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SC Court of Appeals

THE RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143
Appellate Case No. 2022-01224

Palmetto Construction Group, LLC

Respondent

v.

Restoration Specialists, LLC, Reuben
Mark Ward, and Lynette Pennington Ward

Appellants

THE RECORD ON APPEAL

Volume II of III

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Attorneys for Respondent

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group	)	
	)	
Plaintiff,	)	<u>DEFENDANTS' NOTICE OF MOTION</u>
	)	<u>AND MOTION TO DISMISS</u>
vs.	)	<u>PURSUANT TO SCRPC 12(b)(1)</u>
	)	
Restoration Specialists, LLC,	)	
Reuben Mark Ward, and Lynnette	)	
Pennington Ward	)	
	)	
Defendants.	)	

TO: NAAN G. RANNICK, ESQUIRE, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, will move before the presiding Judge or Master in Equity of the Ninth Judicial Circuit at a time and place to be arranged by the Court and counsel involved for an Order dismissing this action, pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure.

This Motion is made on the grounds that the Plaintiff has terminated its legal existence and, therefore, this Court lacks subject matter jurisdiction over this action because it does not present a justiciable controversy. *Exhibit A*.

This Motion is based upon the attached exhibit, Defendants' supporting memorandum of law which will be submitted to the Court prior to the hearing of this motion, the complete files and records in this action, such oral and documentary evidence as may be allowed at the hearing of this motion and upon all applicable law pertaining thereto.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

s/ A. Bright Ariail
A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

April 21, 2021
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

CERTIFIED TO BE A TRUE AND CORRECT COPY
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ORIGINAL ON FILE IN THIS OFFICE

Mar 27 2019
REFERENCE ID: 309804


SECRETARY OF STATE OF SOUTH CAROLINA

**STATE OF SOUTH CAROLINA
SECRETARY OF STATE**
**ARTICLES OF TERMINATION
LIMITED LIABILITY COMPANY - DOMESTIC**

Filing ID: 190322-1416375

Filing Date: 03/22/2019

The following limited liability company, having dissolved and completed its winding up, terminates its existence by filing these articles of termination in accordance with the 1976 S.C. Code of Laws, as amended, Section 33-44-805:

1. The name of the limited liability company is:

PALMETTO CONSTRUCTION GROUP, LLC

2. The date the articles of organization were filed is 10/30/2000.

3. The date of the dissolution of this limited liability company was 02/22/2019.

4. Has the company wound up its business and terminated its legal existence? Yes

5. Unless otherwise specified, these articles are effective when endorsed for filing by the Secretary of State. Specify the date of any delayed effective date: 03/22/2019
(Date)

Signed as Filer: joann eaddy

(Signature)

JoAnn Eaddy

(Print Name)

03/22/2019

(Date)

Capacity/Position of Person Signing (**You must check one box.**)

☐ Manager ☐ Member ☐ Organizer

☒ Fiduciary ☐ Attorney-in-Fact

CERTIFIED TO BE A TRUE AND CORRECT COPY

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Mar 27 2019

REFERENCE ID: A1111111

Signature Page for a Secretary of State Business Filing

completed, scanned, and attached to any business filing where one of the following is true.

signs the digital form on behalf of official signee.

- An attorney's signature is required. (Articles of Incorporation for Corporation and Benefit Corporation)

Official Signatures

(Officer, Incorporator, Director, Agent, Partner, etc)

Required for forms where the signee is not present upon online submission and a filing party is providing a digital signing on their behalf. If the provided space is not enough, please attach multiple pages.

JoAnn Eaddy

3/22/2019

Name

Date

Signature

Finance Director

Title / Position

Name

Date

Signature

Title / Position

Name

Date

Signature

Title / Position

Name

Date

Signature

Title / Position

Name

Date

Signature

Title / Position

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2022-001224 ROA

Page 370

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
PALMETTO CONSTRUCTION GROUP,	)	CASE NO. 2016-CP-10-1143
LLC	)	
	)	
Plaintiff,	)	
vs.	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION TO MOTION TO
RESTORATION SPECIALISTS, LLC,	)	DISMISS
REUBEN MARK WARD, and LYNNETTE	)	
PENNINGTON WARD	)	
	)	
Defendants.	)	
	)	

Defendants' motion to dismiss must fail for at least reasons: (i) a party in default lacks the ability to file a motion to dismiss or seek any other affirmative relief; (ii) Plaintiff is not a terminated entity — articles of termination were improperly filed by a third-party who concedes she lacked any authorization to bind Palmetto, and (iii) the improper termination has since been rectified by the Secretary of State, who recognizes Plaintiff as an entity in good standing. Further, even if Plaintiff *was* a terminated entity, there is no binding authority in South Carolina regarding a terminated entity's ability to sue or be sued. Each point shall be addressed in turn.

I. Defendants Are in Default and Cannot Move to Dismiss

Even if there *were* a basis to dismiss, Defendants lack the ability to move the Court for such relief because they are in default. A party in default has conceded liability and cannot seek affirmative relief:

A party in default has three primary options: (1) do nothing pending the entry of judgment by default under Rule 55(b), SCRCF; (2) file an appearance under Rule 55(b)(2), SCRCF, in an attempt to protect its interests before the entry of judgment by default; or (3) request the entry of default be set aside pursuant to Rule 55(c), SCRCF.

Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 636, 856 S.E.2d

150,151 (2021); *see also Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) (“It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff’s allegations and to have conceded liability.”). All a party in default is permitted to do is cross-examine witnesses at the damages hearing and object to the plaintiff’s evidence. *E.g., Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241, 246 S.E.2d 880, 882 (1978).

Accordingly, a party in default lacks the ability to move to dismiss the case.¹ Defendants were ordered in default on April 21, 2016 and moved to dismiss on April 21, 2021. The motion is not properly made.

II. Palmetto Was Improperly Terminated

On March 22, 2019, one Joanne Eaddy filed articles of termination, purportedly on behalf of Palmetto Construction Group, LLC (“Palmetto”). **Exh. A.** In the articles, she purported to be a fiduciary of Palmetto and its finance director. She was neither. Ms. Eaddy is the finance director for Thompson Construction, had no relationship to Palmetto, and lacked any authority to file articles of termination. **Exh. B** (Handegan Affidavit). Ms. Eaddy signed a sworn affidavit to that effect, stating that the termination had been in error and that she had intended to terminate a Delaware corporation operating under the same name. **Exh. C** (Eaddy Affidavit).

Nor *could* Palmetto have been properly terminated at that time. Articles of Termination require an attestation that the entity is dissolved and has finished winding up its business. *See* S.C. Code § 33-44-805(a) (“At any time *after dissolution and winding up*, a limited liability company may terminate its existence by filing with the Secretary of State articles of termination.

¹ Doubly so when, as here, the motion is filed when the trial court lacks jurisdiction prior to remittitur from the appellate courts.

. . .” (emphasis added)). Palmetto never dissolved, and so it could not have been properly terminated, even if the filer was authorized to act on behalf of Palmetto. **Exh. D.**

III. Palmetto Has Since Been Reinstated

On December 8, 2021, Palmetto filed Articles of Correction to undo the improper termination and reinstate Palmetto as an entity in good standing. Upon receipt of the Articles (**Exh. E**) and submission of the Handegan and Eaddy affidavits (**Exhs. B and C**), the South Carolina Secretary of State reinstated Palmetto as an entity in good standing. **Exh. D.**

However, after Palmetto was improperly terminated, another entity applied for and began using the name “Palmetto Construction Group LLC.” Accordingly, in order to reinstate Palmetto, a new name had to be fashioned; though it remains the same entity, Palmetto is now legally known as “Palmetto Construction Group of SC, LLC.”²

As Palmetto is an entity in good standing, there is no basis for dismissal of this action were such a motion properly made.

IV. The Law of Terminated Entities

The undersigned can find no reported case from any court in South Carolina interpreting the effect of an entity’s termination on an entity’s existing claims. Nor does the statutory scheme regarding dissolved and terminated entities establish the effect of termination on pending claims. *See* S.C. Code §§ 33-14-101 *et seq.*, 33-44-801 *et seq.* The statutes provide only that a *dissolved* entity can sue or be sued for 10 years following dissolution. S.C. Code § 33-14-107(c). No provision is made regarding *terminated* entities.

However, as noted *supra*, the statute provides that an entity may properly file articles of

² To the extent a modification of this case caption is required as a result of the name change, Palmetto so moves.

termination only “*after* dissolution and winding up.” S.C. Code § 33-44-805(a) (emphasis added). Palmetto never dissolved, and so it could not have been terminated, even had the filer of articles of termination been authorized to do so.

Were the instant motion to dismiss properly made, it would be subject to denial on these bases.

V. CONCLUSION

Defendants’ motion to dismiss, in addition to being without merit, is improperly made and should be disregarded by this Court.

Respectfully Submitted:

EPTING & RANNIK, LLC

This 27th day of January, 2022
Charleston, S.C.

/s/ Jaan Rannik
Jaan G. Rannik
46A State Street
Charleston, SC 29401
P: 843.377.1871
jgr@epting-law.com

EXHIBIT A

CERTIFIED TO BE A TRUE AND CORRECT COPY
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Filing ID: 190322-1416377

Filing Date: 03/22/2019

Nov 02 2021
REFERENCE ID: 901434

**STATE OF SOUTH CAROLINA
SECRETARY OF STATE**

**ARTICLES OF TERMINATION
LIMITED LIABILITY COMPANY - DOMESTIC**


SECRETARY OF STATE OF SOUTH CAROLINA

The following limited liability company, having dissolved and completed its winding up, terminates its existence by filing these articles of termination in accordance with the 1976 S.C. Code of Laws, as amended, Section 33-44-805:

1. The name of the limited liability company is:

PALMETTO CONSTRUCTION GROUP, LLC

2. The date the articles of organization were filed is 10/30/2000.

3. The date of the dissolution of this limited liability company was 02/22/2019.

4. Has the company wound up its business and terminated its legal existence? Yes

5. Unless otherwise specified, these articles are effective when endorsed for filing by the Secretary of State. Specify the date of any delayed effective date: 03/22/2019
(Date)

Signed as Filer: joann eaddy

(Signature)

JoAnn Eaddy

(Print Name)

03/22/2019

(Date)

Capacity/Position of Person Signing (**You must check one box.**)

☐ Manager ☐ Member ☐ Organizer

☒ Fiduciary ☐ Attorney-in-Fact

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by signs the digital form on behalf of official signee.

- An attorney's signature is required. (Articles of Incorporation for Corporation and Benefit Corporation)

Official Signatures

(Officer, Incorporator, Director, Agent, Partner, etc)

Required for forms where the signee is not present upon online submission and a filing party is providing a digital signing on their behalf. If the provided space is not enough, please attach multiple pages.

JoAnn Eaddy

3/22/2019

Name

Date _____

Signature

Finance Director

Title / Position

Name

Date _____

Signature

Title / Position

Name

Date _____

Signature

Title / Position

Name

Date _____

Signature

Title / Position

Name

Date _____

Signature

Title / Position

Scan and Upload this document to the Business Filing System during the filing process.
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EXHIBIT B

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) **AFFIDAVIT OF JERRY S. HANDEGAN**

PERSONALLY appeared before me, JERRY "JAY" S. HANDEGAN, stating as follows:

1. My name is Jerry S. Handegan, and I held the position of Vice President in Palmetto Construction Group, LLC ("Palmetto").
2. Palmetto no longer does business as a result of the conduct underlying its pending lawsuit against Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward in Charleston County, South Carolina, Case number 2016-CP-10-1143.
3. I learned through my attorney that Palmetto's existence was terminated through the filing of Articles of Termination with the South Carolina Secretary of State on March 22, 2019. **Exh. A.**
4. The Articles of Termination were not filed or authorized by me or any other officer, agent, or employee of Palmetto.
5. One JoAnn W. Eaddy, who is unknown to this Affiant, filed the Articles of Termination with the Secretary of State without the knowledge of or authorization from Palmetto.
6. Palmetto has been informed the filing of the Articles of Termination by Ms. Eaddy was in error.
7. Palmetto requests the Secretary of State reinstate its corporate position so it may continue to wind up its business.
8. Further affiant says nothing.

SWORN to before me this
3rd day of December, 2021.



[Signature]
JERRY "JAY" S. HANDEGAN

[Signature]
Notary Public for South Carolina
My Commission Expires: 6/16/2027

Nov 02 2021
REFERENCE ID: 901434

**STATE OF SOUTH CAROLINA
SECRETARY OF STATE**

**ARTICLES OF TERMINATION
LIMITED LIABILITY COMPANY - DOMESTIC**


SECRETARY OF STATE OF SOUTH CAROLINA

The following limited liability company, having dissolved and completed its winding up, terminates its existence by filing these articles of termination in accordance with the 1976 S.C. Code of Laws, as amended, Section 33-44-805:

1. The name of the limited liability company is:

PALMETTO CONSTRUCTION GROUP, LLC

2. The date the articles of organization were filed is 10/30/2000.

3. The date of the dissolution of this limited liability company was 02/22/2019.

4. Has the company wound up its business and terminated its legal existence? Yes

5. Unless otherwise specified, these articles are effective when endorsed for filing by the Secretary of State. Specify the date of any delayed effective date: 03/22/2019
(Date)

Signed as Filer: joann eaddy

(Signature)

JoAnn Eaddy

(Print Name)

03/22/2019

(Date)

Capacity/Position of Person Signing (**You must check one box.**)

☐ Manager ☐ Member ☐ Organizer

☒ Fiduciary ☐ Attorney-in-Fact

CERTIFIED TO BE A TRUE AND CORRECT COPY

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The filer signs the digital form on behalf of official signee.

- An attorney's signature is required. (Articles of Incorporation for Corporation and Benefit Corporation)

Official Signatures

(Officer, Incorporator, Director, Agent, Partner, etc)

Required for forms where the signee is not present upon online submission and a filing party is providing a digital signing on their behalf. If the provided space is not enough, please attach multiple pages.

JoAnn Eaddy

3/22/2019

Name

Date

Signature

Finance Director

Title / Position

Name

Date

Signature

Title / Position

Name

Date

Signature

Title / Position

Name

Date

Signature

Title / Position

Name

Date

Signature

Title / Position

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EXH A

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EXHIBIT C

COUNTY OF SUMTER)
)
 STATE OF SOUTH CAROLINA)

AFFIDAVIT OF JOANN EADDY

PERSONALLY APPEARED BEFORE ME the undersigned JoAnn Eaddy who being duly sworn, deposes and says that:

1. I am over 18 years of age, am competent to testify, and have personal knowledge of the matters set forth herein.

2. Since 2015, I have served as the Director of Finance for Thompson Construction Group, Inc. ("Thompson"). Thompson was the Manager of a limited liability company organized in the state of Delaware known as Palmetto Construction Group, LLC. That Delaware entity had a business address of 3511 Silverside Road, Suite 105, Wilmington, Delaware, 19810 and federal EIN of 65-1248199.

3. The Delaware entity known as Palmetto Construction Group, LLC ("Delaware LLC") sold its assets and wound up its business affairs in late 2018 and early 2019. Upon winding up the Delaware LLC's business affairs, I caused to be filed a Certificate of Cancellation with respect to the Delaware, LLC with the State of Delaware, Secretary of State, Division of Corporations.

4. On March 22, 2019, I also filed Articles of Termination – Limited Liability Company Domestic, for "Palmetto Construction Group, LLC" with the South Carolina Secretary of State's Office; those Articles have Filing ID 190322-1416377. I intended for those Articles of Termination to apply to the Delaware LLC. At the time, I believed that such Articles of Termination were necessary because the Delaware LLC of the same name filed tax returns with the South Carolina Department of Revenue with regard to an asset it held and sold in the state. I did not know that there was a separate, distinct business entity formed under South Carolina law

known as Palmetto Construction Group, LLC. The subject Articles of Termination were filed by mistake on March 22, 2019 with South Carolina Secretary of State's Office. There is no relationship or affiliation whatsoever between the Delaware LLC and the South Carolina LLC known as Palmetto Construction Group, LLC. It was not my intent to file Articles of Termination for the South Carolina limited liability company known as Palmetto Construction Group, nor was I acting for or on behalf of that South Carolina LLC in doing so.

5. I request please that the South Carolina Secretary of State's Office accept this Affidavit in support of Articles of Correction being filed on behalf of Palmetto Construction Group, LLC, the South Carolina limited liability company, to revoke the Articles of Termination and allow the South Carolina LLC be reinstated.

I swear or affirm under penalty of perjury that the information in this Affidavit is true and correct to the best of my knowledge.

JoAnn Eaddy
JoAnn Eaddy

SWORN TO before me this 1st
day of December, 2021

Meagan E. Kuhlman
Notary Public for South Carolina
My Commission Expires: 9-21-2031





EXHIBIT D

Business Entities Online

File, Search, and Retrieve Documents Electronically

ELECTRONICALLY FILED - 2022 Jan 27 2:02 PM - CHARLESTON - COMMON PLEAS - CASE#2016CPT1001148

Palmetto Construction Group of SC, LLC

Corporate Information

Entity Type: Limited Liability Company**Status:** Good Standing**Domestic/Foreign:** Domestic**Incorporated State:** South Carolina

Important Dates

Effective Date: 10/30/2000**Expiration Date:** N/A**Term End Date:** N/A**Dissolved Date:** N/A

Registered Agent

Agent: JOHN M KENDLE JR**Address:** 2265 Clements Ferry Rd Suite 204
Charleston, South Carolina 29492

Official Documents On File

Filing Type	Filing Date
Articles of Correction	12/08/2021
Articles of Termination	03/22/2019
Change of Agent or Office	08/24/2006
LLC Annual Reports	05/21/2001
Amendment	05/21/2001
Organization	10/30/2000

Former Names

Name	Filing Date
JOHN KENDLE, LLC	N/A
PALMETTO CONSTRUCTION GROUP, LLC	N/A

EXHIBIT E

Dec 08 2021
REFERENCE ID: 923334

**STATE OF SOUTH CAROLINA
SECRETARY OF STATE**

**ARTICLES OF CORRECTION
LIMITED LIABILITY COMPANY**


SECRETARY OF STATE OF SOUTH CAROLINA

The limited liability company in accordance with Section 33-44-207 of the 1976 S.C. Code of Laws, as amended corrects a record filed by the Secretary of State, which record contains a false or erroneous statement or was defectively signed.

1. The name of the limited liability company is:

PALMETTO CONSTRUCTION GROUP, LLC

2. That on 12/08/2021 the corporation filed (fill out whichever is applicable):

- a. ☐ The following described document:

- b. ☒ The attached document (attach copy of the document).

3. That this document was incorrect in the following manner:

Articles of Termination filed without authorization or knowledge from Palmetto Construction Group, LLC

4. That the incorrect matters stated in Paragraph 3 should be revised as follows:

Corrected Entity Name: Palmetto Construction Group of SC, LLC
Additional Info: Palmetto Construction Group, LLC was wrongly terminated and should be reinstated under the name of Palmetto Construction Group of SC, LLC

Date: 12/08/2021

Signed as Attorney-in-Fact: Jaan G. Rannik

(Signature)

Jaan G. Rannik

(Print Name)

Attorney

(Office)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group	)	
	)	
Plaintiff,	)	<u>MEMORANDUM IN SUPPORT OF</u>
	)	<u>DEFENDANTS' MOTION TO DISMISS</u>
	)	
vs.	)	
	)	
Restoration Specialists, LLC,	)	
Reuben Mark Ward, and Lynnette	)	
Pennington Ward	)	
	)	
<u>Defendants.</u>	)	

TO: JANN G. RANNICK, ESQUIRE OF EPTING & RANNIK, LLC ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP

Pursuant to Rule 12(b)(1), SCRCP, the Defendants, Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward (hereinafter collectively "Defendants"), by and through their undersigned counsel, submit this Memorandum in Support of their Motion to Dismiss.

LEGAL AUTHORITIES

(1): **The Defendants' Motion to Dismiss is properly made because the lack of subject matter jurisdiction cannot be waived and may be raised at any time.**

Questions of justiciability are properly considered to be questions of subject matter jurisdiction and may be raised at any time. "Issues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on [its] own motion." *Bunkum v. Manor Properties*, 321 S.C. 95, 99-100, 467 S.E.2d 758, 761 (Ct. App. 1996). In fact, "lack of subject matter jurisdiction can be raised as any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." *Nix v. Columbia Staffing, Inc.*, 322 S.C. 277, 471 S.E.2d 718, 719 (Ct. App. 1996).

In addition to the defendants' inability to waive subject matter jurisdiction, the South Carolina Appellate Court Rules allow the Master in Equity to proceed with any matters not affected by an appeal. South Carolina Appellate Court Rules, Rule 205 (stating [n]othing in these Rules shall

prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal). Palmetto Construction Group, LLC had not filed Articles of Termination at the time of the defendants' appeal on the issue of arbitration and the termination issue which is the subject of Defendants' Motion to Dismiss was not affected by the Defendants' appeal.

Accordingly, the entry of default in this action does not bar Defendants' Motion to Dismiss for lack of subject matter jurisdiction and Defendants' motion is properly made.

(2): The Court should dismiss Plaintiff's action for lack of subject matter jurisdiction because a justiciable controversy does not exist in this case.

South Carolina courts will not address the merits of any case unless it presents a justiciable controversy. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 468 S.E.2d 861 (1996). Before an action can be maintained, there must exist a justiciable controversy. *See James v. Anne's Inc.*, 390 S.C. 20, 630 S.E.2d 730 (2010); *Byrd*, 321 S.C. 426, 468 S.E.2d 861 (1996). South Carolina courts "will not...make an adjudication where there remains no actual controversy." *Byrd*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996); *see also Peoples Fed. Sav. & Loan Ass'n v. Res. Planning Corp.*, 358 S.C. 460, 477 596 S.E.2d 51, 60 (2004) ("A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy.").

