 1992) (a plaintiff is required only to take reasonable measures to mitigate damages). The Arbitrator finds this testimony to be credible.

Respondents repeatedly referred to the "Hold Harmless Agreement" as a defense. However, the Hold Harmless Agreement is clearly limited to Liscott's actions associated with the installation of the "sewer line installation and locate" only. *See* Exhibit 131, p.1. The Smiths have released Liscott from nothing outside of the distinct act of finding and connecting the sewer lateral. None of the claims alleged by the Smiths in their arbitration demand request damages related to the location or installation of the sewer line. Therefore, the Hold Harmless Agreement does not bar any of the Smiths' claims.

In addition to its affirmative defenses, Respondent provided the following responses in its Response to the Arbitration Demand:

1. Respondent acknowledged it entered into two contracts with Claimant, the Purchase Agreement and the GC Agreement.
2. Respondent denied the allegations that there was defective work, and instead asserted the following defenses to explain its behavior:
    a. Any delays in the Project were due to COVID-19, supply chain disruptions, change orders, weather, et cetera.
    b. The Project was incomplete and only "punch list items" remained.
    c. Claimant failed to pay for completed work.
    d. The Bank issued a "Stop Work Order".

The Arbitrator finds as follows with respect to the defenses provided above:

a. Defendant presented no credible evidence to support its assertion that COVID-19, supply chain disruptions, change orders, weather, or "et cetera" played any role in delays on the Project, nor did any of these factors credibly justify the defects on the Project.
b. The "punch list items" identified in Exhibit 161, were in totality, far from a punch list and contained material defects and work remaining to complete the Project.
c. As proven through the testimony of Shambarger, as well as primarily Exhibit 163, depicting Draw 13, Liscott was paid in full through Draw 12. Following payment of Draw 12, the Smiths began to discover the defects on the Project and justifiably terminated Liscott due to its breach of the Contract.
d. Respondent presented zero evidence to indicate the bank ever issued a "Stop Work Order". The evidence showed the Smiths terminated Liscott sometime in June of 2022.

D. Claimants' Damages Claim

The general measure of actual damages for breach of a construction contract is that amount required to place the owner "in the same position he would have occupied had the breach not occurred." *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 478 (Colo. App. 2003); *see also Pomeranz v. McDonald's Corp.,* 843 P.2d 1378, 1381 (Colo. 1993); *see also McDonald's Corp. v. Brentwood Center, Ltd.,* 942 P.2d 1308, 1310 (Colo. App. 1997). Where only rebuilding a defective building will provide an injured party with the benefit of its bargain, costs to rebuild rather than repair may be a reasonable measure of damages. *Id., see also Gold Rush Invs., Inc. v. G.E. Johnson Constr. Co.,* 807 P.2d 1169, 1174 (Colo. App. 1991).

Costs of rebuilding a defective structure to new specifications may also be reasonable, *Hendrie v. Bd. of County Comm'rs,* 387 P.2d 266, 271 (1963), even if they exceed the costs to repair defects. *Worthen Bank & Trust Co. v. Silvercool Serv. Co.,* 687 P.2d 464 (Colo. App. 1984). Proof of damages with mathematical certainty is not required. *Tull v. Gundersons, Inc.,* 709 P.2d 940, 943 (Colo. 1985).

The evidence introduced at Hearing showed that Claimants' Property is beyond repair.

Many of the construction defects caused by Liscott are fundamental to the integrity of the home, such as the reality that the central marriage line of the four units sunk approximately two inches thus creating a home that is fundamentally and permanently flawed. With many of the defects being simply uncorrectable, the Arbitrator accepts the testimony of Fronapfel that the Property must be "unzipped", torn down to the foundation, and rebuilt. The Arbitrator also finds Claimants proved by a preponderance of the evidence they are entitled to new "modules" from Heritage.

Cooprider's Costs of Repairs Opinion provides the basis for the Smiths' claim of actual damages for the cost to repair the Property. Ex. 106. The burden is on Respondent to rebut Claimants' costs of repair and actual damages, *City of Westminster, supra,* at 480. Respondent did not present an alternative theory of the cost of repairs either through its experts, Vertex, or the testimony of Rob Cowley. Rather, Liscott merely argued it would have repaired all of the identified defects if it was given the opportunity. Liscott argued all of the defects were effectively "punch list" items. Far from punch list items, as illustrated by the many invoices presented by Ben Smith and included in Cooprider's Cost of Repairs Opinion, the amount of work required to repair and complete the Property is extensive. *See* Exhibits 56, 58, 62, 63, 65, 71, 72, 73, 74, 76, 77, 79, 80, and 81 .

The Arbitrator accepts and adopts the Claimants' position set forth in Section II above, that the landscaping costs in the amount of $50,000 should be removed from the Costs of Repair, thus resulting in a total repair cost of $1,599,389.70.