On March 22, 2019, Articles of Termination Limited Liability Company – Domestic ("Articles of Termination") were filed on behalf of the Plaintiff, Palmetto Construction Group, LLC, a South Carolina Limited Liability Company. **Exhibit A.** These Article of Termination became effective on March 22, 2019, the date of filing. **Id.** The Articles of Termination terminated the legal existence of Palmetto Construction Group, LLC effective March 22, 2019. Since Palmetto ceased to exist as a legal entity as of its termination date it is axiomatic that it could no longer sue, be sued or continue to maintain litigation against a third party. The lack of any provisions in the South Carolina Uniform Limited Liability Act of 1996 allowing terminated LLC's to engage in any form of litigation further supports such a result.

On this issue, Palmetto cites S.C. Code § 33-14-107(c) for the proposition that "a *dissolved* entity can sue or be sued for 10 years following dissolution." *Plaintiff's Memorandum in Opposition to Motion to Dismiss*, Pg. 3, Section IV. However, Palmetto acknowledges that this code section does not address *terminated* entities. *Id.* at Pg. 3, Section IV. Furthermore, S.C. Code § 33-14-107(c) is contained in the South Carolina Business Corporations Act of 1988 and applies only to corporations.

This statute is not contained in the South Carolina Uniform Limited Liability Act of 1996 and does not apply to limited liability companies.

In short, effective March 22, 2019, Palmetto ceased to exist as a legal entity, thus terminating any justiciable controversy between it and the defendants in this matter.

(3): The South Carolina Uniform Limited Liability Act of 1996 does not provide for the revocation or reversal of a termination of a limited liability company, and Palmetto's invocation of S.C. Code § 33-34-207 to accomplish such revocation is improper.

The South Carolina Uniform Limited Liability Act of 1996 (the "Act") does not provide for the revocation or reversal of a termination of a limited liability company. There are no statutes contained within the Act that specifically allow for the reinstatement of a terminated LLC or provide a stated procedure for accomplishing such restatement.

In stark contrast, the Act specifically provides for the reinstatement of an administratively dissolved LLC. S.C. Code § 33-44-811. The Act affirmatively and expressly recognizes the right of an administratively dissolved LLC to apply for reinstatement. *Id.* Furthermore, the Act provides an expressly stated and specific procedure for reinstating an administratively dissolved LLC. *Id.* The Act's reinstatement procedures mandate that an administratively dissolved LLC must apply to the Secretary of State for reinstatement within **two years** after the effective date of dissolution. *Id.* Finally, the Act provides for specific procedures for an administratively dissolved LLC to appeal the Secretary of State's denial of its application for reinstatement. S.C. Code § 33-44-812.

The South Carolina legislature ("legislature") clearly intended for administratively dissolved LLC's to have the right and a means and method for reinstatement under the Act. The legislature's intent in this regard is clearly reflected in its drafting of specific provisions for reinstatement of administratively dissolved LLCs for inclusion in the Act.

The legislature certainly could have intended for terminated LLC's to have rights to reinstatement similar to those held by administratively dissolved LLCs under the Act. If the legislature had intended for terminated LLCs to have such reinstatement rights it could have drafted express provisions for reinstatement for inclusion in the Act. However, the legislature chose not to do so, reserving reinstatement rights solely to administratively dissolved LLCs under the Act.

In light of the non-existence of provisions for reinstating a terminated LLC under the Act, Palmetto has attempted to revoke its Articles of Termination, effective March 22, 2019, and reinstate

its existence as a legal entity pursuant to S.C. Code § 33-44-207. Palmetto seeks to have its reinstatement effective retroactively to October 30, 2000, the effective date of its Articles of Organization.

S.C. Code § 33-44-207 allows for **an existing limited liability company or foreign limited liability company to correct** a record filed by the Secretary of State if the record contains a false or erroneous statement or was defectively signed. Palmetto did not exist as a legal entity at the time it filed its articles of correction with the Secretary of State.

Furthermore, this statute is one of correction not revocation or reinstatement. Specifically, S.C. Code § 33-44-207 contains no provision nor express language allowing a terminated LLC (which does not exist as a legal entity) to use this statute to revoke, reverse or otherwise cancel its filed Articles of Termination and seek reinstatement.

Moreover, under S.C. Code § 33-44-207 Articles of correction are effective retroactively on the effective date of the records they correct except as to persons relying on the uncorrected record and adversely affected by the correction. As to those persons, articles of correction are effective when filed.

Aside from Palmetto's improper use of this statute as a vehicle to revoke its Articles of Termination, its efforts to have its reinstatement effective October 30, 2000 violates paragraph (c) of this statute inasmuch as the defendants relied on the Articles of Termination and are adversely affected by the correction.

In summary, the defendants submit that Palmetto's reliance on S.C. Code § 33-44-207 and the use of articles of correction thereunder to revoke its Articles of Termination, reinstate itself as an existing LLC and resume its business as if the termination had never occurred constitutes an improper and contorted use of this statute to accomplish a purpose unintended by the drafters of the statute and the South Carolina legislature.

(4): The Affidavits submitted in support of Palmetto Construction Group, LLC's ("Palmetto's) Articles of Correction to the South Carolina Secretary of State raise credibility issues and do not constitute competent evidence dispositive of the propriety and efficacy of the revocation of Palmetto's Articles of Termination.

Pursuant to S.C. Code § 33-44-207, Palmetto's counsel, Jaan G. Rannik, Esq., acting as Palmetto's "Attorney-in-Fact" submitted Articles of Correction Limited Liability Company to the

Secretary of State on December 8, 2021.¹ Palmetto's Articles of Correction, the affidavit of Joann Eaddy, and a copy of the original Articles of Termination were submitted in support thereof, sought to have the Secretary of State revoke its Articles of Termination and reinstate Palmetto as an existing LLC retroactive to its date of organization on October 30, 2000. *Exhibits B, D and A.*

AFFIDAVIT OF JERRY "JAY" S. HANDEGAN

Palmetto filed the affidavit of Jerry "Jay" S. Handegan, signed by Mr. Handegan under oath before a South Carolina notary with the Secretary of State on December 8, 2021. Mr. Handegan's affidavit is dated December 3, 2021. *Exhibit C.*

Mr. Handegan identifies himself as Palmetto's Vice President in Palmetto Construction Group. *Exhibit C, Paragraph 1.* Mr. Handegan states in his affidavit that "I learned through my attorney that Palmetto's existence was terminated through the filing of Articles of Termination with the Secretary of State on March 22, 2019." *Exhibit C, Paragraph 3.* Mr. Handegan attached a copy of the referenced Articles of Termination to his affidavit as Exh. A. *Id.*

Mr. Handegan further states that "Palmetto has been informed that the filing of the Articles of Termination ...was in error." *Exhibit C, Paragraph 6.*

Based on these statements under oath and the remainder of his affidavit, Mr. Handegan concludes by stating that "Palmetto requests the Secretary of State reinstate its corporate position so it may continue to wind up its business." *Exhibit C, Paragraph 7.*

Mr. Handegan's statements above, while under oath and contained in his affidavit submitted to the Secretary of State, and the implications deriving therefrom concerning the Articles of Termination are contradicted by matters of public record concerning litigation in which both Palmetto and Mr. Handegan were party defendants. Specifically, Palmetto and Mr. Handegan were named defendants in the case of Nathalia Mateus vs. Palmetto Construction Group, LLC; College Funds 4 Four, LLC; Jerry S. Handegan; and McCray's Services, LLC., CA: 2019-CP-10-1675, filed in Charleston County, South Carolina.

The Plaintiff, Nathalia Mateus commenced suit against Palmetto Construction Group, LLC, Jerry S. Handegan and other defendants in April 2019. *Exhibit E.* Plaintiff Mateus' counsel signed the Complaint on March 28, 2019 and filed the Summons and Complaint on April 1, 2019. Plaintiff

¹ Palmetto's Articles of Correction submitted in support of Plaintiff's Memorandum in Opposition to Motion to Dismiss do not contain Mr. Rannik's handwritten or electronic signature as required by S.C. Code § 33-44-205.

Mateus' counsel signed the Complaint **nine (9) days** after Palmetto's Articles of Termination were filed with the Secretary of State. Plaintiff Mateus' counsel filed the Complaint **twelve (12) days** after Palmetto's Articles of Termination were filed with the Secretary of State.

Plaintiff Mateus' Complaint alleged, *inter alia*, that:

- (a): "Palmetto is or was a company organized and operating under the laws of the State of South Carolina." ***Complaint, Paragraph 3. (Exhibit E).***
- (b): "[Jerry S.] Handegan is or was a member of Palmetto and College Fund and exercised control and direction over their operations in Charleston County, South Carolina." ***Exhibit E., Paragraph 5.***
- (c): "The South Carolina Secretary of State's records show Palmetto and College Fund as having been dissolved." ***Complaint, Paragraph 8. (Exhibit E).***
- (d): "Handegan was a member of Palmetto and College Fund at the time of their dissolutions." ***Complaint, Paragraph 9. (Exhibit E).***
- (e): "As a member of the dissolved entities, Handegan is liable for the claims against Palmetto and College Fund." ***Complaint, Paragraph 10. (Exhibit E).***

Palmetto Construction Group, LLC and Jerry S. Handegan, individually, filed their joint Answer and Crossclaims of Palmetto Construction Group, LLC and Jerry S. Handegan to Plaintiff Mateus' Complaint on June 11, 2019. ***Exhibit F.*** Palmetto's and Mr. Handegan's ("Handegan") legal counsel filed Palmetto's and Handegan's Answer and Counterclaims **eighty-four (84) days** after Palmetto's Articles of Termination were filed with the Secretary of State.

Palmetto and Handegan responded to the allegations in Plaintiff Mateus' Complaint cited above as follows:

- (a): Palmetto and Handegan admitted the allegations contained in Paragraph 3 of the Complaint. ***Answer, Paragraph 3. (Exhibit F).***
- (b): Palmetto and Handegan admitted the allegations contained in Paragraph 5 upon information and belief. ***Answer, Paragraph 5. (Exhibit F).***
- (c): With respect to Paragraph 8, Palmetto and Handegan craved reference to the Secretary of State and denied only those allegations contained in Paragraph 8 to the extent that such allegations were incongruent or conflicting with the Secretary of State's records. ***Answer, Paragraph 8. (Exhibit F).***
- (d): Handegan admitted the allegations contained in Paragraph 9 of the Complaint. ***Answer, Paragraph 9. (Exhibit F).***

(e): Handegan objected to Paragraph 10 of the Complaint on the grounds that it sought a legal conclusion and thereafter denied Paragraph 10 and demanded strict proof of all elements. ***Answer, Paragraph 10. (Exhibit F).***

As established by Palmetto's and Handegan's admissions above, both Palmetto and Handegan were expressly informed and placed on notice of the records on file with the Secretary of State indicating Palmetto was a dissolved entity. In fact, Palmetto's and Handegan's admissions directly contradict the statements of Palmetto's own counsel of record in Palmetto's memorandum opposing defendants' motion to dismiss. Palmetto's counsel states on several occasions that "Palmetto never dissolved" and therefore argues Palmetto could not have been terminated. *Plaintiff's Memorandum in Opposition to Motion to Dismiss, Pg. 3, Lines 1 and 2, Pg. 4, Lines 2 and 3.*

Furthermore, and most importantly, despite Palmetto and Handegan having the records of the Secretary of State and Palmetto's status therein called to their attention in the Spring/Summer of 2019 and Handegan being alleged to be liable for Palmetto's claims due to its status on file in these records with the Secretary of State at that time, neither Palmetto nor Handegan refuted, denied, objected or protested to the accuracy or efficacy of the public records on file with the Secretary of State, including the Articles of Termination filed on March 22, 2019. In fact, both Palmetto and Handegan expressly craved reference to the records of the Secretary of State and denied only information conflicting or incongruent with the Secretary of State's records.

It was only after the defendants in this action filed their Motion to Dismiss on the basis of Palmetto's termination on April 21, 2021 that Palmetto took action. Even then, Palmetto waited until December 8, 2021, approximately **eight (8) months** after the filing of defendants' motion to seek revocation of its termination and reinstatement with the Secretary of State.

Finally, Palmetto's December 8, 2021 filings with the Secretary of State were approximately **two years and six months (2 ½ years)** after the filing of its Articles of Termination to apply for reinstatement with the Secretary of State. This is **six (6) months** longer than is expressly allowed for even an administratively dissolved LLC to apply to the Secretary of State for reinstatement. S.C. Code § 33-33-811.

In summary, Palmetto and Handegan were informed and placed on notice of the records of the Secretary of State, which records included Palmetto's Articles of Termination, via the Mateus lawsuit in the Spring/Summer of 2019. Nonetheless, armed with this knowledge, Palmetto waited almost **two and one-half (2 ½) years later** to refute its Articles of Termination and file Articles of Correction

seeking to revoke said Articles of Termination and reinstate itself as an existing LLC in South Carolina.

AFFIDAVIT OF JOANN EADDY

Palmetto filed the affidavit of Joann Eaddy, signed by Ms. Eaddy under oath before a South Carolina notary, with the Secretary of State on December 8, 2021. Palmetto filed Ms. Eaddy's affidavit in support of its Articles of Correction. Ms. Eaddy's affidavit is dated December 1, 2021.

Exhibit D.

A review of Ms. Eaddy's affidavit and statements contained therein raises questions and issues as to the credibility and sufficiency of this affidavit as competent evidence concerning the propriety and efficacy of the revocation of Palmetto's Articles of Termination. Such questions include, but are not limited to the following:

(1): Ms. Eaddy's affidavit states a Delaware entity known as Palmetto Construction Group, LLC ("Delaware LLC") sold its assets and wound up its business affairs in late 2018 and 2019 and that she filed Articles of Termination which applied to a domestic South Carolina LLC intending for those Articles of Termination to apply to the Delaware LLC. ***Exhibit D, Paragraphs 3 and 4.*** These statements and stated actions thus raise the question of: *Why would Ms. Eaddy have used Articles of Termination that clearly applied to a domestic South Carolina LLC, as opposed to a foreign LLC, while attempting to terminate a Delaware Corporation?*

(2): In completing the Articles of Termination for a domestic South Carolina, LLC, Ms. Eaddy was required to insert the date of the articles of organization for the LLC she was attempting to terminate. Ms. Eaddy's affidavit states that she was attempting to terminate the Delaware LLC. Nonetheless, Ms. Eaddy inserted in the Articles of Termination the date of the Articles of Organization of the LLC as 10/30/2000. ***Exhibit A.*** In fact, the date of 10/30/2000 is the date of the Articles of Organization of the Plaintiff, Palmetto Construction Group, LLC, a South Carolina LLC. ***Exhibit G.*** The date of the Certificate of Formation of the Delaware LLC is 03/05/2005. ***Exhibit H.*** These statements and stated actions thus raise the question of: *Why would Ms. Eaddy insert the date of the South Carolina LLC's formation, instead of the date of the Delaware LLC's formation in the Articles of Termination?*

3): Ms. Eaddy's affidavit states that the Delaware LLC wound up its business affairs in late 2018 and early 2019 and that upon winding up the Delaware LLC's business affairs (which was completed in early 2019) she caused a Certificate of Cancellation to be filed for the Delaware LLC in Delaware.

However, the Secretary of State's records for the State of Delaware reflect that the Certificate of Cancellation for the Delaware LLC was not filed until May 13, 2020. **Exhibit I.** These statements and stated actions thus raise the question of: Why would the Certificate of Cancellation for the Delaware LLC have not been filed in Delaware until May 13, 2020, almost one and a half (1 ½) years after the Delaware completed winding up its business in early 2019?

A copy of the certified documents filed with the South Carolina Secretary of State on December 8, 2021 is attached hereto as **Exhibit J.**

For the above state reasons, the above-referenced affidavits of Jerry "Jay" S. Handegan and Joann Eaddy raise credibility issues and do not constitute competent evidence dispositive of the propriety and efficacy of the revocation of Palmetto's Articles of Termination.

CONCLUSION

Based on the foregoing, the Defendants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward are entitled to an order dismissing this action.

For these reasons, the Defendants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward hereby respectfully request that their Motion to Dismiss be granted.

Respectfully submitted,

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

/s/ A. Bright Ariail

A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

January 31, 2022
Charleston, SC 29412

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Nov 02 2021
REFERENCE ID: 901434


SECRETARY OF STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

ARTICLES OF TERMINATION
LIMITED LIABILITY COMPANY - DOMESTIC

Filing ID: 190322-1416377

Filing Date: 03/22/2019

The following limited liability company, having dissolved and completed its winding up, terminates its existence by filing these articles of termination in accordance with the 1976 S.C. Code of Laws, as amended, Section 33-44-805:

1. The name of the limited liability company is:

PALMETTO CONSTRUCTION GROUP, LLC

2. The date the articles of organization were filed is 10/30/2000.

3. The date of the dissolution of this limited liability company was 02/22/2019.

4. Has the company wound up its business and terminated its legal existence? Yes

5. Unless otherwise specified, these articles are effective when endorsed for filing by the Secretary of State. Specify the date of any delayed effective date: 03/22/2019
(Date)

Signed as Filer: joann eaddy

(Signature)

JoAnn Eaddy

(Print Name)

03/22/2019

(Date)

Capacity/Position of Person Signing (You must check one box.)

☐ Manager ☐ Member ☐ Organizer

☒ Fiduciary ☐ Attorney-in-Fact

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completed, scanned, and attached to any business filing where one of the following is true.



SECRETARY OF STATE OF SOUTH CAROLINA

y signs the digital form on behalf of official signee.

- An attorney's signature is required. (Articles of Incorporation for Corporation and Benefit Corporation)

Official Signatures

(Officer, Incorporator, Director, Agent, Partner, etc)

Required for forms where the signee is not present upon online submission and a filing party is providing a digital signing on their behalf. If the provided space is not enough, please attach multiple pages.

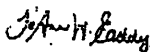
JoAnn Eaddy

Name

3/22/2019

Date

Signature



Finance Director

Title / Position

Name

Date

Signature

Title / Position

Name

Date

Signature

Title / Position

Name

Date

Signature

Title / Position

Name

Date

Signature

Title / Position

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Filing ID: 211208-1006549

Filing Date: 12/08/2021

Dec 08 2021
REFERENCE ID: 923334

**STATE OF SOUTH CAROLINA
SECRETARY OF STATE**


SECRETARY OF STATE OF SOUTH CAROLINA

**ARTICLES OF CORRECTION
LIMITED LIABILITY COMPANY**

The limited liability company in accordance with Section 33-44-207 of the 1976 S.C. Code of Laws, as amended corrects a record filed by the Secretary of State, which record contains a false or erroneous statement or was defectively signed.

1. The name of the limited liability company is:

PALMETTO CONSTRUCTION GROUP, LLC

2. That on 12/08/2021 the corporation filed (fill out whichever is applicable):

- a. ☐ The following described document:

- b. ☒ The attached document (attach copy of the document).

3. That this document was incorrect in the following manner:

Articles of Termination filed without authorization or knowledge from Palmetto Construction Group, LLC

4. That the incorrect matters stated in Paragraph 3 should be revised as follows:

Corrected Entity Name: Palmetto Construction Group of SC, LLC
Additional Info: Palmetto Construction Group, LLC was wrongly terminated and should be reinstated under the name of Palmetto Construction Group of SC, LLC

Date: 12/08/2021

Signed as Attorney-in-Fact: Jaan G. Rannik

(Signature)

Jaan G. Rannik

(Print Name)

Attorney

(Office)

Form Revised by South Carolina Secretary of State, August 2016
F0036

EXHIBIT B

2022-001224 ROA

Page 401

SC Secretary of State
Mark Hammond

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) AFFIDAVIT OF JERRY S. HANDEGAN

PERSONALLY appeared before me, JERRY "JAY" S. HANDEGAN, stating as follows:

1. My name is Jerry S. Handegan, and I held the position of Vice President in Palmetto Construction Group, LLC ("Palmetto").
2. Palmetto no longer does business as a result of the conduct underlying its pending lawsuit against Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward in Charleston County, South Carolina, Case number 2016-CP-10-1143.
3. I learned through my attorney that Palmetto's existence was terminated through the filing of Articles of Termination with the South Carolina Secretary of State on March 22, 2019. **Exh. A.**
4. The Articles of Termination were not filed or authorized by me or any other officer, agent, or employee of Palmetto.
5. One JoAnn W. Eaddy, who is unknown to this Affiant, filed the Articles of Termination with the Secretary of State without the knowledge of or authorization from Palmetto.
6. Palmetto has been informed the filing of the Articles of Termination by Ms. Eaddy was in error.
7. Palmetto requests the Secretary of State reinstate its corporate position so it may continue to wind up its business.
8. Further affiant says nothing.

SWORN to before me this
3rd day of December, 2021.



[Signature]
JERRY "JAY" S. HANDEGAN

[Signature]
Notary Public for South Carolina
My Commission Expires: 6/16/2027

COUNTY OF SUMTER)
)
 STATE OF SOUTH CAROLINA)

AFFIDAVIT OF JOANN EADDY

PERSONALLY APPEARED BEFORE ME the undersigned JoAnn Eaddy who being duly sworn, deposes and says that:

1. I am over 18 years of age, am competent to testify, and have personal knowledge of the matters set forth herein.

2. Since 2015, I have served as the Director of Finance for Thompson Construction Group, Inc. ("Thompson"). Thompson was the Manager of a limited liability company organized in the state of Delaware known as Palmetto Construction Group, LLC. That Delaware entity had a business address of 3511 Silverside Road, Suite 105, Wilmington, Delaware, 19810 and federal EIN of 65-1248199.

3. The Delaware entity known as Palmetto Construction Group, LLC ("Delaware LLC") sold its assets and wound up its business affairs in late 2018 and early 2019. Upon winding up the Delaware LLC's business affairs, I caused to be filed a Certificate of Cancellation with respect to the Delaware, LLC with the State of Delaware, Secretary of State, Division of Corporations.

4. On March 22, 2019, I also filed Articles of Termination – Limited Liability Company Domestic, for "Palmetto Construction Group, LLC" with the South Carolina Secretary of State's Office; those Articles have Filing ID 190322-1416377. I intended for those Articles of Termination to apply to the Delaware LLC. At the time, I believed that such Articles of Termination were necessary because the Delaware LLC of the same name filed tax returns with the South Carolina Department of Revenue with regard to an asset it held and sold in the state. I did not know that there was a separate, distinct business entity formed under South Carolina law

EXHIBIT D

known as Palmetto Construction Group, LLC. The subject Articles of Termination were filed by mistake on March 22, 2019 with South Carolina Secretary of State's Office. There is no relationship or affiliation whatsoever between the Delaware LLC and the South Carolina LLC known as Palmetto Construction Group, LLC. It was not my intent to file Articles of Termination for the South Carolina limited liability company known as Palmetto Construction Group, nor was I acting for or on behalf of that South Carolina LLC in doing so.

5. I request please that the South Carolina Secretary of State's Office accept this Affidavit in support of Articles of Correction being filed on behalf of Palmetto Construction Group, LLC, the South Carolina limited liability company, to revoke the Articles of Termination and allow the South Carolina LLC be reinstated.

I swear or affirm under penalty of perjury that the information in this Affidavit is true and correct to the best of my knowledge.

JoAnn Eaddy
JoAnn Eaddy

SWORN TO before me this 1st
day of December, 2021

Meagan E. Kuhlman
Notary Public for South Carolina
My Commission Expires: 9-21-2031



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Nov 02 2021
REFERENCE ID: 901434


SECRETARY OF STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

ARTICLES OF TERMINATION
LIMITED LIABILITY COMPANY - DOMESTIC

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2. The date the articles of organization were filed is 10/30/2000.

3. The date of the dissolution of this limited liability company was 02/22/2019.

4. Has the company wound up its business and terminated its legal existence? Yes

5. Unless otherwise specified, these articles are effective when endorsed for filing by the Secretary of State. Specify the date of any delayed effective date: 03/22/2019
(Date)

Signed as Filer: joann eaddy

(Signature)

JoAnn Eaddy

(Print Name)

03/22/2019

(Date)

Capacity/Position of Person Signing (You must check one box.)

☐ Manager ☐ Member ☐ Organizer

☒ Fiduciary ☐ Attorney-in-Fact

CERTIFIED TO BE A TRUE AND CORRECT COPY

AS TAKEN FROM AND COMPARED WITH NAME: XXXXXXXXXXXXXXXXXXXX XXXXXX

ORIGINAL ON FILE IN THIS OFFICE

Nov 02 2021

REFERENCE ID:

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completed, scanned, and attached to any business filing where one of the following is true.


 Mark Hammond
 SECRETARY OF STATE OF SOUTH CAROLINA

y signs the digital form on behalf of official signee.

- An attorney's signature is required. (Articles of Incorporation for Corporation and Benefit Corporation)

Official Signatures

(Officer, Incorporator, Director, Agent, Partner, etc)

Required for forms where the signee is not present upon online submission and a filing party is providing a digital signing on their behalf. If the provided space is not enough, please attach multiple pages.

JoAnn Eaddy

3/22/2019

Name

Date

Signature

JoAnn Eaddy

Finance Director

Title / Position

Name

Date

Signature

Title / Position

Name

Date

Signature

Title / Position

Name

Date

Signature

Title / Position

Name

Date

Signature

Title / Position

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

NATHALIA MATEUS,

Plaintiff

vs.

PALMETTO CONSTRUCTION GROUP, LLC;
COLLEGE FUNDS 4 FOUR, LLC; JERRY S.
HANDEGAN; and MCCRAY'S SERVICES, LLC,

Defendants

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2019-CP - 10- 1675

Submitted By: F. Elliott Quinn, IV
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103 Grandview Drive, Ste. A
Summerville, SC 29485

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Other: equinn@steinberglawfirm.com
E-mail:

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. This form is NOT required to be filed in E-Filed Cases.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

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

NATURE OF ACTION (Check One Box Below)

☒ Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/ Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199) _____	☐ Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20____-NI-_____ ☐ Notice/ File Med Mal (230) ☐ Other (299) _____	☐ Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399) _____	☐ Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499) _____
☐ Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599) _____	☐ Administrative Law/Relief ☐ Reinstatement Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899) _____	☐ Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Incapacitated Adult Settlement (790) ☐ Other (799) _____	☐ Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999) _____
☐ Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) _____ ☐ Sexual Predator (510) ☐ Permanent Restraining Order (680) ☐ Interpleader (690)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Pre-Suit Discovery (670)		

Submitting Party Signature: F. Elliott Quinn, IV

Date: 3/28/19

SCCA / 234 (02/2018)

2022-001224 ROA

Page 1 of 2

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

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

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

Pursuant to the ADR Rules, you are required to take the following action(s):

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

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

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

NATHALIA MATEUS,

Plaintiff,

v.

PALMETTO CONSTRUCTION GROUP,
LLC; COLLEGE FUNDS 4 FOUR, LLC;
JERRY S. HANDEGAN; and MCCRAY'S
SERVICES, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2019-CP-10-1675

SUMMONS

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2019 APR -1 PM 1:37

FILED

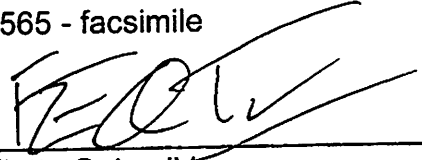
TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is hereby served upon you, to file a copy of your Answer with the Clerk of Court, and to serve a copy of your Answer upon the Plaintiff through her attorney, Elliott Quinn, at his office at P.O. Box 2670, Summerville, SC 29484, within thirty days after the service hereof, exclusive of the day of such service; and if you fail to Answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

DATED at Summerville, South Carolina, this 28th day of March, 2019.

THE STEINBERG LAW FIRM, L.L.P.
P.O. Box 2670
Summerville, SC 29484
(843) 871-6522 - office
(843) 871-8565 - facsimile

By: _____


F. Elliotte Quinn IV
SC Bar No.: 100450
equinn@steinberglawfirm.com

Attorney for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
NATHALIA MATEUS,

Plaintiff,

v.

PALMETTO CONSTRUCTION GROUP,
LLC; COLLEGE FUNDS 4 FOUR, LLC;
JERRY S. HANDEGAN; and MCCRAY'S
SERVICES, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2019-CP-10-1675

COMPLAINT

BY

JULIE J. ARTHUR
CLERK OF COURT

2019 APR - 1 PM 1:31

FILED

Plaintiff Nathalia Mateus ("Plaintiff"), by and through her undersigned counsel, complains of Defendants Palmetto Construction Group, LLC ("Palmetto"), College Funds 4 Four, LLC ("College Fund"), Jerry S. Handegan ("Handegan"), and McCray's Services, LLC ("McCray"), (together "Defendants"), as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff owns the real property located at 24 Orr's Court in Charleston in Charleston County, South Carolina, (the "Property").
2. The claims in this action arise from and relate to Defendants' development of, sale of, construction of, and work at the Property.
3. Palmetto is or was a company organized and operating under the laws of the State of South Carolina.
4. College Fund is or was a company organized and operating under the laws of the State of South Carolina.

5. Handegan is or was a member of Palmetto and College Fund and exercised control and direction over their operations in Charleston County, South Carolina.

6. McCray is a company organized and operating under the laws of the State of South Carolina.

7. At all relevant times, Defendants conducted business in Charleston County.

8. The South Carolina Secretary of State's records show Palmetto and College Fund as having been dissolved.

9. Handegan was a member of Palmetto and College Fund at the time of their dissolutions.

10. As a member of the dissolved entities, Handegan is liable for the claims against Palmetto and College Fund.

FACTUAL BACKGROUND

11. Plaintiff contracted with College Fund for the purchase of the Property and a residence constructed or to be constructed thereon.

12. Palmetto served as the general contractor for the construction of the Property.

13. Palmetto constructed improvements on the Property including the residence located thereon.

14. McCray, as a subcontractor to Palmetto, installed the heating, air conditioning, and ventilation system and related components ("HVAC") at the Property.

15. Defendants owed duties to Plaintiff to complete their work free from defects, in a good and workmanlike manner, and in accordance with all applicable laws, building codes, industry standards, manufacturer's installation instructions, and industry standard

of care.

16. Defendants failed to properly construct and install the HVAC at the Property.

17. Plaintiff discovered the Property is damaged with the damage being the proximate result of the improper work performed by Defendants, and their employees, agents, servants, and/or subcontractors.

18. As a direct and proximate result of the improper and defective work by Defendants, and their employees, agents, servants, and/or subcontractors, Plaintiff spent and/or will be required to spend substantial sums of money to repair the Property.

19. The Property suffered a loss of value as a direct and proximate result of the improper and defective work by Defendants, and their employees, agents, servants, and/or subcontractors.

20. Plaintiff suffered the loss of use and enjoyment of the Property as a direct and proximate result of the improper and defective work by Defendants, and their employees, agents, servants, and/or subcontractors.

21. As a direct and proximate result of the improper and defective work by Defendants, and their employees, agents, servants, and/or subcontractors, Plaintiff will be required to spend substantial sums to investigate the deficiencies, develop and design repairs, and undertake the repairs, in addition to other actual, direct, indirect, consequential, and special damages.

22. The improper and defective work performed by Defendants resulted or will result in substantial consequential and resulting damage to non-defective components of the Property on which Defendants did not perform work.

FOR A FIRST CAUSE OF ACTION
Negligence/Gross Negligence

23. Plaintiff realleges the allegations in the preceding paragraphs as if fully set forth herein.

24. Defendants, through their employees, agents, or servants, through the use of subcontractors, or through both, performed work at the Property.

25. Having undertaken the performance of construction work at the Property, Defendants owed a duty to Plaintiff to exercise due care in the performance of the work, owed a duty to Plaintiff to perform the work in accordance with all applicable building codes, industry standards, plans, specifications, and manufacturer's installation instructions, and owed a duty to Plaintiff to perform the work in a good and workmanlike manner.

26. Defendants and their employees, agents, servants, and/or subcontractors were negligent, careless, reckless, and grossly negligent in failing to exercise due care in the performance of the construction work, in failing to construct the Property in a good and workmanlike manner, and in failing to construct the Property in accordance with all applicable building codes, industry standards, plans, specifications, and manufacturer's installation instructions, including, but not limited to, the following:

- a. In failing to construct the Property in accordance with the applicable building code;
- b. In failing to construct the Property in accordance with the industry standards and industry standard of care;
- c. In failing to install the HVAC in accordance with the applicable building

code, industry standards, manufacturer's installation instructions, and industry standard of care;

- d. In failing to properly investigate their employees, agents, servants, and/or subcontractors to determine if they were competent and capable of performing their work with due care, in a good and workmanlike manner, and in compliance with all applicable building codes, industry standards, plans, specifications, and manufacturer's installation instructions;
- e. In failing to properly supervise their employees, agents, servants, and/or subcontractors;
- f. In failing to properly inspect and investigate the work of their employees, agents, servants, and/or subcontractors;
- g. In failing to discover defects in the work of their employees, agents, servants, and/or subcontractors;
- h. In failing to investigate and correct defective work;
- i. In failing to act as a reasonably prudent developer, general contractor, subcontractor, and/or construction professional would in similar circumstances; and
- j. In such other failures as will be shown through discovery and trial in this action.

27. As a direct, foreseeable, and proximate result of the negligence and gross negligence of Defendants, and their employees, agents, servants, and/or subcontractors, Plaintiff suffered and will suffer damage to the Property.

28. As a direct, foreseeable, and proximate result of the negligence and gross negligence of Defendants and their employees, agents, servants, and/or subcontractors, Plaintiff suffered diminution in the value of the Property and loss of the use and enjoyment of the Property.

29. As a direct, foreseeable, and proximate result of the negligence and gross negligence of Defendants and their employees, agents, servants, and/or subcontractors, Plaintiff suffered increased maintenance and utility costs.

30. As a direct, foreseeable, and proximate result of the negligence and gross negligence of Defendants and their employees, agents, servants, and/or subcontractors, Plaintiff was damaged in that Plaintiff spent or will be required to spend substantial sums to determine the extent of the damage to the Property, to develop and design repairs for the Property, and to repair the Property.

31. The violation of the applicable building codes by Defendants and their employees, agents, servants, and/or subcontractors constitutes negligence *per se*.

32. The acts and omissions of Defendants and their employees, agents, servants, and/or subcontractors constitute gross negligence.

33. Plaintiff is entitled to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION
Breach of Implied Warranties

34. Plaintiff realleges the allegations in the preceding paragraphs as if fully set forth herein.

35. By operation of law, Defendants warranted that the work would be performed using the utmost skill and attention, in a good and workmanlike manner, and

free from defects.

36. Defendants breached the implied warranties by performing defective work as set forth herein.

37. In selling the Property or otherwise placing the Property into the stream of commerce, College Fund, by operation of law, impliedly warranted the Property would be habitable and free from defects.

38. College Fund breached the implied warranty of habitability by constructing and selling a defective residence as set forth above.

39. As a direct, foreseeable, and proximate result of the breach of the implied warranties by Defendants, Plaintiff suffered and will suffer damage to the Property including portions of the Property on which Defendants did not perform work.

40. As a direct, foreseeable, and proximate result of the breach of the implied warranties by Defendants, Plaintiff suffered diminution in the value of the Property and loss of the use and enjoyment of the Property.

41. As a direct, foreseeable, and proximate result of the breach of the implied warranties by Defendants, Plaintiff was damaged in that Plaintiff spent or will be required to spend substantial sums to determine the extent of the damage to the Property, to develop and design repairs for the Property, and to repair the Property.

FOR A THIRD CAUSE OF ACTION
Unfair Trade Practices Act, S.C. Code §§ 39-5-10, et seq.

42. Plaintiff realleges the allegations in the preceding paragraphs as if fully set forth herein.

43. Defendants engaged in unfair and deceptive acts and practices in violation

of the South Carolina Unfair Trade Practices Act, S.C. Code §§ 39-5-10, *et seq.*

44. The unfair and deceptive acts and practices of Defendants include, but are not limited to:

- a. The construction of the Property in a manner resulting in defects hidden from Plaintiff;
- b. Misrepresentations regarding the Property and warranties;
- c. The use of unlicensed persons for the construction of the Property; and
- d. Failure to make efforts to comply with the warranties.

45. Defendants' violations of the Unfair Trade Practices Act affect the public interest.

46. Upon information and belief, Defendants engaged in a pattern of unfair and deceptive acts and practices.

47. Upon information and belief, Defendants engaged in substantially similar unfair and deceptive acts and practices with others.

48. Plaintiff suffered damages as a result of Defendants' unfair and deceptive acts and practices including, but not limited to, damage to the Property, diminution in the value of the Property, loss of use and enjoyment of the Property, increased maintenance and utility costs, and the substantial sums Plaintiff has been or will be required to spend to determine the extent of the damage to the Property, to develop and design repairs for the Property, and to repair the Property.

49. Defendants' unfair and deceptive acts and practices proximately caused Plaintiff's damages.

50. Defendants knew, reasonably should have known, and/or could have

ascertained through the exercise of reasonable efforts that the unfair and deceptive acts and practices violated the Unfair Trade Practices Act.

51. Defendants' violations of the Unfair Trade Practices Act were knowing or willful.

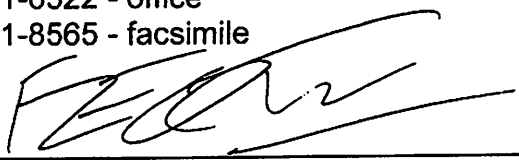
52. Plaintiff is entitled to an award of treble damages.

53. Plaintiff is entitled to an award of attorneys' fees, expert fees, costs, and expenses.

WHEREFORE, Plaintiff demands a jury trial and prays for judgment against Defendants for actual, consequential, treble, and punitive damages and for such other and further relief as this Court deems just and proper.

THE STEINBERG LAW FIRM, L.L.P.
P.O. Box 2670
Summerville, SC 29484
(843) 871-6522 - office
(843) 871-8565 - facsimile

By: _____


F. Elliotte Quinn IV
SC Bar No.: 100450
equinn@steinberglawfirm.com

Attorney for Plaintiff

March 28, 2019

Summerville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

NATHALIA MATEUS,

Plaintiff

V

PALMETTO CONSTRUCTION
GROUP, LLC; COLLEGE FUNDS
4 FOUR, LLC; JERRY S.
HANDEGAN; and MCCRAY'S
SERVICES, LLC,

Defendants

IN THE COURT OF COMMON PLEAS

CASE NO. 2019-CP-10-1675

ANSWER AND CROSSCLAIMS OF
DEFENDANTS PALMETTO
CONSTRUCTION GROUP, LLC AND
JERRY S. HANDEGAN
(JURY TRIAL DEMANDED)

FILED
2019 JUN 11 PM 2:12
JULIE J. ARSTRONG
CLERK OF COURT

TO F. ELLIOTE QUINN IV, ESQ., Attorney for Plaintiff:

Defendants Palmetto Construction Group, LLC and Jerry S. Handegan, individually, by their undersigned counsel of record, pursuant to the South Carolina Rules of Civil Procedure, hereby file their Answer to the Complaint, and states as follows.

PARTIES, JURISDICTION, AND VENUE

1. The Defendants Palmetto Construction Group, LLC ("Palmetto" and Jerry S. Handegan ("Handegan") (collectively "Defendants") are not in possession of information necessary to confirm or deny the allegation contained in Paragraph 1. Defendants crave reference to the title documents on record at the Charleston County Register of Deeds.

2. The allegations contained in Paragraph 2 do not require a response from the Defendants. To the extent it is deemed a response is required, same are denied.

3. Defendant Palmetto admits those allegations contained in Paragraph 3.

4. Defendants are not in a position to admit or deny the allegations contained in Paragraph 4.

EXHIBIT F

5. The allegations contained in Paragraph 5 are admitted upon information and belief.

6. The allegations contained in Paragraph 5 are made against a Defendant other than the Defendant Handegan and Palmetto and, thus, a response is not required at this time from the Defendants.

7. As to the allegations contained in Paragraph 7, the Defendant Palmetto admits that it conducted business in Charleston County, South Carolina. The Defendant Handegan denies the allegations in this paragraph as this Defendant is an individual who was not a party to any contracts, negotiations, or the acts/omissions which are the subject matter of this lawsuit.

8. With regard to those allegations contained in Paragraph 8, the Defendants would crave reference to the Secretary of State. To the extent the information asserted in Paragraph 8 is incongruent or conflicting with the Secretary of State's records, each conflict or incongruity is denied.

9. The Defendant Handegan admits the allegations contained in Paragraph 9.

10. The Defendant Handegan objects to Paragraph 10 of the Plaintiff's Complaint because it seeks a legal conclusion which this Defendant is not required to make. To the extent it is deemed that a response is required, this Defendant denies this Paragraph and demands strict proof of all elements.

FACTUAL BACKGROUND

11. The Defendants Handegan and Palmetto reassert Paragraphs 1-10 as stated verbatim.

12. The allegations contained in Paragraph 11 make no claims against the Defendants Handegan and Palmetto and, therefore, a response is not required. To the extent a response is

required, same is denied to the extent it conflicts with the records retrieved from Charleston County Register of Mesne Conveyances.

13. The Defendants Handegan and Palmetto admit those allegations contained in Paragraphs 12, 13, and 14.

14. The allegations contained in Paragraph 15 are not required to be answered by the Defendants Handegan and Palmetto as the Paragraph seeks to establish a legal conclusion. To the extent a response to Paragraph 15 is required, same is denied and strict proof is demanded.

15. The allegations contained in Paragraphs 16, 17, 18, 19, 20, 21, and 22 are denied with strict proof demanded of each element and assertion.

FOR A FIRST CAUSE OF ACTION
Negligence/Gross Negligence

16. The allegations contained in Paragraph 23 are a reassertion of the previous 22 Paragraphs and, as such, a response is not required at this time. To the extent a response is required, same is denied.

17. The Defendants admit those allegations contained in Paragraph 24.

18. The Defendants do not have an obligation to respond to the allegations contained in Paragraph 25 as these allegations require the Defendants Handegan and Palmetto to provide legal conclusions requested by the Plaintiff. To the extent a response is required, the Defendants deny the allegations and demand strict proof of all.

19. The Defendants Handegan and Palmetto deny the allegations contained in Paragraphs 26, 27, 28, 29, 30, 31, 32, and 33.

FOR SECOND CAUSE OF ACTION
Breach of Implied Warranties

20. The allegations contained in Paragraph 34 are a reassertion of the previous 33 Paragraphs and, as such, a response is not required at this time. To the extent a response is required, same is denied.

21. The allegations contained in Paragraph 35 contain legal conclusions that the Defendant is not required to answer. To the extent an answer is required, same is denied.

22. The allegations contained in Paragraph 36 are denied with strict proof of each demanded.

23. The allegations contained in Paragraphs 37 and 38 are made against a party which is separate from the Defendants Handegan and Palmetto and, as such, a response is not required at this time.