Claimants also presented testimony and exhibits to support diminution of value damages. Shamburger testified that First Bank obtained an appraisal on the Property in January 2023, after Liscott was terminated. The valuation of the Property if it were built according to the plans, and in a reasonable and workmanlike manner, would have been $1,996,000. The valuation of the property as constructed by Liscott was determined to be $1,240,000. The difference of these two figures represents the diminution of value of $756,000.[10]

Claimant presented Summit County Assessor par sheets depicting the value of the Property in 2022 and 2023, and the respective values of Claimant's neighbors' properties on Mule Deer Court. Ex. 103. The Arbitrator finds this evidence persuasive by a preponderance of the evidence that the Property's value without the defects caused by Liscott would be $2,400,000, as also supported by the testimony of Ben Smith.

The builder bears the burden of proving that fair market value is less than plaintiffs' estimate of repair costs. *See, e.g., City of Westminster v. Centric – Jones Constructors,* 100

[10] The Arbitrator acknowledges the Smiths alternative diminution of value theory as set forth in Section II above, supported by the Summit County Assessor's valuations showing a diminution of $334,215.00. However, because no alternative theories were presented by Liscott, and both theories are supported by credible evidence, the Arbitrator accepts the larger diminution value.

P.3d 472, 480 (Colo. App. 2003). Liscott presented no evidence rebutting the cost of repair, diminution, and loss of use damages presented by the Smiths. Moreover, the Arbitrator finds that the testimony and evidence presented by the Smiths at Hearing related to their damages was credible. Accordingly, the Arbitrator finds the Smiths are entitled to damages under their initial theory of CDARA damages for Respondent's breach of the Contract as follows:

1. $1,599,389.70 for costs of repairs;
2. $573,141.82 for new "modules" from Heritage;
3. $756,000 for diminution of value; and
4. pre- and post-judgment interest at a rate of 8% per annum from the date of January 1, 2022 and costs. *Ballow v. PHICO Ins. Co.*, 878 P.2d 672, 677, fn 5 (Colo. 1994) (measure of damages in contract action is benefit of the bargain rule, designed to give plaintiff expectation interest for loss of bargain).

This reflects a total damages award of $2,928,531.50.

While the damages award reflected above would ordinarily be the final judgment of the Arbitrator, it has also been determined that Respondent failed to produce any financial records or invoicing related to the Project, and thus is in violation of the Construction Trust Statute. The testimony and evidence presented at the Hearing showed beyond a preponderance of the evidence that Respondent knowingly retained, deprived and cannot account for Project funds in the amount of $1,061,797.78.

The award of treble damages pursuant to C.R.S. § 38-22-127 and C.R.S. § 18-4-401 supersedes the damages award under CDARA. Accordingly, Claimants are entitled to $3,185,393.10, plus their attorney's fees, pre- and post-judgment interest at a rate of 8% per annum from the date of January 1, 2022 and costs.

V. JUDGMENT

Based upon the foregoing findings of fact and conclusions of law, the Arbitrator hereby:

1. ENTERS JUDGMENT in favor of Claimants Ben Smith and Holly Smith and against Respondent Hephaistos Enterprises, Inc. d/b/a Liscott Custom Homes, Ltd. on Claimants' **Breach of Contract** claim for actual and consequential damages in the amount of $2,928,531.50, plus pre- and post-judgment interest at the rate of 8% per annum from January 1, 2022, and costs;

2. ENTERS JUDGMENT in favor of Claimants Ben Smith and Holly Smith and against Respondent Hephaistos Enterprises, Inc. d/b/a Liscott Custom Homes, Ltd. on Claimants' Construction Trust claim for actual and treble damages in the amount of **$**3,185,393.10, plus attorney's fees, post-judgment interest at the rate of 8% per annum on the remainder, and costs;

3. The award on Claimants' Construction Trust claim shall supersede the award on Claimants' Breach of Contract claim; and

4. Claimants shall submit a bill of costs and attorney fees not later than fifteen (15) days from the date of this Order.

Respectfully submitted this 30th day of October, 2023.

WEST HUNTLEY GREGORY PC

By: *s/ Robert N. Gregory*
Robert N. Gregory

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **CLAIMANTS' CLOSING ARGUMENT, PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT** was served via File & ServeXpress this 30th day of October, 2023, on:

Andrew A. Scott, Esq.
White & Steele, P.C.
Dominion Towers, North Tower
600 Seventeenth Street, Suite 600N
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ascott@wsteele.com
Attorneys for Respondent Hephaistos Enterprises, Inc. d/b/a Liscott Custom Homes, Ltd.

s/ Jill Block

APPENDIX A

List of Received (Admitted) Exhibits

Exhibits Received from Claimant

- 1
- 2
- 8
- 11
- 12
- 32 (without audio)
- 33 (without audio)
- 38 (without audio)
- 56
- 58
- 60
- 62
- 63
- 65
- 66
- 71
- 72
- 73
- 74
- 74
- 76
- 77
- 79
- 80
- 81
- 83
- 84 – first 3:18 (without audio)
- 91
- 95
- 96 (photos 1-158)
- 98
- 99
- 102
- 103
- 104
- 105
- 106

Exhibits Received from Respondent

- A
- B (all pages except 24-34
- G
- L
- 129
- 131
- 132
- 135
- 136
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- 140
- 141
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- 158
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