24. The allegations contained in Paragraphs 39, 40 and 41 are denied with strict proof demanded of each.

FOR A THIRD CAUSE OF ACTION
Unfair Trade Practices Act, S.C. Code §§ 39-5-10, et seq.

25. The allegations contained in Paragraph 42 are a reassertion of the previous 41 Paragraphs and a response is not required by the Defendants Handegan or Palmetto.

26. The allegations contained in Paragraphs 43, 44, 45, 46, 47, 48, 49, 50 and 51 are denied with strict proof demanded of each.

27. The allegations contained in Paragraphs 52 and 53 contain legal conclusions and are, therefore, not required to be answered by the Defendants Handegan and Palmetto. To the extent a response is required, same is denied with strict proof demanded of each.

As an Affirmative Defense and Motion to Dismiss

28. The Defendants Handegan and Palmetto were entitled to notice and an opportunity to cure any alleged defects pursuant to the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §40-59-810-860 (the "Act") which

requires a claimant to serve written notice of a construction defect claim on the contractor at least ninety days before filing an action arising out of the construction of a dwelling.

As the First Affirmative Defense

29. The Plaintiff has failed to state a cause of action under which relief can be granted and this case should be dismissed pursuant to Rule 12(b)(6).

As a Second Affirmative Defense

30. The damages complained of by the Plaintiff, if any, are the sole or partial result of an intervening or superseding cause, the result of which is a complete or partial defense to the allegations made by the Plaintiff against the Defendants.

As a Third Affirmative Defense

31. The damages complained of by the Plaintiff are a result of the sole negligence of a person or entity other than the Defendants Handegan and Palmetto and this negligence acts as a complete bar to liability of these defendants.

As an Additional Affirmative Defense

32. The Plaintiff's claim(s) are barred under the doctrine of spoliation of evidence.

As an Additional Affirmative Defense

33. The Plaintiff's claims are barred by equitable doctrines including waiver, estoppel, laches, and the doctrine of unclean hands.

As an Additional Affirmative Defense

34. The Plaintiff's claims are barred by the statutes of limitations and statutes of repose.

As an Additional Affirmative Defense

35. The Plaintiff's claims are barred by the doctrine of acceptance.

As an Additional Affirmative Defense

36. The Plaintiff's claims are barred by Plaintiff's failure to join necessary and indispensable parties.

As an Additional Affirmative Defense

37. The Plaintiff's claims seeking damages under the Unfair Trade Practices Act are barred as the Plaintiff was a subsequent purchaser who was not in privity with the Defendant Palmetto or Handegan. *See Reynolds v. Ryland Group, Inc.*, 340 S.C. 331, 531 S.E.2d 917, 2000 S.C. LEXIS 105

As an Additional Affirmative Defense

38. The Plaintiff has an obligation to mitigate damages and she has failed to do so.

As an Additional Affirmative Defense

39. Plaintiff can not recover in tort for purely economic loss.

As an Additional Affirmative Defense

40. The Defendants Handegan and Palmetto can not be held liable from those causes of action related to warranties flowing from the sale of the property.

As an Additional Affirmative Defense

41. The Defendants Handegan and Palmetto limited any warranties by contract and, as such, the causes of action for express and implied warranties must fail.

As an Additional Affirmative Defense

42. The acts and/or omissions alleged by the Plaintiff are not the proximate cause of Plaintiff's alleged injuries.

As an Additional Affirmative Defense

43. There was no privity of contract between the Plaintiff and Defendants Handegan

and Palmetto which excuses all claims regarding Unfair Trade Practices as well as certain warranties.

As an Additional Affirmative Defense

44. The Defendants Handegan and Palmetto incorporate all defenses alleged by others.

As an Additional Affirmative Defense

45. The Plaintiff has alleged negligent acts or omissions against the Defendants Handegan and Palmetto, as well as additional Defendants. To the extent the Defendants were negligent with regard to any of the acts or omissions asserted, that degree of negligence was not in excess of fifty percent and the negligence of Handegan and Palmetto shall be reduced or apportioned in that fashion as is prevailing norm under South Carolina's doctrine of comparative negligence.

46. The Defendants Handegan and Palmetto hereby assert their rights to use additional affirmative defenses not known at this time.

As a Cross-Claim Against Defendant McCray's Services, LLC

47. The allegations contained in Paragraphs 1-46 are reasserted as verbatim.

48. That, upon information and belief, Defendant, McCray's Services, LLC was authorized to and did perform work in Charleston County, South Carolina as a subcontractor hired to provide labor and/or materials for the HVAC system and all complementary components at the subject property.

49. That, upon information and belief, McCray's had a duty to properly, adequately, and completely construct the building and all components in compliance with the plans and

specifications and in compliance with the applicable industry standards, manufacturer specifications, and building codes.

50. If the allegations within Plaintiff's Complaint are proven true, McCray's breached this duty and was negligent, grossly negligent, wanton, reckless and willful in failing to construct the HVAC system according the plans and specifications and in compliance with the applicable industry standards and building codes, among other alleged deficiencies, as set forth in the Complaint.

51. Any alleged negligence on the part of the Defendants Handegan and/or Palmetto was merely passive and did not result in the damages claimed.

52. The alleged damages, if any, to the building that is the subject of the Plaintiff's Complaint are the direct and proximate result of McCray's negligence, which has caused and will continue to cause the Defendants Handegan and Palmetto to suffer substantial damages.

53. The Defendants Handegan and Palmetto have been exposed to a potential judgment, have suffered actual damages in paying for allegedly defective work and the costs investigating and defending this lawsuit, and are entitled to recover actual and consequential damages from the Defendant McCray's including but not limited to the full amount of any judgment and/or settlement in this case.

As a Second Crossclaim Against McCray's

54. The Defendants Handegan and Palmetto reassert and reallege Paragraphs 1-53 as expressed verbatim.

55. The Defendant McCray's Services, LLC made express and implied warranties that they would perform their work according to the plans and specifications, industry standards, the applicable building codes, manufacturer's recommendations, and that their work or products

would be fit for its intended purpose, would be merchantable, would be free of defects, and would be of good workmanlike quality.

56. If the allegations within Plaintiff's Complaint are proven true, McCray's breached these warranties as complained of in the Plaintiff's Complaint.

57. The alleged damages to the property that is the subject of the Plaintiff's Complaint are the direct and proximate result of McCray's breaches of warranties, which has caused and will continue to cause the Defendants Handegan and Palmetto to suffer substantial damages. The Defendants Handegan and Palmetto have been exposed to a potential judgment, have suffered actual damages in paying for allegedly defective work and the costs defending this lawsuit, and is entitled to recover its actual and consequential damages from the Subcontractor Defendants, including but not limited to the full amount of any judgment and/or settlement in this case.

As a Third Crossclaim Against Defendant McCray's

58. The Defendants Handegan and Palmetto reassert and reallege Paragraphs 1-57 as expressed verbatim.

59. The Defendant McCray's Services, LLC agreed to furnish labor, materials, and all items necessary to construct the building in accordance with applicable building codes, industry standards, and manufacturer's recommendations.

60. By agreeing to perform services and supply materials on behalf of the Defendant Palmetto, McCray's formed a contractual relationship.

61. If the allegations within Plaintiff's Complaint are proven true, McCray's breached this contract in that they failed to properly install the HVAC system as alleged in the Complaint.

62. The alleged damages, if any, to the improvements to real property which are the subject of the Plaintiff's Complaint are the direct and proximate result of the Subcontractor

Defendants' breach of contract, which has caused and will continue to cause the Defendants Handegan and Palmetto to suffer substantial damages. The Defendants Handegan and Palmetto have been exposed to a potential judgment, have suffered actual damages in paying for allegedly defective work and the costs defending this lawsuit, and are entitled to recover their actual and consequential damages from McCray's, including but not limited to the full amount of any judgment and/or settlement in this case.

As a Fourth Crossclaim Against Defendant McCray's

63. The Defendants Handegan and Palmetto reassert and reallege Paragraphs 1-62 as expressed verbatim.

64. The Plaintiff has alleged the Project was defectively constructed in numerous particulars related to the installation of the HVAC system and that property damage has resulted as a consequence from such defective labor and/or material.

65. The Defendant Palmetto has a special relationship with McCray's due to the general contractor and subcontractor relationship.

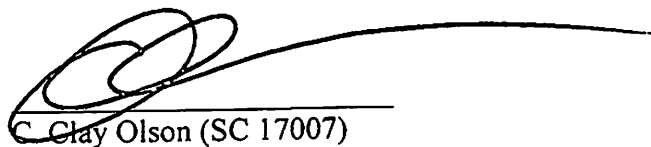
66. The Defendants Palmetto and Handegan have denied the allegations contained in the Plaintiff's Complaint.

67. If, however, the facts alleged by the Plaintiff are proven true, then the Defendants Palmetto and Handegan are entitled to full and complete indemnity from McCray's for all liability imposed upon Palmetto and Handegan arising in whole or in part by virtue of the negligent acts and/or omissions, including being indemnified for the full amount of any judgment or settlement as well as for the costs and attorney's fees associated with defending this action.

68. Any negligence alleged as to Palmetto and/or Handegan is merely passive and not the cause of any of the alleged damage.

NOW, having answered the Complaint filed against it, Defendants Palmetto Construction Group, LLC and Jerry S. Handegan move this Court to dismiss the Complaint, with prejudice, with all costs assessed against Plaintiff, and for such other and further relief to which the Defendants may be entitled; additionally the Defendants ask that the Court award damages as set forth in its Cross-Claims, attorney's fees and costs; pre and post-judgment interest; full indemnity; and for any such other and further relief this Court may deem just and proper. Defendants demand a trial by jury.

HARPER LITTLE PLLC



C. Clay Olson (SC 17007)
43 Broad Street Unit 202 (Physical)
164 Market Street Suite 139 (Mail)
Charleston, SC 29401
843-224-6676 (Phone)
662-259-8464 (Facsimile)

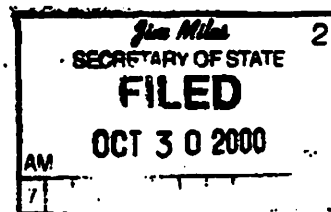
Charleston, SC
June 7th 2019

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

Sep 27 2019
REFERENCE ID: 407064

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA
SECRETARY OF STATE
JIM MILES
ARTICLES OF ORGANIZATION
LIMITED LIABILITY COMPANY



The undersigned deliver the following articles of organization to form a South Carolina limited liability company pursuant to § 33-44-202 and § 33-44-203 of the 1976 South Carolina Code, as amended.

1. The name of the limited liability company which complies with § 33-44-105 of the South Carolina Code of 1976, as amended is John Kendle, LLC

2. The office of the initial designated office of the limited liability company in South Carolina is:

5265 Kenco Lane
Street address
Yonges Island, South Carolina 29409 29449
City Zip Code

3. The initial agent for service of process of the limited liability company is

John M. Kendle, Jr.

Name

and the street address in South Carolina for this initial agent for service of process is:

5265 Kenco Lane
Street address
Yonges Island, South Carolina 29409 29449
City Zip Code

4. The name and address of each organizer is:

(a) John M. Kendle, Jr.

Name
5265 Kenco Lane
Street address
Yonges Island, South Carolina 29409 29449
City State Zip Code

(b)

Name

Street address

City

State

Zip Code

(Add additional lines if necessary)

5. ☐ Check this box only if the company is to be term company. If so, provide the term specified:

EXHIBIT G

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

6 Sep 27 2019 Check this box only if management of the limited liability company is vested in a
REFERENCE ID: 407064 manager or managers. If this company is to be managed by managers, specify the
name and address of each initial manager:

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

(a)

Name

Street address

City State Zip Code

(b)

Name

Street address

City State Zip Code

(c)

Name

Street address

City State Zip Code

(d)

Name

Street address

City State Zip Code

(Add additional lines if necessary)

7. ☐ Check this box only if one or more of the members of the company are to be liable for
its debts and obligations under Section 33-44-303(c). If one or more members are so
liable, specify which members, and for which debts, obligations or liabilities such
members are liable in their capacity as members.

8. Unless a delayed effective date is specified, these articles will be effective when endorsed for
filing by the Secretary of State. Specify any delayed effective date and time:

9. Set forth any other provisions not inconsistent with law which the organizers determine to
include, including any provisions that are required or are permitted to be set forth in the limited
liability company operating agreement.

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

Sep 27 2019

REFERENCE ID: A07964
Signature of each organizer:

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

m m. kendle jr.

Signature of Organizer John M. Kendle, Jr.

Signature of Organizer

Date: 10/23/00

Delaware

Page 1

The First State

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED ARE TRUE AND CORRECT COPIES OF ALL DOCUMENTS ON FILE OF 'PALMETTO CONSTRUCTION GROUP LLC' AS RECEIVED AND FILED IN THIS OFFICE.

THE FOLLOWING DOCUMENTS HAVE BEEN CERTIFIED:

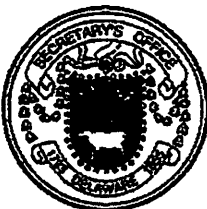
CERTIFICATE OF FORMATION, FILED THE ELEVENTH DAY OF MARCH, A.D. 2005, AT 3:11 O'CLOCK P.M.

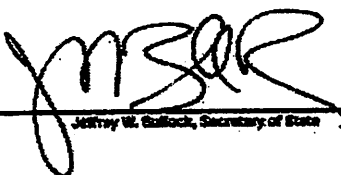
CERTIFICATE OF MERGER, FILED THE TWENTY-SEVENTH DAY OF FEBRUARY, A.D. 2006, AT 4:20 O'CLOCK P.M.

CERTIFICATE OF CANCELLATION, FILED THE FOURTH DAY OF JUNE, A.D. 2020, AT 10 O'CLOCK A.M.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CERTIFICATES ARE THE ONLY CERTIFICATES ON RECORD OF THE AFORESAID LIMITED LIABILITY COMPANY, 'PALMETTO CONSTRUCTION GROUP LLC'.

EXHIBIT H




Jeffrey W. Bullock, Secretary of State

3938742 8100H
SR# 20220176699

Authentication: 202433062
Date: 01-19-22

You may verify this certificate online at corn.delaware.gov/authver.shtml

State of Delaware
Secretary of State
Division of Corporations
Delivered 03:17 PM 03/11/2005
FILED 03:11 PM 03/11/2005
SRV 050207366 - 3938742 FILE

CERTIFICATE OF FORMATION
OF

PALMETTO CONSTRUCTION GROUP LLC

The undersigned authorized person hereby certifies that:

FIRST. The name of the limited liability company (hereafter the "Company") is:

PALMETTO CONSTRUCTION GROUP LLC

SECOND. The address of the Company's registered office in the State of Delaware is to be located at 3511 Silverside Road, Suite 105, in the City of Wilmington, County of New Castle. The Registered Agent in charge thereof is DELAWARE REGISTRY, LTD., 3511 Silverside Road, Suite 105, Wilmington, Delaware USA 19810.

THIRD. The Authority of the undersigned authorized person is limited to, and solely for the purpose of, executing and filing this Certificate of Formation.

IN WITNESS WHEREOF, the undersigned has executed this Certificate of Formation of the company this 11 day of March, 2005.

DELAWARE REGISTRY, LTD.

By: Joy Stidham
Joy Stidham, Assistant Secretary
Authorized Person

Delaware

The First State

Page 1

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED ARE TRUE AND CORRECT COPIES OF ALL DOCUMENTS ON FILE OF "PALMETTO CONSTRUCTION GROUP LLC" AS RECEIVED AND FILED IN THIS OFFICE.

THE FOLLOWING DOCUMENTS HAVE BEEN CERTIFIED:

CERTIFICATE OF FORMATION, FILED THE ELEVENTH DAY OF MARCH, A.D. 2005, AT 3:11 O'CLOCK P.M.

CERTIFICATE OF MERGER, FILED THE TWENTY-SEVENTH DAY OF FEBRUARY, A.D. 2006, AT 4:20 O'CLOCK P.M.

CERTIFICATE OF CANCELLATION, FILED THE FOURTH DAY OF JUNE, A.D. 2020, AT 10 O'CLOCK A.M.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CERTIFICATES ARE THE ONLY CERTIFICATES ON RECORD OF THE AFORESAID LIMITED LIABILITY COMPANY, "PALMETTO CONSTRUCTION GROUP LLC".

EXHIBIT I




Jeffrey W. Bullock, Secretary of State

3938742 8100H
SR# 20220176699

Authentication: 202433062
Date: 01-19-22

You may verify this certificate online at corn.delaware.gov 2022011922 ROA

**STATE OF DELAWARE
CERTIFICATE OF CANCELLATION**

1. The name of the limited liability company is _____
Palmetto Construction Group, LLC
2. The Certificate of Formation of the limited liability company was filed on
3/11/2005

IN WITNESS WHEREOF, the undersigned has executed this Certificate of
Cancellation this 13th day of May, A.D. 2020.

By: _____

Authorized Person(s)

Name: _____

Print or Type

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

Jan 17 2022
REFERENCE ID: 949820

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

ARTICLES OF CORRECTION
LIMITED LIABILITY COMPANY

Filing ID: 211208-1006549

Filing Date: 12/08/2021

The limited liability company in accordance with Section 33-44-207 of the 1976 S.C. Code of Laws, as amended corrects a record filed by the Secretary of State, which record contains a false or erroneous statement or was defectively signed.

1. The name of the limited liability company is:

PALMETTO CONSTRUCTION GROUP, LLC

2. That on 12/08/2021 the corporation filed (fill out whichever is applicable):

- a. ☐ The following described document:

- b. ☒ The attached document (attach copy of the document).

3. That this document was incorrect in the following manner:

Articles of Termination filed without authorization or knowledge from Palmetto Construction Group, LLC

4. That the incorrect matters stated in Paragraph 3 should be revised as follows:

Corrected Entity Name: Palmetto Construction Group of SC, LLC
Additional Info: Palmetto Construction Group, LLC was wrongly terminated and should be reinstated under the name of Palmetto Construction Group of SC, LLC

Date: 12/08/2021

Signed as Attorney-in-Fact: Jaan G. Rannik

(Signature)

Jaan G. Rannik

(Print Name)

Attorney

(Office)

EXHIBIT J

Form Revised by South Carolina Secretary of State, August 2016
F0036

2022-001224 ROA

Page 439

SC Secretary of State
Mark Hammond

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

JAN 17 2022
COUNTY OF SUMTER
REFERENCE ID: 949820

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

H CAROLINA

AFFIDAVIT OF JOANN EADDY

PERSONALLY APPEARED BEFORE ME the undersigned JoAnn Eaddy who being duly

sworn, deposes and says that:

1. I am over 18 years of age, am competent to testify, and have personal knowledge of the matters set forth herein.
2. Since 2015, I have served as the Director of Finance for Thompson Construction Group, Inc. ("Thompson"). Thompson was the Manager of a limited liability company organized in the state of Delaware known as Palmetto Construction Group, LLC. That Delaware entity had a business address of 3511 Silverside Road, Suite 105, Wilmington, Delaware, 19810 and federal EIN of 65-1248199.
3. The Delaware entity known as Palmetto Construction Group, LLC ("Delaware LLC") sold its assets and wound up its business affairs in late 2018 and early 2019. Upon winding up the Delaware LLC's business affairs, I caused to be filed a Certificate of Cancellation with respect to the Delaware, LLC with the State of Delaware, Secretary of State, Division of Corporations.
4. On March 22, 2019, I also filed Articles of Termination – Limited Liability Company Domestic, for "Palmetto Construction Group, LLC" with the South Carolina Secretary of State's Office; those Articles have Filing ID 190322-1416377. I intended for those Articles of Termination to apply to the Delaware LLC. At the time, I believed that such Articles of Termination were necessary because the Delaware LLC of the same name filed tax returns with the South Carolina Department of Revenue with regard to an asset it held and sold in the state. I did not know that there was a separate, distinct business entity formed under South Carolina law

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ORIGINAL ON FILE IN THIS OFFICE

Jan 17 2022
known as Palmetto Construction Group, LLC. The subject Articles of Termination were filed by
REFERENCE ID: 949820

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA
12, 2019 with South Carolina Secretary of State's Office. There is no
relationship or affiliation whatsoever between the Delaware LLC and the South Carolina LLC
known as Palmetto Construction Group, LLC. It was not my intent to file Articles of Termination
for the South Carolina limited liability company known as Palmetto Construction Group, nor was
I acting for or on behalf of that South Carolina LLC in doing so.

5. I request please that the South Carolina Secretary of State's Office accept this
Affidavit in support of Articles of Correction being filed on behalf of Palmetto Construction
Group, LLC, the South Carolina limited liability company, to revoke the Articles of Termination
and allow the South Carolina LLC be reinstated.

I swear or affirm under penalty of perjury that the information in this Affidavit is true and
correct to the best of my knowledge.

JoAnn Eaddy
JoAnn Eaddy

SWORN TO before me this 1st
day of December, 2021

Meagan E. Kuhlman
Notary Public for South Carolina
My Commission Expires: 9-21-2031



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AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

Jan 17, 2022
REFERENCE ID: 949820


SECRETARY OF STATE OF SOUTH CAROLINA



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ORIGINAL ON FILE IN THIS OFFICE

Rev 10/2/2018
REFERENCE ID: 909636

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

ARTICLES OF TERMINATION
LIMITED LIABILITY COMPANY - DOMESTIC

Filing ID: 190322-1416377

Filing Date: 03/22/2019

The following limited liability company, having dissolved and completed its winding up, terminates its existence by filing these articles of termination in accordance with the 1976 S.C. Code of Laws, as amended, Section 33-44-805:

1. The name of the limited liability company is:

PALMETTO CONSTRUCTION GROUP, LLC

2. The date the articles of organization were filed is 10/30/2000.

3. The date of the dissolution of this limited liability company was 02/22/2019.

4. Has the company wound up its business and terminated its legal existence? Yes

5. Unless otherwise specified, these articles are effective when endorsed for filing by the Secretary of State. Specify the date of any delayed effective date: 03/22/2019
(Date)

Signed as Filer: Joann eaddy

(Signature)

JoAnn Eaddy

(Print Name)

03/22/2019

(Date)

Capacity/Position of Person Signing (You must check one box.)

☐ Manager ☐ Member ☐ Organizer

☒ Fiduciary ☐ Attorney-In-Fact

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

Business Name: XXXXXXXXXXXXXXXXXXXX

Nov 102 2022

REFERENCE ID: XXXXXXXXXXXX

Signature Page for a Secretary of State Business Filing

Completed, scanned, and attached to any business filing where one of the following is true.

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

by signs the digital form on behalf of official signee.

- An attorney's signature is required. (Articles of Incorporation for Corporation and Benefit Corporation)

Official Signatures

(Officer, Incorporator, Director, Agent, Partner, etc)

Required for forms where the signee is not present upon online submission and a filing party is providing a digital signing on their behalf. If the provided space is not enough, please attach multiple pages.

<u>JoAnn Eaddy</u>	<u>3/22/2019</u>
Name	Date
<u><i>JoAnn W. Eaddy</i></u>	<u>Finance Director</u>
Signature	Title / Position
<u></u>	<u></u>
Name	Date
<u></u>	<u></u>
Signature	Title / Position
<u></u>	<u></u>
Name	Date
<u></u>	<u></u>
Signature	Title / Position
<u></u>	<u></u>
Name	Date
<u></u>	<u></u>
Signature	Title / Position
<u></u>	<u></u>
Name	Date
<u></u>	<u></u>
Signature	Title / Position

Scan and Upload this document to the Business Filing System during the filing process.
File must be PDF format.

2022-001224 ROA

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EXH A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group, LLC	)	
	)	
Plaintiff,	)	<u>DEFENDANTS' NOTICE OF MOTION</u>
	)	<u>AND MOTION TO EXCLUDE AND STRIKE</u>
vs.	)	
	)	
Restoration Specialists, LLC,	)	
Reuben Mark Ward, and Lynnette	)	
Pennington Ward	)	
	)	
Defendants.	)	

TO: JAAN G. RANNICK, ESQUIRE OF EPTING & RANNIK, LLC, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP, LLC

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, will move before the presiding Judge or Master in Equity of the Ninth Judicial Circuit at a time and place to be arranged by the Court and counsel involved for an Order excluding and striking the documents designated and attached as "exhibits" in Palmetto Construction Group, LLC's two Notices of Filing Trial Exhibits ("Notices"), which Notices were filed with the Charleston County Clerk of Court on February 1, 2022. This Motion is made pursuant to the South Carolina Rules of Civil Procedure and South Carolina Rules of Evidence and seeks an order excluding and striking the above-referenced documents from the court record in this matter.

This Motion is made on the grounds that: (a) the Plaintiff failed to move for the admission of these documents into evidence as exhibits at the damages hearing and (b) these documents were never admitted into evidence as exhibits at the damages hearing.

The Defendants file this Motion to Exclude and Strike subject to, without waiving and expressly preserving all evidentiary and other objections to these documents and any and all references or testimony related to these documents raised by Defendants during the damages hearing. Furthermore, Defendants hereby expressly preserve any and all objections to information, cited documents, statements, findings, conclusions, rulings, summaries, awards and judgments contained within the proposed order filed by Plaintiff with the Charleston County Clerk of Court on February 16, 2022 and contained within any order or judgment ultimately issued by this Court which may be addressed in

post-trial motions by Defendants pursuant to the South Carolina Rules of Civil Procedure and/or the South Carolina Rules of Evidence, after receipt of written notice of any order or entry of judgment issued by the Court. These preserved objections, include, but are not limited to, those related to evidentiary issues as well as substantive and procedural objections to proposed findings of fact, conclusions of law, calculations, determinations and awards of damages (including categories, amounts of each, and entry of judgments in connection therewith) and judgments.

This Motion is based upon, supported by, and made upon the grounds set forth herein, as well as the duly recorded official transcript of the damages hearing before this court, the complete files and records in this action, applicable statutory, regulatory and case law, and rules of court.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

/s/ A. Bright Ariail

A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

February 22, 2022
Charleston, South Carolina

Rule 11, SCRCP Certification:

Undersigned counsel certifies that she has not contacted counsel for Plaintiff concerning this Notice of Motion and Motion to Exclude and Strike insomuch as consultation would serve no useful purpose.

By: s/A. Bright Ariail
A. Bright Ariail

February 2, 2022

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON

PALMETTO CONSTRUCTION
GROUP, LLC

Plaintiff,

v.

RESTORATION SPECIALISTS, LLC,
REUBEN MARK WARD, and
LYNNETTE PENNINGTON WARD,

Defendants.

Case No. 2016-CP-10-01143

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO STRIKE OR
EXCLUDE**

Defendants' counsel has moved to strike or exclude materials provided to the Court during the default damages hearing held January 31, 2022 on the basis that they were not formally moved or admitted into evidence. This objection was not raised at the hearing, when a party in default has the opportunity to object to the plaintiff's evidence. For this reason and the reasons that follow, the Court should deny Defendants' motion.

I. The Materials in Question Are in Evidence

The materials in question were all presented to the Court and opposing counsel during the hearing, were reviewed with the witness, and were objected to by Defendants' counsel. The objections were overruled by the Court, and the materials were subsequently filed with the Court. Accordingly, Plaintiff understands the documents were offered and admitted into evidence, and Defendants' motion should be denied.

Without reviewing the transcript, though, Plaintiff cannot discount the possibility that the materials were not formally moved into evidence after Defendants' objections were overruled.¹ Should this Court so find or deem it prudent or necessary in these circumstances,² Plaintiff would

¹ To the extent this is a requirement in a non-jury default damages hearing.

² There can be no doubt the materials were presented to the Court for the purpose of the Court's

now move for the formal admission into evidence³ of the following materials included within Plaintiff's hearing notebook:⁴

- Tab 2 – Teaming Agreement
- Tab 3 – Subcontract
- Tab 4 – Indemnity Agreement with Surety
- Tab 6 – Summary of Damages
- Tab 7 – Summary of Job Costs and Profit
- Tab 7A – Checks related to the job, as produced by Defendants
- Tab 7B – Project materials produced by Defendants
- Tab 8 – Palmetto subcontract job costs
- Tab 9 – Demand letters from Surety
- Tab 10 – Affidavit regarding other attorneys' fees
- Tab 11 – Excerpt from Palmetto financial statement
- Tab 12 – Interest calculation

The Rules of Evidence are to “be construed to secure fairness in administration . . . to the end that the truth may be ascertained and proceedings justly determined.” S.C.R.E. 102. The testimony by Mrs. Peterson and the materials offered in support of her testimony were found to be relevant, reliable, credible, and accurate; to strike them from the record would not serve the ends of truth and justice.

consideration and the documents' admission into evidence. Should Defendants appeal, the documents will properly be included in the Record on Appeal. S.C.A.C.R. 210(c) (“The Record shall not, however, include matter which was not *presented to* the lower court or tribunal.” (emphasis added)).

³ If the Court deemed it necessary, Plaintiff would request the hearing be reopened for the limited purpose of admitting these items into evidence. Given that Defendants had (and took) the opportunity to object to the materials presented, there could be no prejudice to Defendants in reopening the hearing for this limited purpose.

⁴ All reviewed with the witness during the hearing and subsequently filed with the Court.

For these reasons, Plaintiff requests that Defendants' motion be denied.

Respectfully Submitted:

EPTING & RANNIK, LLC

This 23rd day of February, 2022
Charleston, S.C.

/s/ Jaan Rannik
Jaan G. Rannik
46A State Street
Charleston, SC 29401
P: 843.377.1871
jgr@epting-law.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group	)	
	)	
Plaintiff,	)	<u>DEFENDANTS' REPLY TO PLAINTIFF'S</u>
	)	<u>OPPOSITION TO DEFENDANTS' MOTION</u>
vs.	)	<u>TO EXCLUDE AND STRIKE</u>
	)	
Restoration Specialists, LLC,	)	
Reuben Mark Ward, and Lynnette	)	
Pennington Ward	)	
	)	
Defendants.	)	

During the damages hearing held in this matter on January 31, 2022, counsel for Defendants raised numerous objections to 1) the documents contained in the notebook that was handed to the witness, the Judge and defense counsel by Plaintiff's counsel at the start of the damages hearing and 2) testimony by the witness related to those documents. Preliminary objections were made early and often until the Court noted a standing objection. Certain initial objections to the documents and testimony included objections based on relevance, failure to comport to the allegations made within the four corners of the Complaint, and failure to authenticate documents as a preliminary issue. The damages hearing concluded with, *inter alia*, counsel for Defendants reasserting the objections above and also raising a hearsay objection to the documents.

I. The Materials and Testimony in Question Are Not in Evidence and Should be Excluded and Stricken from the Record

During the damages hearing, at no time did counsel for Plaintiffs 1) mark exhibits, 2) make any attempt to authenticate these documents, 3) lay a foundation for the documents, or 4) move to admit these documents as exhibits into evidence. Rather, Plaintiff's counsel used the notebook of documents, which was handed up to the witness at the start of her testimony, as a

guide and aid to the witness's testimony. Consistent with the above, the court had not admitted any of these documents as exhibits into evidence as of the conclusion of the damages hearing on January 31, 2022.

On February 1, 2022, the day after the conclusion of the damages hearing, Plaintiff's filed two Notices of Filing Trial Exhibits ("Notices") with attachments including the majority of the documents included in the notebook. Plaintiff filed these Notices (with attachments) with the Clerk of Court despite that (a): Plaintiff had failed to move to have the documents in the notebook admitted as exhibits into evidence at the damages hearing and (b): none of these documents had been admitted as exhibits into evidence during the damages hearing.

By Footnote 1 of Plaintiff's Opposition to Defendant's Motion to Strike or Exclude (sic) ("Opposition Memo"), Plaintiff asserts that the obligation to move for the admission of these documents as exhibits into evidence and to have the court admit these documents as exhibits into evidence may not be required in a non-jury damages hearing. Plaintiff's assertion is clearly contrary to the South Carolina Rules of Evidence (SCRE).

By Footnote 2 of the Opposition Memo, Plaintiff asserts that the documents filed by its Notices should be included in the Record on Appeal, should Defendants appeal. However, if the Motion to Exclude and Strike is granted, those documents should be removed from the record and should not be included in the Record on Appeal.

In summary, documents that are not marked, moved for admission or admitted into evidence are not trial exhibits. Likewise, documents that are not admitted into evidence are not evidence. In the present case, at no time during the damages hearing did the Plaintiff mark the documents in the notebook as exhibits or move to admit these documents as exhibits into evidence. Also, at no time during the damages hearing did the Court enter these documents as

exhibits into evidence. Accordingly, Defendants' Motion to Exclude and Strike should be granted.

II. Plaintiff's Attempt to Move to Admit Documents into Evidence by the Opposition Memo is Untimely and Improper and the Hearing Should Not Be Reopened For the Limited Purpose of Admitting the Documents Into Evidence

By its Opposition Memo, Plaintiff admits that it "cannot discount the possibility that the materials were not formally moved into evidence...[at the damages hearing]". *Plaintiff's Opposition to Defendant's Motion to Strike or Exclude*, Pg. 1, Lines 12-13. In light of this admission, and by its Opposition Memo, Plaintiff now improperly attempts to "move" for the "formal admission" into evidence of certain documents contained in the notebook. Pursuant to the SCRE, the proper time and place for Plaintiff to move for the admission of evidence was during the damages hearing held on January 31, 2022. Accordingly, any admission of evidence after the close of evidence and conclusion of the hearing as Plaintiff has attempted through its Notices and the attached documents would flagrantly violate the South Carolina Law of Evidence, SCRE, South Carolina Rules of Civil Procedure (SCRPC) and applicable case law and is highly improper.

Furthermore, to allow such a flagrant violation through this highly improper procedure would cause severe prejudice to Defendants. At the time a Plaintiff moves to admit a document as an exhibit into evidence, a defendant has the fundamental and absolute right to object to the admission of that document as an exhibit into evidence. This right remains fundamental and absolute even if certain preliminary objections have previously been made to a document prior to the time Plaintiff moves for admission of the document as an exhibit into evidence. If the Plaintiff herein is allowed to move for the "formal admission" into evidence of these documents at this time, the Defendants will be denied this absolute and fundamental right. For these

reasons, Plaintiff's "motion" to now move for the "formal admission" of these documents as exhibits into evidence should be denied.

The Defendants strongly object to the Plaintiff's "motion" for the "formal admission" of the documents listed in its Opposition Memo as exhibits into evidence. However, if the Court is so inclined as to allow Plaintiff to move at this time to admit these documents as exhibits into evidence, Defendants hereby object to the admission of each and every document based on 1) Plaintiff's failure to lay a foundation, 2) Plaintiff's failure to authenticate, 3) a lack of relevance to the matter in general, 4) a lack of relevance to the matter due to a failure to comport to the allegations made within the four corners of the Complaint, and 4) hearsay. Defendants further object to any and all testimony received related to the documents and reassert their request that the documents and all related testimony be excluded and stricken from the record.

By Footnote 3 of its Opposition Memo, Plaintiff also requests that the Hearing be reopened, solely for the purpose of admitting the documents as exhibits into evidence. Once again, no provision of the South Carolina Law of Evidence, SCRE, SCRCP or applicable case law allows for such irregular procedure. To allow such an irregular procedure would be a flagrant violation of these legal authorities.

Once again as well, to allow such a flagrant violation and highly improper procedure would cause severe prejudice to Defendants. In this situation, once again the Defendants would be denied their fundamental and absolute right to object to the admission of these documents at the time Plaintiff moves to admit the documents as exhibits into evidence. For these reasons, Plaintiff's "request" to reopen the hearing for the limited purpose of admitting these items into evidence" should be denied.

The Defendant strongly object to the Plaintiff's "request" to reopen the hearing for the

limited purpose of admitting the documents in the notebook as exhibits into evidence. However, if the Court is so inclined as to allow Plaintiff to reopen the hearing for this limited purpose, Defendants hereby object to the admission of each and every document based on 1) Plaintiff's failure to lay a foundation, 2) Plaintiff's failure to authenticate, 3) a lack of relevance to the matter in general, 4) a lack of relevance to the matter due to a failure to comport to the allegations made within the four corners of the Complaint, and 4) hearsay. Defendants further object to any and all testimony received related to the documents and reassert their request that the documents and all related testimony be excluded and stricken from the record.

Plaintiff cites SCRE 102 in its Opposition Memo stating that [t]he Rules of Evidence are to "be construed to secure fairness in administration . . . to the end that the truth may be ascertained and the proceedings justly determined". To that end, fairness in administration, the ascertainment of the truth on the basis of the evidence, and for the proceedings to be justly determined, the Court must exclude and strike the documents which were not admitted into evidence during the hearing held on January 31, 2022.¹

Conclusion

Based on the foregoing, the Defendants are entitled to an Order:

(1): Excluding and striking the documents designated and attached as "exhibits" in Palmetto Construction Group, LLC's two Notice of Filing Trial Exhibits, which Notices were filed with the Charleston County Clerk of Court on February 1, 2022;

(2): Excluding and striking the documents listed in the Opposition Memo; and

(3): Excluding and striking any and all testimony received at the damages hearing related to the documents.

¹ Plaintiff further asserts that "the materials offered in support" of Mrs. Peterson's testimony were found to be "relevant, reliable, credible and accurate"; however, no such finding related to

For these reasons, the Defendants hereby respectfully request that their Motion to Exclude and Strike be granted.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

/s/ A. Bright Ariail

A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

February 25, 2022
Charleston, SC 29412

the documents was made by the Court during the hearing.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group	)	
	)	
Plaintiff,	)	<u>DEFENDANTS' NOTICE OF MOTION AND</u>
	)	<u>MOTION TO RECONSIDER AND TO</u>
	)	<u>ALTER, AMEND OR RELIEVE</u>
vs.	)	<u>DEFENDANTS FROM THE COURT'S</u>
	)	<u>ORDER DENYING DEFENDANTS' MOTION</u>
Restoration Specialists, LLC,	)	<u>TO DISMISS AND ENTERING DEFAULT</u>
Reuben Mark Ward, and Lynnette	)	<u>JUDGMENT</u>
Pennington Ward	)	
	)	
Defendants.	)	

TO: JAAN G. RANNICK, ESQUIRE OF EPTING & RANNIK, LLC, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP ("PLAINTIFF" OR "PCG")

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, will move before the presiding Judge or Master in Equity of the Ninth Judicial Circuit at a time and place to be arranged by the Court and counsel involved for the Court to reconsider and to alter, amend or relieve Defendants from its Order Denying Defendants' Motion To Dismiss and Entering Default Judgment, dated February 28, 2022 ("Order and Judgment").

The Defendants will move the Court to alter, amend or relieve Defendants from its Order and Judgment so as to make its Order and Judgment consistent and in accordance with the grounds supporting Defendants' Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order ("Defendant's Motion").

The Defendants' Motion is made pursuant to Rules 52(b), 55(c), 59(e), 60(b)(1) of the South Carolina Rules of Civil Procedure and all applicable case law.

The Defendants' Motion is made on the following grounds:

DEFAULT

(1): The entry of default entered prior to and underlying the default judgment should be set aside for good cause shown pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure.

See, all motions, memorandums, affidavits, records, exhibits and documents of Defendants related to the entry of default (and related issues) and all hearing transcripts and court orders contained in the court record in this action, all of which are incorporated herein by reference. See also Rule 55(c) of the South Carolina Rules of Civil Procedure and all applicable law, which are incorporated herein by reference.

(2): The Defendants should be relieved from the default damages hearing proceedings held on January 31, 2022 and the default judgment entered by the Court on February 28, 2022 should be set aside due to mistake, inadvertence, surprise, or excusable neglect.

See, all motions, memorandums, affidavits, records, exhibits and documents of Defendants related to the entry of default and the default judgment (and related issues) and all hearing transcripts and court orders contained in the court record in this action, all of which are incorporated herein by reference. See also Rule 61(b) of the South Carolina Rules of Civil Procedure and all applicable law, which are incorporated herein by reference.

ARBITRATION

(1): The Defendants have not defaulted upon nor waived their right to mediation/arbitration under the mandatory alternative dispute resolution provisions of the contract and applicable law.

See, all motions, memorandums, affidavits, records, exhibits and documents of Defendants related to arbitration (and related issues) and all hearing transcripts and court orders contained in the court record in this action, all of which are incorporated herein by reference. See also all applicable South Carolina Rules of Civil Procedure and applicable law, all of which are incorporated herein by reference.

MOTION TO DISMISS

(1): The Court's footnote 1 "assumes" that Defendant's Motion to Dismiss "was properly brought despite (i) the default status of the movant and (ii) the filing of the motion prior to remittitur from the appellate courts and addresses Defendants' motion "as it appears to be a question of subject matter jurisdiction..." Defendants assert that Defendant's motion was timely and properly brought as a question of subject matter jurisdiction and moves for the Court's Order and Default Judgment to be altered or amended to make such a finding of fact and conclusion of law. *See Defendants' Motion to Dismiss and supporting memorandum and applicable law.*

(2): Defendants respectfully submit that the Court's findings/conclusions that provisions of the South Carolina Uniform Limited Liability Act of 1996 ("Act") provide for the revocation or reversal of a termination of a limited liability Company, and that PCG's invocation of these provisions to accomplish such revocation or reversal was proper is erroneous (error of law and/or fact) and lack the requisite evidentiary support. *Id.* This error and lack of requisite evidentiary support applies to the Court's findings/conclusions as to both the wrongful application of the Act as to this issue in general as well as to the facts of this case wherein the reversal of termination occurred almost 3 years after the date of termination (with the Vice President of PCG having knowledge of the termination within several months of the termination). In short, the Act does not contemplate or allow for the revocation or reversal of PCG's termination in this case.

(3): Defendants' assert that the Affidavit of Joann Eaddy raised questions and issues as to the credibility and sufficiency of the affidavit as competent evidence concerning the propriety and efficacy of the revocation of Palmetto's Articles of Termination, that it was merely "rubber-stamped" by the South Carolina Secretary of State, and that it, and other evidence presented by Plaintiff, was insufficient to revoke Palmetto's Articles of Termination. *See Defendants' Memo in support of Motion to Dismiss.*

(4): Defendants respectfully submit that the Court's findings/conclusions that "there is no record from the Secretary of State that Palmetto was ever dissolved as an entity" and that such a record is a "pre-requisite for termination" per S.C. Code § S.C. Code 33-44-805(a) are erroneous (error of law

and/or fact) and lack the requisite evidentiary support. *Id.*

(A): § S.C. Code 33-44-805(a) is misconstrued and misapplied as it does not require filing of articles of dissolution or any such record or proof of dissolution of an LLC with the Secretary of State as a pre-requisite for termination. Rather, § S.C. Code 33-33-805(a) states that “[a]t any time after dissolution and winding up, a limited liability company may terminate its existence by filing with the Secretary of State articles of termination stating...(2) the date of dissolution.”

(B): The Articles of Termination PCG filed with the Secretary of State expressly state that PCG was dissolved on February 22, 2019, a month prior to the filing of the Articles of Termination.

(C): Jerry S. Handegan, as Vice President of PCG, was on notice and fully aware of the dissolution and termination of PCG, and the related Articles of Termination on file with the South Carolina Secretary of State no later than June of 2019. Nonetheless, neither Palmetto nor Handegan protested, refuted, denied, corrected or objected to the dissolution or termination of PCG in June of 2019 or at any time before Defendants filed their Motion to Dismiss on April 21, 2021. In fact, Handegan, specifically confirmed and craved reference to the Articles of Termination on file with the South Carolina Secretary of State in his pleadings in response to litigation in which he was a named defendant in June of 2019.

(5): Defendants respectfully submit that the Court’s finding/conclusion that reinstatement of PCG by the South Carolina Secretary of State retroactive to its original creation date (October 30, 2020) with the filing of Articles of Correction by Palmetto on December 12, 2021 was proper is erroneous (error of law and/or fact) and lacks the requisite evidentiary support. *Id.*

(A): The Court’s finding that “[i]t is not clear to the Court that Restoration was entitled to rely on the filing given the pendency of this litigation and the absence of articles of dissolution...” is an error of law and/or fact and unsupported by required evidence.

(B): Jerry S. Handegan (“Handegan”), as Vice President of PCG, was on notice and fully aware of the dissolution and termination of PCG, and the related Articles of Termination on file with the South Carolina Secretary of State no later than June of 2019. Nonetheless, neither Palmetto nor Handegan protested, refuted, denied, corrected or objected to the dissolution or termination of PCG in June of 2019 or at any time before Defendants filed their Motion to Dismiss on April 21, 2021. In fact, Handegan, specifically confirmed and craved reference to the Articles of Termination on file with the South Carolina Secretary of State in his pleadings in response to litigation in which he was a

named defendant in June of 2019. Nonetheless, neither Palmetto nor Handegan protested, refuted, denied, corrected or objected to the dissolution or termination of PCG in June of 2019 or at any time before Defendants filed their Motion to Dismiss on April 21, 2021. In fact, Handegan, specifically confirmed and craved reference to the Articles of Termination on file with the South Carolina Secretary of State in his pleadings in response to litigation in which he was a named defendant in June of 2019. Handegan's agreement with the termination of PCG should have been adequate for the Defendants to rely on the termination and estop PCG from contesting Defendants' motion.

(C): The Court's finding/conclusion that "[i]t is not clear to the Court that Restoration...was adversely affected by the correction of the erroneous filing", there is ample evidence that Restoration has been adversely affected insomuch as it has had to pursue an appeal for an extended period of time, the majority of which was during a time that the opposing party, Palmetto, was a terminated limited liability company, it has had to file and prosecute this Motion to Dismiss, and it has had to defend itself in a damages hearing, again, while Palmetto remained terminated for an extended period of time.

(D): The Court's finding/conclusion that "[but] regardless [of the above] the correction [of the Articles of Termination] would at the very least be retroactive to the December 12, 2021 date of filing" would establish the lack of continuity of PCG as an existing LLC and the termination of this lawsuit for lack of justiciability necessarily resulting therefrom.

(E): The Court's finding/conclusion that "[a]s [Defendant's Motion to Dismiss] was heard by the Court after December 12, 2021, there is no basis for the Court to hold Palmetto as a terminated entity for purposes of [Defendant's Motion to Dismiss]" misapplies the proper determinative date on this issue. Specifically, the proper determinative date of PCG's company status under Defendants' Motion to Dismiss should be the date of filing of Defendant's motion on April 21, 2021. As of April 21, 2021, PCG was a terminated LLC per its Articles of Termination on file with the South Carolina Secretary of State and PCG and its Vice President, Mr. Handegan, had been aware and on notice of PCG's terminated company status for two years. Nonetheless, PCG did not file its Articles of Correction until eight (8) months after the filing and service of Defendant's Motion on April 21, 2021. The fact that Defendant's Motion was not scheduled on the Court's docket for hearing until January 31, 2022 should not be controlling nor grounds for finding "no basis for the Court to hold Palmetto as a terminated entity for purposes of [Defendants' Motion to Dismiss]".

(6): Defendants renew any and all remaining arguments, objections and positions asserted in Defendants' Motion to Dismiss and respectfully submit that the Court's findings/conclusions contrary thereto are erroneous (error of law and/or fact) and lack the requisite evidentiary support.

(7): *See all motions, memorandums, affidavits, records, exhibits and documents of Defendants related to issues (1) thru (6) above (and related issues) and all hearing transcripts and court orders contained in the court record in this action in support of Defendants' arguments, objections and positions regarding these issues, all of which are incorporated herein by reference.*

MOTION TO EXCLUDE AND STRIKE

(1): Defendants respectfully submit that the Court's findings/conclusions (a) that "[a]fter the hearing, Defendants filed a Motion to Exclude or Strike Evidence submitted to the Court: the Defendants' objection however was not contemporaneously made as the evidence was offered and therefore is waived", (b) that the "evidence [was] relevant and admissible and (c) denying Defendants' Motion to Exclude and Strike are erroneous (error of law and/or fact), lack the requisite evidentiary support and contrary to the record in this matter.

See all motions, memorandums, affidavits, exhibits and documents of Defendants related to Defendants' Motion to Exclude and Strike (and related issues) and all hearing transcripts and court orders contained in the court record in this action and all applicable law, all of which are incorporated herein by reference.

DAMAGES AND DEFAULT JUDGMENT

Preamble

(1): Defendant's respectfully submit that the Court's findings/conclusions that PCG "offered" evidence that was the subject of its Motion to Exclude and Strike at the damages hearing, that Defendants were afforded a full opportunity to object to the evidence at the hearing, that Defendants' objections were not contemporaneously made as the evidence was offered and were therefore waived,

and that the evidence is relevant and admissible are erroneous, lack the requisite evidentiary support, and contrary to the record in this matter.

See all motions, memorandums, affidavits, exhibits and documents of Defendants related to Defendants' Motion to Exclude and Strike (and related issues) and all hearing transcripts and court orders contained in the court record in this action, all of which are incorporated herein by reference. See also all applicable law.

(2): Defendants made preliminary objections during the course of the damages hearing to the documents shown to PCG's witness during the course of the damages hearing, and testimony related to these documents and information outside of the four corners of PCG's Complaint, but were denied the opportunity to make final objections to these documents and witness testimony related thereto during the damages hearing contemporaneous to any request to move these documents as exhibits into evidence. The reason for this is these documents were never marked as exhibits, were never offered as evidence, and were never admitted as evidence by the Court at the damages hearing. After PCG filed two Notices of Filing Trial Exhibits the day after conclusion of the damages hearing, the Defendants filed an appropriate Motion to Exclude and Strike¹ and supporting legal memorandum. As part of their Motion to Exclude and Strike, the Defendants made written objections to the evidence (including the documents contained in PCG's Notices of Filing Trial Exhibits and testimony related thereto). Defendants continue their objections made at the damages hearing and their written objections and attach a catalog of objections describing these objections in further detail marked as **Exhibit A** (this exhibit is also attached to and incorporated in *Defendants' Motion to Reconsider and to Alter or Amend the Court's Order Denying Defendants' Motion to Exclude and Strike*) and incorporated herein by reference. In addition, the Court's post-hearing finding of admissibility of Plaintiffs' documents in its Order and Judgment marks the Court's first ruling that these documents are admissible. As a result, the Defendants have been denied their fundamental and absolute right to raise final objections to the admission of these documents and testimony related thereto at the time Plaintiff moves to admit the documents as exhibits into evidence. For these reasons, and the grounds set forth in Defendants' court filings in this matter, Defendants did not waive their evidentiary objections to these documents and testimony related thereto, and they continue to object to the

¹ The Court refers to Defendants' motion as a "Motion to Exclude or Strike Evidence". In fact, Defendants' Motion is purposefully entitled a "Motion to Exclude and Strike" so as to acknowledge its position that the documents and testimony to which Defendants objected were not properly considered as evidence at the damages hearing.

admission of these documents into evidence and all testimony related thereto. *Id.*

Section II. - Paragraph A. Background

(1): Footnote 3 indicates that the “Tab” numbers (rather than “exhibits” or “exhibit numbers”) correspond with the tabs of the binder of “exhibits offered by Plaintiff during the damages hearing and filed with the Court”. However, at no time did PCG move for admission of these documents as exhibits into evidence during the damages hearing.

(2): Defendants respectfully submit that the Court’s finding/conclusion that “Restoration lacked the ability to obtain the requisite performance and payment bonds to be awarded the project, and so teamed with Palmetto who could obtain the bonds” is erroneous (error of law and/or fact), lacks the requisite evidentiary support, exceeds the scope of the Complaint (and allegations/claims, causes pled therein) and is not relevant or material to any fact, claim or cause of action at issue in the damages hearing.

(3): Defendants respectfully submit that the Court’s finding/conclusion that “in exchange for obtaining the bonds, Palmetto would receive a share of the project profits, estimated at around \$500,00 – 600,000” is erroneous (error of law and/or fact) and lacks the requisite evidentiary support.

(4): Defendants respectfully submit that the Court’s finding/conclusion that “Restoration Specialists were to administer the project and interface with the federal government; Palmetto was to manage the construction” is erroneous (matter of law and/or fact), lacks the requisite evidentiary support, is contrary to the record in this case and contradicts the express terms of the subcontract agreement between Restoration Specialists and Palmetto. Specifically, Palmetto’s Portion of Work was to “[p]rovide supervision and management of concrete subcontractor (Atlantic Concrete Contractors)”, not to “manage the construction”.

(5): Defendants respectfully submit that the Court’s finding/conclusion that “Palmetto and Restoration Specialists entered into a subcontract agreement relating to concrete work for the project and memorializing the 50-50 profit share agreement” is erroneous (matter of law and/or fact), lacks

the requisite evidentiary support, is contrary to the record in this case and contradicts the subcontract agreement. Specifically, there is no subcontract term that “memorializ[ed] a 50-50 profit share agreement.” As a preliminary matter, Tab 3, which is referenced as support for this finding in the Order and Judgment was never admitted into evidence at the damages hearing and was later filed a day after the conclusion of the damages hearing with the Clerk of Court. Tab 3, which was filed with the Clerk of Court as an attachment to one of Plaintiff’s Notices includes, as page 16 of that document, a purported “PCG Subcontract Breakdown”. However, this document was (1) not included as a page contained within the subcontract agreement which was attached to Plaintiff’s Complaint, and (2) is not the document referenced by Section 9.3 of the Subcontract that expressly indicates to “[s]ee PCG Subcontract Breakdown spreadsheet dated 9/5/14 provided, attached.” This document has also been objected to otherwise herein and Defendants additional court filings in this matter.

(6): Defendants respectfully submit that the Court’s finding/conclusion that “[a]s the job neared completion, Restoration Specialists stopped paying the subcontractors, despite having received payment from the federal government” is erroneous (error of law and/or fact) and lacks the requisite evidentiary support.

(7): Defendants respectfully submit that the Court’s finding/conclusion that “[i]n granting Defendants’ Motion for Continuance [filed on June 3, 2016], the Court instructed Defendants’ counsel to provide financial and banking records to Plaintiff sufficient to show what funds Defendants received from the VA and how those funds were used” is erroneous, lacks the requisite evidentiary support and is contrary to the court record in this matter. Rather, after preliminary discussions during the hearing by counsel concerning Plaintiff’s discovery requests, the Court instructed Defendants’ counsel that “it sounds like to me your client needs to come up with some information pretty darn quick” and “I would see if you-all can’t...get some information and get rolling with this.” *See Transcript of the Hearing before the Honorable Mikell R. Scarborough, Master in Equity, reported by Christine A. Smith, Court Reporter and Notary Public, at 11:29 a.m. on June 6, 2016 at 100 Broad Street, Charleston, South Carolina filed with the Court on September 30, 2016 (“June 16, Hearing Transcript”) at page 12.* Furthermore, Defendants submit this instruction was improper insomuch as, at that time, the Court indicated that “[a]s it stands now, the Defendants

are in default.” *Id.* Regardless, Defendants complied with the Court’s direction and provided written discovery responses and produced documents then in its possession that were requested therein. Defendants were prejudiced by being required to respond to discovery while in default. Moreover, despite Defendants’ request that “since [they] have in good faith participated in discovery that [they] be allowed to serve some form of discovery related to the damages”, the Court determined that it wasn’t going to mandate it because “I don’t think that’s proper.” *See June 16, Hearing Transcript at Pages 9-11.*

(8): Defendants respectfully submit that the Court’s finding/conclusion that “...Court accepts, that no materials have been provided that demonstrate what amounts were received by Defendants from the VA and how those amounts were disposed of” is erroneous (error of law and/or fact), lacks the requisite evidentiary support, exceeds the scope of the Complaint (and allegations/claims contained therein) and is not relevant or material to any fact, claim or cause of action at issue in the damages hearing.

(9): Defendants respectfully submit that the Court’s findings/conclusions that “Ultimately, Palmetto lacked the financial strength to pay on the guaranty; and, after claims were made on the bond, Palmetto could no longer obtain bonding and lost the majority of its work. Palmetto was forced out of business and its owners invested their personal assets into the company so it could finish the remaining projects it started” are erroneous (error of law and/or fact), lacks the requisite evidentiary support, exceed the scope of the Complaint (and allegations/claims/causes of action pled therein) and are not relevant or material to any fact, claim, or cause of action at issue in the damages hearing.

(10): *See all motions, memorandums, affidavits, records, exhibits, and documents of Defendants related to issues (1) thru (9) above (and related issues) and all hearing transcripts and court orders contained in the court record in this action and all applicable law in support of Defendants’ arguments, objections and positions regarding these issues.*

Section II. - Paragraph B. Amount Due on Subcontract

(1): The subcontract between Restoration and Palmetto was a stipulated sum in the amount of

\$1,082,342.10 with no modifications issued. PCG admitted these facts at the damages hearing. PCG further admitted that it was paid \$1,096,858.69 at the damages hearing. Accordingly, PCG was overpaid for its subcontract work and was not due what it claims as “total compensable costs”.

(2): Defendants respectfully submit that the Court’s finding/conclusion that “amounts due under the subcontract was alleged in Palmetto’s complaint, was admitted when Defendants went into default, and cannot now be contested” is erroneous (error of law and/or fact), lacks the requisite evidentiary support and is contrary to the court record in this matter. Specifically, PCG’s Complaint, at its First Cause of Action – Breach of Agreements, alleges “Palmetto has been damaged in a sum to be determined.” Nowhere in the Complaint is there a sum certain alleged for any of the damages, including those purportedly due under the subcontract. The damages hearing was the vehicle to determine the amounts owed and Defendants were certainly entitled to contest the calculation of damages at the damages hearing. In short, the Court’s finding/conclusion above ignores the express language of the subcontract and the testimony of PCG’s witness, Ms. Peterson, which acknowledged the subcontract was a stipulated sum contract in an amount less than the amount of payment received by Palmetto.

(3): Defendants respectfully submit that the Court’s finding/conclusion that “the parties conduct indicates an agreement that Palmetto was due its total costs of the work” is erroneous (error of law and/or fact), lacks the requisite evidentiary support, exceeds the scope of the Complaint (and allegations/claims/causes of action pled therein), is not relevant or material to any fact at issue in the damages hearing, ignores the Court’s above finding that PCG alleged amounts due “under the subcontract” (not amounts due under some course of dealing or an “agreement” outside of the subcontract), and is contrary to the Court’s finding/conclusion that express language of the subcontract and the testimony of Ms. Peterson regarding the stipulated sum.

(4): *See all motions, memorandums, affidavits, records, exhibits and documents of Defendants related to issues (1) thru (3) above (and related issues) and all hearing transcripts and court orders contained in the court record in this action and all applicable law in support of Defendants arguments, objections and positions regarding these issues, all of which are incorporated herein by reference.*

Section II. - Paragraph C. Share of Profits

(1): Defendants respectfully submit that the Court's finding/conclusion that PCG is entitled to an award of 50% of the profits earned on the VA project is erroneous(error of law and/or fact) and lacks the requisite evidentiary support. Specifically, there is no subcontract provision that indicates that PGC was entitled to 50% of the profits. While the subcontract between Restoration and PCG at Section 9.3 under a section entitled "Portion of Work" expressly indicates to "[s]ee PCG Subcontract Breakdown spreadsheet dated 9/5/14 provided, attached", Plaintiff has never produced such a document at any point during this litigation. There was no attachment to the subcontract which was filed by PCG as an exhibit to its Complaint. Rather, it has subsequently produced an unauthenticated, hearsay document entitled "PCG Subcontract Breakdown" that is undated and therefore is not a portion of the subcontract between Restoration and PCG. This document has been repeatedly objected to by Defendants through this litigation.

(2): Defendants respectfully submit that the statement that "[t]he testimony during the hearing established that the initial estimated profit on the job was in the \$500,000-600,000 range, because of changes in the work that expended the scope of the work and increased the contract sum by over \$2,000,000, the estimated profit grew to around \$1,000,000" is erroneous, lacks the requisite evidentiary support, exceeds the scope of the Complaint (and allegations/claims/causes of action pled therein), is not relevant or material to any fact at issue in the damages hearing, and is contradicted by documents discussed during the hearing; specifically, the large change orders to the VA Contract that all predated the subcontract between Palmetto and Restoration.

(3): Defendants respectfully submit that all references in the Court's Order and Judgment relating to PCG using Restoration's documents to calculate "job costs" and all related testimony should be stricken as those documents were not authenticated, marked, requested to be moved as exhibits into evidence nor admitted as exhibits into evidence at the damages hearing. Furthermore, these documents constitute hearsay. These documents were objected to during the hearing and are further addressed in Defendant's Notice of Motion and Motion to Reconsider and to Alter or Amend the Court's Order denying Defendants' Motion to Exclude and Strike file in concert with this instant

motion.

(4): Defendants respectfully request that all references to calculations performed by Palmetto be stricken as well as all references to the purported use of Restoration's costs of \$541,980.80 inasmuch as Ms. Peterson testified that calculation of profits cannot be made until a project is completed, and these calculations were based on incomplete information provided prior to completion of the project.

(5): Defendants respectfully submit that the Court's finding/conclusion that "Defendants' counsel...objected to...and...argued that the lack of specificity about the amount of damages in the complaint was an obstacle to this Court awarding the requested damages" is a mischaracterization of the argument. Rather, Defendant's counsel objected to and argued, *inter alia*, that the four corners of Plaintiff's complaint (and the allegations/claims/causes of action as pled therein) was insufficient to support a recovery under any of the causes of action pled and damages alleged by PCG (including, but not limited to shared profits).

(6): Defendants respectfully requests that the Court's statement that ". . . Mrs. Peterson testified that Defendants refused to provide accounting records during or after the job from which Palmetto could determine the financial status of the job or of Defendants" be stricken inasmuch as no such accounting was required by the subcontract between Restoration and Palmetto.

(7): Defendants respectfully submit that the Court's finding/conclusion that "[it] is hard for this Court to imagine penalizing Palmetto when documents that were ***ordered produced*** (emphasis added) were not produced, and when any uncertainty about the job's profitability stems from the failure to produce those documents in compliance with the ***Court order***..." is erroneous (error of law and/or fact), lacks the requisite evidentiary support, refers to a "**Court order**" which Defendants respectfully submit does not exist and is contrary to the court record in this matter. *See Section II. Paragraph A. Background - Paragraph (7) above.*

(8): *See all motions, memorandums, affidavits, records, exhibits, and documents of Defendants related to issues (1) thru (7) above (and related issues) and all hearing transcripts and court orders contained in the court record in this action in support of Defendants' arguments, objections and*

positions regarding these issues, all of which are incorporated herein by reference.

Section II. - Paragraph D. Indemnity From Claims by the Surety

(1): Defendants respectfully submit that the Court's award of legal and equitable relief to PCG "as a result of the myriad subcontractor claims against the surety bond in the complaint" represented by the Court's award of damages to PCG in the amount of \$1,307,978.71 plus prejudgment interest on that amount in the amount of \$537,057.15) (*see Court's Order and Judgment Sections II. D. and G.*) is erroneous (error of law and/or fact) and lacks the requisite evidentiary support.

(2): The Plaintiff, in seeking an award for indemnity under the Indemnity Agreement, and the Court, in rendering an award of indemnity to PCG under the Indemnity Agreement, both ignore Paragraph 20 of the Indemnity Agreement which states: "The Indemnitors waive and subordinate all rights of indemnity subrogation and contribution each against the other until all obligations to the Surety have been first satisfied in full." The award of any legal relief to PCG from Defendants is governed by the terms and conditions of the Indemnity Agreement. PCG's claim for legal relief under the Indemnity Agreement and an award of damages for indemnity thereunder cannot be greater than its rights under the Indemnity Agreement. Accordingly, the Court's award of indemnity (as a form of legal relief) to PCG in connection with the surety claims is erroneous (error of law and/or fact), lacks the requisite evidentiary support, and contradicts the Indemnity Agreement.

(3): The Plaintiff, in seeking an award for equitable relief, and the Court, in rendering such an award to PCG under equitable principles (of equitable subrogation or otherwise), both ignore the fact that PCG has not paid the surety in full for the surety claims. It is essential to a recovery of damages under equitable principles that PCG must make and prove full payment to the surety **before** it is entitled to equitable relief on this claim. PCG failed to prove and satisfy this essential element of recovery. In fact, PCG's witness acknowledge and testified at trial had not made any payments to the surety, much less payment in full. Accordingly, the Court's award of equitable relief to PCG in connection with the surety claims is erroneous (error of law, equity and/or fact) and lacks evidentiary support.

(4): Plaintiff alleged in its Complaint that the Defendants “must indemnify the surety and Plaintiffs to the extent they are required to pay.” *Complaint*, ¶ 10. Thus, the Plaintiff acknowledged as an admission in its own Complaint that any liability of the Defendants to pay indemnity: (a) to the surety was limited to the amount that the surety paid and (b) to the Plaintiff was limited to the amount that the Plaintiff paid. However, there can be no liability to the surety in this action inasmuch as the surety is not a party to this lawsuit and has not asserted causes of action against Defendants herein. Likewise, by Plaintiff’s own admission there can be no liability to the Plaintiff inasmuch as Plaintiff admitted, through the testimony of its witness, Ms. Peterson, that PCG had not paid the surety.

(5): Defendants respectfully submit that the Court’s reference to and use of its finding/conclusion that “[the] Indemnity Agreement signed by the bond guarantors states that “[p]ayment shall be made to the Surety by the Indemnitors *as soon as liability exists or is asserted against the Surety, whether or not the Surety shall have made any payment therefor*” as a basis or grounds for awarding indemnity to PCG is erroneous (error of law and/or fact), lacks the requisite evidentiary support, is based on irrelevant and immaterial information, misapplies this provision to its analysis of PCG’s entitlement to damages in this action, and incorrectly conflates an obligation of payment to the surety into an obligation of payment to PCG.

(6): Defendants respectfully submit that the Court’s finding/conclusion that “Palmetto alleged an **entitlement** (emphasis added) to legal and equitable relief as a result of the myriad subcontractor claims against the against the surety bond in its complaint is erroneous, lacks the requisite evidentiary support, fails to allege legal or equitable causes of action, fails to assert actionable allegations or elements of a claim upon which damages could be awarded against Defendants in favor of Plaintiff and is contrary to the court record in this matter. Rather, in its fourth cause of action entitled “Other Legal and Equitable Relief”, Plaintiff merely alleged that (1) “[a]ll Defendants are contractually bound to pay funds if there are claims on the surety bond”, (2) “[t]here are claims on the surety bond”, and (3) “[p]laintiff **requests** (emphasis added) legal and equitable relief against the Defendants”.

(7): Defendants respectfully submit that the Court’s finding/conclusion that “Plaintiff introduced into the record two letters sent to it by the surety...demanding payment from the indemnitors” and

characterizing such letters as “evidence” is erroneous, lacks the requisite evidentiary support, and is contrary to the record in this matter. Specifically, these letters were never authenticated and a proper foundation was not laid for these letters as exhibits at the damages hearing. Also, these letters constitute inadmissible hearsay. Furthermore, at no time did Plaintiff “introduce” these letters “into the record” during the damages hearing. In fact, Plaintiff did not “introduce into the record” any documents at the damages hearing. The Plaintiff failed to mark these letters or any other documents as exhibits and failed to move to have them admitted into evidence at the damages hearing. Also, no documents, including these letters, were ever admitted as exhibits into evidence at the damages hearing. Finally, these letters are irrelevant and immaterial inasmuch as they do not establish any entitlement to a damages award against the Defendants to pay PCG for claims by the surety. These letters demand payment to the surety, not to PCG.

(8): *See all motions, memorandums, affidavits, records, exhibits, and documents of Defendants related to issues (1) thru (7) above (and related issues) and all hearing transcripts and court orders contained in the court record in this action and all applicable law in support of Defendants’ arguments, objections and positions regarding these issues, all of which are incorporated herein by reference.*

Section II. - Subparagraph E. Lost Profits

- (1) Plaintiff’s claimed lost profits were not pled in Plaintiff’s Complaint as a substantive matter nor as special damages or otherwise.
- (2) Plaintiff’s claimed lost profits (a) were not a natural consequence of the breach of the subcontract, (b) are conjectural, speculative and cannot be established with reasonable certainty, and (c) are not founded on facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can logically and rationally be drawn.
- (3) Plaintiff has failed to establish a claim for lost profits and is not entitled to an award for such damages.

Section II. - Paragraph F. Consequential Legal Costs

- (1) Plaintiff's claimed attorneys' fees and costs were not pled in Plaintiff's Complaint as a substantive matter nor as special/consequential damages or otherwise.
- (2) Plaintiff's claimed attorneys fees and costs (a) were not a natural consequence of the breach of the subcontract, (b) are conjectural, speculative and cannot be established with reasonable certainty, and (c) are not founded on facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can logically and rationally be drawn.
- (3) Plaintiff has failed to establish a claim for attorneys' fees and costs.

Section II. - Paragraph G. Interest

(1): Defendants respectfully submit that the Court's award of pre-judgment interest is erroneous (error of law and/or law) and lacks the requisite evidentiary support. First, Plaintiff's claim for pre-judgment interest was not pled in Plaintiff's Complaint. Second, Defendants submit that Plaintiff was not entitled to any award of damages, thus making any pre-judgment award improper. Third, there is no statutory provision or contractual agreement allowing the recovery of prejudgment interest by Plaintiff. Fourth, there was no sum certain due, payable and demandable by which Plaintiff was entitled to recover prejudgment interest from the Defendants. Fifth, the Court's award of prejudgment interest on the amounts it asserts are due on the subcontract is improper inasmuch as Defendant Restoration Specialist, LLC overpaid PCG on its subcontract. Sixth, the Court's award of prejudgment interest on the amount of the surety's claims², which claims were not paid by PCG, is improper.

(2): Footnote 5 states that the "[original damages] hearing [was] delayed by Defendants' filing of multiple notices of appeal to divest this Court of jurisdiction." Defendants respectfully submit that

² The surety was not a party to this lawsuit, never asserted a legal claim or cause of action against the Plaintiff or Defendants, never filed a lawsuit against the Plaintiff or Defendants, and were never paid by Plaintiff on their claims. Also, the surety is now barred by the statute of limitations from asserting legal claims or filing lawsuits against the Plaintiff or Defendants.

this finding/conclusion is erroneous (error of law and factually erroneous), lacks the requisite evidentiary support, is irrelevant and immaterial and is contrary to the record in this matter.

(3): *See all motions, memorandums, affidavits, records, exhibits, and documents of Defendants related to issues (1) thru (2) above (and related issues) and all hearing transcripts and court orders contained in the court record in this action and all applicable law in support of Defendants' arguments, objections and positions regarding these issues, all of which are incorporated herein by reference.*

Section III. - Summary

(1): The Court awarded damages against Defendants in favor of PCG on its cause of action for: (1) breach of subcontract (awarded damages for alleged subcontract balance and profit split and for pre-judgment interest on this amount) and its "claim" for (2): unspecified "other legal and equitable relief" (awarded damages for indemnity from claims by surety and for pre-judgment interest on this amount). Defendants respectfully submit that the Court's award of damages is erroneous (error of law and/or fact) and lacks the requisite evidentiary support and that Plaintiff was not entitled to an award of damages against the Defendants in this matter.

(2): Specifically preserving, and without waiving its objections to the Court's damages award asserted in paragraph (1) above, the Defendants respectfully submit, in the alternative, that the Court's joint and several damages award and entry of judgment against all Defendants under these two (2) causes of action is erroneous (error of law and/or fact) and lacks the requisite evidentiary support. Specifically, the breach of contract cause of action is asserted solely against Defendant Restoration Specialists, LLC and not against the individual Defendants Mark and Lynette Ward. The amount of the award under this cause of action is \$494,922.78. Nonetheless, the Court has included this amount in its award of damages against the individual Defendants Mark and Lynette Ward as well. This sum of \$494,922.78 should not have been included in the damages award and entry of judgment against the individual Defendants Mark and Lynette Ward. The Court's error in this regard is further established by the fact that the "claim" for unspecified "other legal and equitable relief" is asserted against all of the Defendants. Court awarded damages against all Defendants on this "claim"

in the amount of \$1,845,035.86. Accordingly and alternatively, again subject to Defendants' damages award objections set forth in paragraph (1) above, the Court's joint and several award of damages against all Defendants is erroneous and lacks the requisite evidentiary support inasmuch as the damages award against the individual Defendants Mark and Lynette Ward should not have included the amount of damages awarded against Defendant Restoration Specialists, LLC under the breach of contract cause of action. A spreadsheet illustrating and supporting this objection is attached hereto as ***Exhibit B*** and incorporated herein by reference.

(3): *See all motions, memorandums, affidavits, records, exhibits, and documents of Defendants related to issues (1) thru (2) above (and related issues) and all hearing transcripts and court orders contained in the court record in this action and all applicable law in support of Defendants' arguments, objections and positions regarding these issues, all of which are incorporated herein by reference.*

Miscellaneous

(1): Defendants respectfully submit that (a): all references and/or citations to **Tabs** contained in the Court's Order and Judgment, (b): all references, citations, quotes to exhibits and/or testimony objected to by Defendants contained in the Court's Order and Judgment be excluded and stricken and (c) all reliance by the Court on (a) and/or (b) above be reconsidered and reversed by the Court.

(2): Factual allegations of the complaint must be sufficient to carry the burden of proof for each cause of action. A default operates to admit the well-pled factual allegations of the Complaint and the fair inferences and conclusions of fact to be drawn from those allegations. It is axiomatic that a default does not result in the admission of allegations that are not well-pled or the result of forced inferences. A default serves as an admission of the well-pled facts alleged in the Complaint, but does not admit any legal conclusions therein. A default simply does not require blind acceptance of a plaintiff's erroneous conclusions of law. A default does not preclude a defendant from showing that under the facts deemed admitted, no claim existed which would allow the plaintiff to recover. The Court must look at the facts which are deemed admitted to determine what cause or causes of action those facts are legally sufficient to support. Liberal construction of a pleading does not encompass the

imputation or engrafting to a claim of a meaning not reasonably deductible or inferable from the explicit language of the pleading. While pleadings are to be construed to do substantial justice, justice is not obtained when a pleading is so liberally construed as to circumvent its true intent, especially when the opposing party is thereby deprived of a significant [statutory] right as in this case, of having default entered.

Defendants have prepared a spreadsheet attached hereto as Exhibit C which includes certain causes of action contained within the Complaint, specifically 1) Breach of Agreement, 2) Negligent Misrepresentation, 3) Constructive and Actual Fraud, and 4) Other Legal and Equitable Relief. This spreadsheet includes the elements for each of these causes of action pursuant to South Carolina law, the corresponding allegations contained in the Complaint for these causes of action which are admitted due to the default status of the Defendants, and various issues, omissions, and problems related to these causes of action and/or the related admissions that cause these causes of action to fail.

(3): *See all motions, memorandums, affidavits, records, exhibits, and documents of Defendants related to issue (1) above (and related issues) and all hearing transcripts and court orders contained in the court record in this action and all applicable law in support of Defendants' arguments, objections and positions regarding these issues, all of which are incorporated herein by reference.*

This Motion is based upon any memorandum of law in support of Defendants' Motion which may be submitted to the Court prior to the hearing of Defendants' Motion, all motions, memorandums, affidavits, records, exhibits and documents of Defendants related to the issues in Defendant's Motion and all hearing transcripts and Court Orders contained in the court record in this action, oral arguments, such oral and documentary evidence as may be allowed at the hearing of this motion, and all applicable law pertaining to Defendants' Motion.

SIGNATURE PAGE FOLLOWS

Respectfully submitted,

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

/s/ A. Bright Ariail

A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

March 10, 2022
Charleston, SC 29412

Rule 11, SCRCP Certification:

Undersigned counsel certifies that she has not contacted counsel for Plaintiff concerning this Motion to Reconsider and to Alter, Amend or Relieve Defendants From the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment inasmuch as consultation would serve no useful purpose.

By: /s/ A. Bright Ariail
A. Bright Ariail

March 10, 2022

<u>PCG TAB NUMBER</u>	<u>DEFENDANTS' SUBTAB NUMBER</u>	<u>PAGE LOCATION WITHIN TAB</u>	<u>DOCUMENT DESCRIPTION</u>	<u>OBJECTIONS</u>
2		1-6	TEAMING AGREEMENT	No objections as this is a duplicate of the document attached to the Complaint as Exhibit B
3	A	1-15	AIA A401 SUBCONTRACT	No objections to Pages 1-15 of this document – AIA 401 as this is a duplicate of the documents attached to the Complaint as Exhibit A.
	B	16	PCG SUBCONTRACT BREAKDOWN (undated)	Defendants object to Page 16 of this document as follows: 1) Not Relevant 2) Inadequate/No Foundation 3) No testimony as to who prepared it 4) Not Authenticated 5) Hearsay 6) Is undated and therefore does not conform with the reference contained in Section 9.3 of the AIA A401 which describes the Portion of Work to be performed as Work by the subcontractor as “PCG Subcontract Breakdown spreadsheet dated 9/5/10 provided, attached”.
4	A	1-7	Hanover Indemnity Agreement	Defendants object to this document as follows: 1) Not Relevant 2) Inadequate/No Foundation 3) No testimony as to who prepared it 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint
	B	8-9	Resolutions	Defendants object to this document as follows: 1) Not Relevant

				2) Inadequate/No Foundation 3) No testimony as to who prepared it 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint 7) Not cited in the hearing
	C	10	Appears to be notes to "Mark"	Defendants object to this document as follows: 1) Inadequate/No Foundation 2) No testimony as to who prepared it 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Not cited in the hearing
	D	11-14	Performance and Payment Bonds	Defendants object to this document as follows: 1) While these documents were attached to the Complaint as Exhibit C, they are unsigned 2) Inadequate/No Foundation 3) No testimony as to who prepared it 4) Not relevant to the allegations contained within the four corners of the Complaint
6		1	PCG Damages Summary	Defendants object to this document as follows: 1) No testimony as to who prepared it 2) Inadequate/No Foundation 3) Not Authenticated 4) Hearsay 5) Documents which support calculations were not provided

7	A	1-3	ALL JOB COSTS (Method 1 and 2)	Defendants object to this document as follows: 1) Not Relevant 2) No testimony as to who prepared it 3) Inadequate/No Foundation 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint 7) Documents referenced which support calculations are not authenticated and hearsay
	B	4	CONTRACT LOG FOR VMAC PARKING	Defendants object to this document as follows: 1) No testimony as to who prepared it 2) Inadequate/No Foundation 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Preliminary document/Incomplete 7) Documents which support calculations were not provided
	C	5-6	RS Augusta VA Monthly Expenses July 2013 – October 31, 2014	Defendants object to this document as follows: 1) Inadequate/No Foundation 2) No testimony as to who prepared it 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Preliminary Document/Incomplete

				7) Documents which support calculations were not provided
7A		1-72	Various Checks	Defendants object to this document as follows: 1) No testimony as to who prepared it 2) Inadequate/No Foundation 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Preliminary Documents/Incomplete 7) Documents which support calculations/payments were not provided
7B		1-108	Various Contract and Subcontract Documents	Defendants object to this document as follows: 1) Many are unsigned (including P00012 change order from VA to RS which expressly states it is not valid until signed) 2) No testimony as to who prepared them 3) Inadequate/No Foundation 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint 7) No testimony concerning these documents 8) Preliminary Documents/Incomplete 9) Documents which support calculations were not provided

8	A	1-2	A/R History Report	Defendants object to this document as follows: 1) Not Relevant 2) No testimony as to who prepared it 3) Inadequate/No Foundation 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint 7) Documents which support calculations were not provided
	B	3-15	Job Cost & Billing Detail	Defendants object to this document as follows: 1) Not Relevant 2) Inadequate/No Foundation 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Documents which support calculations were not provided
	C	16-17	Pay App Summary	Defendants object to this document as follows: 1) Not Relevant 2) Inadequate/No Foundation 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Documents which support calculations were not provided

9	A	1-2	Hanover Letter of 1/24/2022	Defendants object to this document as follows: 1) Inadequate/No Foundation 2) No testimony as to who prepared it 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Documents which support calculations were not provided (no vouchers)
	B	3-7	Hanover Letter of 9/30/2016 with attached spreadsheets	Defendants object to this document as follows: 1) Inadequate/No Foundation 2) No testimony as to who prepared it 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Documents which support calculations were not provided (no vouchers) 7) Attached spreadsheets include math errors and inconsistencies
10		1-3	Ranik Affidavit with Attachment A	Defendants object to this document as follows: 1) Not Relevant 2) Inadequate/No Foundation 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint

				6) Documents which support calculations were not provided
11		1	PCG Statement of Operations	Defendants object to this document as follows: 1) Not Relevant 2) No testimony as to who prepared it 3) Inadequate/No Foundation 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint 7) Documents which support calculations were not provided 8) Lost Profits was not pled
12		1	Interest Calculation	Defendants object to this document as follows: 1) Not Relevant 2) No testimony as to who prepared it 3) Inadequate/No Foundation 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint 7) Interest was not pled

Note 1 – All documents referenced herein (except Tab 2 which is marked with no objections) are objected to as they 1) were objected to by Defendants' counsel as general objections to all documents during the January 31, 2022 hearing, 2) not marked as exhibits during the hearing, 3) had no or inadequate

foundation laid, 4) not authenticated, 5) not relevant in general, 6) are hearsay, 7) are not relevant to the allegations contained within the four corners of the Complaint, 8) were never moved into evidence by Plaintiff's Counsel, and 9) never admitted into evidence as exhibits at the damages hearing.

Note 2 - Documents filed with the Court were modified from those that were contained in the notebook used at the damages hearing to include footers with Tab designations.

Note 3 – Tab 7B includes, but is not limited to some of the following purported documents: 1) P00012 from VA to RS (unsigned), 2) Subcontractor change orders (incomplete), 3) Pay Applications from Subcontractors (incomplete), 4) Vendor Invoices (incomplete), 5) RS Checks (incomplete), 6) Subcontracts with other subcontractors(incomplete), 7) RS Invoice to VA (not certified)

<u>DAMAGES BREAKDOWN</u>	<u>Allegations in Complaint Against</u>	<u>Damages</u>	<u>Subtotal</u>
<u>Breach of Subcontract</u>	Restoration Specialists		
Subcontract Balance		\$ 184,858.69	
Profit Split		\$ 225,389.81	
Interest		\$ 83,674.28	
			\$ 493,922.78
<u>Negligent Misrepresentation</u>	Mr. Ward		
<u>Constructive and Actual Fraud</u>	Mr. Ward		
<u>Unspecified "Other Legal and Equitable Relief"</u>	Restoration Specialists, Reuben Mark Ward and Lynnette Pennington Ward		
Claim by Surety		\$ 1,307,978.71	
Interest		\$ 537,057.15	\$ 1,845,035.86
		\$ 2,338,958.64	\$ 2,338,958.64

<u>Paragraph Number(s) in Complaint</u>	<u>ALLEGED CAUSES OF ACTION AND ELEMENTS REQUIRED BY SC LAW</u>	<u>FACTUAL ALLEGATIONS CONTAINED IN COMPLAINT THAT ARE ADMITTED AS A RESULT OF DEFAULT</u>	<u>ISSUES,OMISSIONS AND PROBLEMS RELATED TO CAUSES OF ACTIONS AND/OR RELATED ADMISSIONS OF FACT THAT CAUSE THESE CAUSES OF ACTION TO FAIL</u>
12-14	<u>Breach of Agreement</u>		
	<u>Elements:</u>		
	1) A binding contract entered into by the parties		
	2) Breach or unjustifiable failure to perform the contract		
	3) damage suffered by the plaintiff as a direct and proxiate result of the breach		
5		Palmetto entered into a contract w/Restoration on or about 9/10/14 for construction of a project in Augusta, Georgia for US Govt.	
7		(Sub)contract between Palmetto and Restoration is attached to the Complaint as Exhibit A	Exhibit A is an AIA A401 (2007) Standard Form of Agreement between Contract and Subcontractor and consists of 15 pages and does not include the "PCG Subcontract Breakdown spreadsheet dated 9/5/14 provided, attached" referenced in Section 9.3 of the contract. The document Plaintiff provided at the 1/31/22 damages hearing that it purports is the "PCG Subcontract Breakdown" is undated and is not this document.
7		Exhibit B attached to the Complaint is a teaming agreement between Restoration and Palmetto.	Per the express terms of the Teaming Agreement and testimony received 1/31/22, the Teaming Agreement was terminated upon execution of the Subcontract. See Article 7 Subparagraph (e) of the Teaming Agreement.

9			Restoration has failed to 1) pay contract balances due and 2) account for the profit sharing funds. Accordingly Restoration has defaulted under its agreements with Palmetto.		This is an admission, if any, that Restoration has failed to account for profit sharing funds, not that profit sharing was a contract requirement, not that a profit was made, and not that there was any profit sharing funds due Palmetto. The Teaming Agreement indicates that any profit sharing arrangement will be per the terms of the subcontract. There are no subcontract terms regarding profit sharing.
13			Restoration has received funds from US and has not paid them as required by its agreements w/Palmetto and other subcontractors		
14			As a consequence of Restorations' Default under its agreements with Palmetto and other subonctractors, Palmetto has been damaged in a sum <i>to be determined.</i> <i>(emphasis added).</i>		

		<u>Negligent Misrepresentation</u>			
		1) A false representation made by Defendant to Plaintiff.			1) Must be a false representation of material fact, 2) integral component of the element is that the representation must be false at the time it is made, 3) the representation cannot be based on unfulfilled promises or statements of future events.
		2) A pecuniary interest by the defendant in making the statement			
		3) A duty of care owed by the defendant to see that truthful information was communicated to plaintiff			
		4) Breach of the duty by failing to exercise due care			
		5) Plaintiff justifiably relied on the representation			
16			Mr. Ward represented that he would manage this project and that all monies from the project would be used to pay for material and work supplied to or performed on the project.		1) No allegation of profit sharing, and in fact, contradicts any obligations of profit sharing. 2) The first element fails due to the following: a)There is no allegation that is statement was false. b)The allegation is against Mr. Ward personally, not Restoration Specialists. c) The allegation was not false at the time it was made. d) The statement clearly was based on unfulfilled promises or statements of future events.
17			Mr. Ward had a pecuniary interest in the project.		Restoration Specialist had a pecuniary interest in the project, not Mr. Ward.
18			The representations of Mr. Ward were material and were relied upon by Palmetto. Mr. Ward is personally liable for his own tortious conduct.		1) No allegation of elements of duty of care or proximate cause. 2) No duty of care owed by Ward. 3) This is not the proximate cause of the alleged loss.

		<u>Constructive and Actual Fraud</u>			
		<u>Constructive Fraud</u>			
		Elements:			
		1) a representation			Again, the action cannot be predictions of future events
		2) falsity			
		3) the speaker ought to have known of the falsity			
		4) materiality			
		5) intent that the representation be acted upon			
		6) the hearer's ignorance of its falsity			
		7) the hearer's reliance on the truth			
		8) the hearer's right to rely thereon			
		9) the hearer's consequent and proximate injury			
		<u>Additional Elements for Actual Fraud</u>			
		1) either knowledge of its falsity or a reckless disregard of its truth or falsity			
		2) intent that the representation be acted upon			
		<u>Additional Elements for Punitive Damages</u>			
		1) Defendant acted in reckless or in conscious disregard of plaintiff's rights			

16		Mr. Ward represented that he would manage this project and that all monies from the project would be used to pay for material and work supplied to or performed on the project.	1) No allegation of profit sharing, and, in fact, contradicts any obligation of profit sharing. 2) This is the only alleged representation made by Mr. Ward in the Complaint. A claim for constructive or actual fraud must fail because: a)There is no allegation that is statement was false. b)The allegation is against Mr. Ward personally, not Restoration Specialists. c) The allegation was not false at the time it was made. d) The statement clearly was based on unfulfilled promises or statements of future events, e) there is no indication that he intended for the representation to be acted upon, f) this was not the proximate cause of the alleged loss, g) plaintiff has not clearly shown how it was injured by the alleged representation, h) any damages related to the alleged representation are speculative, i) punitive damages are not recoverable as plaintiff has not shown that defendant acted in a reckless or in conscious disregard of plaintiff's rights .
21		Mr. Ward knew or should have known that his statements were material and would be relied upon by Palmetto	
22		Mr. Ward intended and induced Palmetto to rely upon his representations.	
23		Palmetto's justifiable reliance has damaged Palmetto in a sum to be determined.	
24		Palmetto, in addition to requesting actual damages, requests punitive damages.	Punitive damages are not recoverable as plaintiff has not shown that defendant acted in a reckless or in conscious disregard of plaintiff's rights .
	<u>OTHER LEGAL AND EQUITABLE RELIEF</u>		

		There are no causes of actions alleged here, just a generalized request for "legal and equitable relief".			
10			Palmetto, Restoration, and individually, Mr. Ward and Mrs. Ward, all signed an indemnity agreement with a surety in relation to a Payment Bond for this Project (Exhibit C)		1) The "indemnity agreement with a surety" was not attached to the Complaint as an exhibit. This document was first provided in Plaintiff's notebook at the 1/31/22 damages hearing. Exhibit C is a copy of the Performance and Payment bonds for the project, all of which are unsigned. 2) the Indemnity Agreement, by Paragraph 20, indicates that "[t]he Indemnitors waive and subordinate all rights of indemnity, subrogation and contribution each aghainst the other until all obligations to the Surety have been first satisfied in full.
10			"Accordingly, Restoration, Mr. Ward, and Mrs. ward must indemnify the surety and Plaintiffs to the extend that they are required to pay."		1) Testimony during the 1/31/22 hearing was that Palmetto has not paid anything to date to the surety, 2) Equitable subrogation was not pled, 3) Elements of equitable subrogation are not met as Palmetto has not paid anything to the surety.
11			Claims have been made by other subcontractors upon the Payment Bond and as a consequence subcontractors are making claims against Palmetto and its surety.		1) Testimony during the 1/31/22 hearing was that Palmetto has not paid anything to date to the surety, 2) Equitable subrogation was not pled, 3) Elements of equitable subrogation are not met as Palmetto has not paid the surety's claim. 4) Palmetto would receive a windfall if it prevails on its indemnity claim. 5) Testimony from a former employee that Palmetto will pay the surety if it prevails on its indemnity claim is not adequate to ensure payment to Hanover and fails as a matter of law to establish a claim or entitlement to damages for equitable subrogation or any other equitable relief in favor of PCG to the surety's claims.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group, LLC	)	
	)	
Plaintiff,	)	<u>DEFENDANTS' NOTICE OF MOTION</u>
	)	<u>AND MOTION TO RECONSIDER AND TO</u>
vs.	)	<u>ALTER OR AMEND THE COURT'S ORDER</u>
	)	<u>DENYING DEFENDANTS' MOTION TO</u>
Restoration Specialists, LLC,	)	<u>EXCLUDE AND STRIKE</u>
Reuben Mark Ward, and Lynnette	)	
Pennington Ward	)	
	)	
Defendants.	)	

TO: JAAN G. RANNICK, ESQUIRE OF EPTING & RANNIK, LLC, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP, LLC

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, will move before the presiding Judge or Master in Equity of the Ninth Judicial Circuit at a time and place to be arranged by the Court and counsel involved for the Court to reconsider and to alter or amend its Order Denying Defendants' Motion to Exclude and Strike, dated February 28, 2022 ("Order"). The Defendants will move the Court to reconsider and to alter or amend its Order so as to exclude and strike; (a) the documents designated and attached as "exhibits" in Palmetto Construction Group, LLC's two Notices of Filing Trial Exhibits ("Notices"), which Notices were filed with the Charleston County Clerk of Court on February 1, 2022 and (b) all testimony related to these documents.

The Defendants' Motion to Reconsider and to Alter or Amend ("Defendants' Motion") is made pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure and all applicable case law. Defendant's Motion is also made in concert with Defendants Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment, filed in concert with this motion, and pursuant to Rules 52(b), 55(c), 59(e), and 60(b)(1) of the South Carolina Rules of Civil Procedure and other rules and/or authorities cited therein.

This Motion is made on the grounds that: (a) the Plaintiff failed to mark and to move for the admission of these documents into evidence as exhibits at the damages hearing; (b) these documents were never admitted into evidence as exhibits at the damages hearing; and (c) Plaintiff's witness

testimony related to these documents not in evidence should be excluded and stricken. Further, this Motion is made on the basis of Defendants' objections raised at the damages hearing and in Defendants' original Motion to Strike and Exclude (and supporting Reply Memorandum), Defendants' Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment, and the catalog of objections further describing Defendants' objections in detail attached hereto as *Exhibit A* and incorporated herein by reference and all rights preserved and granted to Defendants under 52(b) of the South Carolina Rules of Civil Procedure and all applicable law .

This Motion is based upon, supported by, and made upon the grounds set forth herein, as well as the duly recorded official transcript of the damages hearing before this court, the complete files and records in this action, oral arguments, applicable statutory, regulatory and case law, rules of court, oral arguments, any oral and documentary evidence as may be allowed at the hearing of this motion, and any affidavits and/or supporting memorandums of law that may be provided prior to or at the hearing of this motion.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

/s/ A. Bright Ariail
A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

March 10, 2022
Charleston, South Carolina

Rule 11, SCRPC Certification:

Undersigned counsel certifies that she has not contacted counsel for Plaintiff concerning this Motion to Reconsider and to Alter or Amend Defendant's Motion to Exclude and Strike inasmuch as consultation would serve no useful purpose.

By: /s/ A. Bright Ariail
A. Bright Ariail

March 10, 2022

<u>PCG TAB NUMBER</u>	<u>DEFENDANTS' SUBTAB NUMBER</u>	<u>PAGE LOCATION WITHIN TAB</u>	<u>DOCUMENT DESCRIPTION</u>	<u>OBJECTIONS</u>
2		1-6	TEAMING AGREEMENT	No objections as this is a duplicate of the document attached to the Complaint as Exhibit B
3	A	1-15	AIA A401 SUBCONTRACT	No objections to Pages 1-15 of this document – AIA 401 as this is a duplicate of the documents attached to the Complaint as Exhibit A.
	B	16	PCG SUBCONTRACT BREAKDOWN (undated)	Defendants object to Page 16 of this document as follows: 1) Not Relevant 2) Inadequate/No Foundation 3) No testimony as to who prepared it 4) Not Authenticated 5) Hearsay 6) Is undated and therefore does not conform with the reference contained in Section 9.3 of the AIA A401 which describes the Portion of Work to be performed as Work by the subcontractor as “PCG Subcontract Breakdown spreadsheet dated 9/5/10 provided, attached”.
4	A	1-7	Hanover Indemnity Agreement	Defendants object to this document as follows: 1) Not Relevant 2) Inadequate/No Foundation 3) No testimony as to who prepared it 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint
	B	8-9	Resolutions	Defendants object to this document as follows: 1) Not Relevant

				2) Inadequate/No Foundation 3) No testimony as to who prepared it 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint 7) Not cited in the hearing
	C	10	Appears to be notes to "Mark"	Defendants object to this document as follows: 1) Inadequate/No Foundation 2) No testimony as to who prepared it 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Not cited in the hearing
	D	11-14	Performance and Payment Bonds	Defendants object to this document as follows: 1) While these documents were attached to the Complaint as Exhibit C, they are unsigned 2) Inadequate/No Foundation 3) No testimony as to who prepared it 4) Not relevant to the allegations contained within the four corners of the Complaint
6		1	PCG Damages Summary	Defendants object to this document as follows: 1) No testimony as to who prepared it 2) Inadequate/No Foundation 3) Not Authenticated 4) Hearsay 5) Documents which support calculations were not provided

7	A	1-3	ALL JOB COSTS (Method 1 and 2)	Defendants object to this document as follows: 1) Not Relevant 2) No testimony as to who prepared it 3) Inadequate/No Foundation 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint 7) Documents referenced which support calculations are not authenticated and hearsay
	B	4	CONTRACT LOG FOR VMAC PARKING	Defendants object to this document as follows: 1) No testimony as to who prepared it 2) Inadequate/No Foundation 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Preliminary document/Incomplete 7) Documents which support calculations were not provided
	C	5-6	RS Augusta VA Monthly Expenses July 2013 – October 31, 2014	Defendants object to this document as follows: 1) Inadequate/No Foundation 2) No testimony as to who prepared it 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Preliminary Document/Incomplete

				7) Documents which support calculations were not provided
7A		1-72	Various Checks	Defendants object to this document as follows: 1) No testimony as to who prepared it 2) Inadequate/No Foundation 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Preliminary Documents/Incomplete 7) Documents which support calculations/payments were not provided
7B		1-108	Various Contract and Subcontract Documents	Defendants object to this document as follows: 1) Many are unsigned (including P00012 change order from VA to RS which expressly states it is not valid until signed) 2) No testimony as to who prepared them 3) Inadequate/No Foundation 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint 7) No testimony concerning these documents 8) Preliminary Documents/Incomplete 9) Documents which support calculations were not provided

8	A	1-2	A/R History Report	Defendants object to this document as follows: 1) Not Relevant 2) No testimony as to who prepared it 3) Inadequate/No Foundation 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint 7) Documents which support calculations were not provided
	B	3-15	Job Cost & Billing Detail	Defendants object to this document as follows: 1) Not Relevant 2) Inadequate/No Foundation 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Documents which support calculations were not provided
	C	16-17	Pay App Summary	Defendants object to this document as follows: 1) Not Relevant 2) Inadequate/No Foundation 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Documents which support calculations were not provided

9	A	1-2	Hanover Letter of 1/24/2022	Defendants object to this document as follows: 1) Inadequate/No Foundation 2) No testimony as to who prepared it 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Documents which support calculations were not provided (no vouchers)
	B	3-7	Hanover Letter of 9/30/2016 with attached spreadsheets	Defendants object to this document as follows: 1) Inadequate/No Foundation 2) No testimony as to who prepared it 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint 6) Documents which support calculations were not provided (no vouchers) 7) Attached spreadsheets include math errors and inconsistencies
10		1-3	Ranik Affidavit with Attachment A	Defendants object to this document as follows: 1) Not Relevant 2) Inadequate/No Foundation 3) Not Authenticated 4) Hearsay 5) Not relevant to the allegations contained within the four corners of the Complaint

				6) Documents which support calculations were not provided
11		1	PCG Statement of Operations	Defendants object to this document as follows: 1) Not Relevant 2) No testimony as to who prepared it 3) Inadequate/No Foundation 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint 7) Documents which support calculations were not provided 8) Lost Profits was not pled
12		1	Interest Calculation	Defendants object to this document as follows: 1) Not Relevant 2) No testimony as to who prepared it 3) Inadequate/No Foundation 4) Not Authenticated 5) Hearsay 6) Not relevant to the allegations contained within the four corners of the Complaint 7) Interest was not pled

Note 1 – All documents referenced herein (except Tab 2 which is marked with no objections) are objected to as they 1) were objected to by Defendants' counsel as general objections to all documents during the January 31, 2022 hearing, 2) not marked as exhibits during the hearing, 3) had no or inadequate

foundation laid, 4) not authenticated, 5) not relevant in general, 6) are hearsay, 7) are not relevant to the allegations contained within the four corners of the Complaint, 8) were never moved into evidence by Plaintiff's Counsel, and 9) never admitted into evidence as exhibits at the damages hearing.

Note 2 - Documents filed with the Court were modified from those that were contained in the notebook used at the damages hearing to include footers with Tab designations.

Note 3 – Tab 7B includes, but is not limited to some of the following purported documents: 1) P00012 from VA to RS (unsigned), 2) Subcontractor change orders (incomplete), 3) Pay Applications from Subcontractors (incomplete), 4) Vendor Invoices (incomplete), 5) RS Checks (incomplete), 6) Subcontracts with other subcontractors(incomplete), 7) RS Invoice to VA (not certified)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group	)	
	)	
Plaintiff,	)	<u>MEMORANDUM IN SUPPORT OF</u>
	)	<u>DEFENDANTS' MOTION TO RECONSIDER</u>
	)	<u>AND TO ALTER, AMEND OR RELIEVE</u>
vs.	)	<u>DEFENDANTS FROM THE COURT'S ORDER</u>
	)	<u>ORDER DENYING DEFENDANTS' MOTION</u>
Restoration Specialists, LLC,	)	<u>TO DISMISS AND ENTERING</u>
Reuben Mark Ward, and Lynnette	)	<u>DEFAULT JUDGMENT</u>
Pennington Ward	)	
	)	
Defendants.	)	

TO: JANN G. RANNICK, ESQUIRE OF EPTING & RANNIK, LLC, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP ("PLAINTIFF" OR "PCG")

Pursuant to Rules 52(b), 55(c), 59(e), and 60(b)(1) and 60(b)(5) of the South Carolina Rules of Civil Procedure, the Defendants, Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward (hereinafter collectively "Defendants"), by and through their undersigned counsel, submit this Memorandum in Support of their Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment.

On January 31, 2022 the Court held a default damages hearing in the above-referenced matter. The damages hearing concluded on January 31, 2022. Thereafter, on February 28, 2022, the Court issued its Order Denying Defendants Motion to Dismiss and Entering Default Judgment ("Court's Order and Judgment"). The Court's Order and Judgment entered judgment against the Defendants in the amount of Two Million Three Hundred Thirty-Eight Thousand Nine Hundred Fifty Eight and 64/100ths (\$2,338, 958.64) Dollars, with instructions to the Charleston County Clerk of Court to enroll the judgment in the judgment index.

On March 10, 2022, the Defendants filed a Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment. The Defendants crave reference to Defendants' Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment and the supporting grounds cited therein, upon which grounds the

Defendants are entitled to an Order:

- (1): Granting Defendants' Motion to Dismiss and the relief requested therein;
- (2): Granting Defendants' Motion to Exclude and Strike and the relief requested therein;
- (3): Granting Defendants' Motion to Reconsider the Court's Order Denying Defendants'

Motion to Dismiss and Entering Default Judgment and granting the relief requested therein, including reversing and vacating the Court's damages awards against the Defendants, reversing and vacating the Court's judgment against the Defendants, relieving the Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment and the damages hearing proceeding, and unenrolling, striking, cancelling, vacating, or otherwise removing the Court's judgment against the Defendants, individually and severally, from the court record and judgment index .

CONCLUSION

For these reasons, the Defendants hereby respectfully request that their Motion to Reconsider the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment be granted.

Respectfully submitted,

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

/s/ A. Bright Ariail

A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

March 13, 2022
Charleston, SC 29412

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143

Palmetto Construction Group,

Respondent,

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward

Appellants.

RECEIVED

OCT 11 2016

SC Court of Appeals

NOTICE OF APPEAL

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward appeal the Bench and Formal Orders of the Honorable Mikell R. Scarborough dated July 14, 2016. The Court's orders: (a): Denied Appellant's Motion to Lift Entry of Default for lack of good cause; (b): Denied Appellant's Motion to Stay and Compel Arbitration on the basis of default; and (c): Set a damages hearing for October 4, 2016. Appellants received written notice of entry of these orders on July 18, 2016.

Appellants filed a Motion to Reconsider and to Alter and Amend the Court's orders pursuant to SCRCP 59(e) and applicable case law on July 27, 2016. The Court scheduled the hearing on Appellants' motion for October 11, 2016. On September 7, 2016, standing on their rights to arbitration, the Appellants requested the Court to schedule the hearing on Appellants' motion prior to the October 4, 2016 damages hearing.

On September, 7, 2016, the Court replied to Appellants' request and made the decision to switch the hearing dates, with the motions hearing to be held on October 4, 2016 and, if necessary, the damages hearing to be held on October 11, 2016. The Court asked the parties to advise if this plan was acceptable. The Appellants informed the Court that this plan was acceptable. The Respondent notified the Court that it would defer to the Court, but preferred the damages hearing to be held on October 4, 2016 and the motions hearing to be held on October 11, 2016.

After further consideration, the Court then rendered a decision not to switch the hearing dates and informed the parties that the damages hearing would be held on October 4, 2016 and the motions hearing would be held October 11, 2016. Appellants received written notice of the Court's decision on September 12, 2016.

The Court's decision to proceed with the damages hearing and not hear the Appellant's Rule 59(e) prior thereto effectively denies this motion and proceeding with the damages hearing under these circumstances would severely prejudice Appellants' rights to arbitration. Therefore, subject to, without waiving, and fully preserving their rights to arbitration, the Appellants hereby file the instant appeal in this matter.

September 29, 2016



A. Bright Ariail
Law Office of A. Bright Ariail, LLC
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, S.C. 29412
(843) 814-8805
Attorney for Appellants

Other Counsel of Record:
Andrew K. Epting, Jr.
Michelle N. Endemann
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, S.C. 29401
(843) 377-1871
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143

Palmetto Construction Group,

Respondent,

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward

Appellants.

RECEIVED

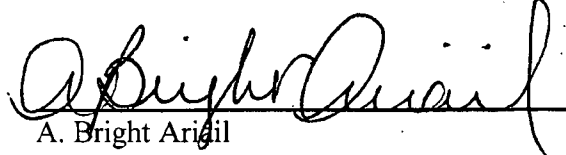
OCT 11 2016

SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Palmetto Construction Group by depositing a copy of it in the United States Mail, postage prepaid, on September 30, 2016, addressed to Palmetto Construction Group's attorneys of record, Andrew K. Epting, Jr. and Michelle N. Endemann, Adrew K. Epting, Jr., LLC, 46A State Street, Charleston, South Carolina 29401 and by delivering a copy of it to Palmetto Construction Group's attorneys of record, Andrew K. Epting, Jr. and Michelle N. Endemann, at their office at 46A State Street, Charleston, South Carolina 29401, on September 30, 2016.

September 30, 2016



A. Bright Ariail
Law Office of A. Bright Ariail, LLC
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, S.C. 29412
(843) 814-8805
Attorney for Appellants

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

125E WAPPOO CREEK DRIVE, SUITE 202
CHARLESTON, SC 29412
bright@brightariailaaw.com

A. Bright Ariail, Esquire

Telephone: (843) 814-8805
Facsimile: (843) 266-0538

October 6, 2016

VIA FACSIMILE (803) 734-1839 & US MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED
OCT 11 2016
SC Court of Appeals

RE: *Palmetto Construction Group v. Restoration Specialists, LLC,*
Reuben Mark Ward, and Lynette Pennington Ward
Case No. 2016-CP-10-1143

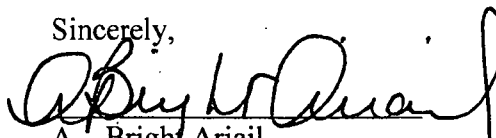
Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal in the above case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal on the Respondent.
- (2) A copy of the order(s) which are to be challenged on appeal.
- (3) A filing fee of \$100.00.

Please file the Notice of Appeal and return the clocked copy to me in the enclosed SASE. Thank you for your assistance in this matter.

Sincerely,


A. Bright Ariail
Attorney for Appellants

Enclosures

cc: Andrew K. Epting, Jr.,
Michelle N. Endemann
Andrew K Epting, Jr., LLC
46A State Street
Charleston, S.C. 29401
(843) 377-1871
Attorneys for Respondent

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

125-E WAPPOO CREEK DRIVE, SUITE 202

CHARLESTON, SC 29412

(843) 814-8805 (TELEPHONE)

(843) 266-0538 (FACSIMILE)

RECEIVED

OCT 11 2016

FACSIMILE TRANSMITTAL SHEET

SC Court of Appeals

TO: THE HONORABLE JENNY ABBOTT KITCHINGS FROM: A. BRIGHT ARIAIL, ESQ

FAX NUMBER
(803)-734-1839

DATE:
OCTOBER 6, 2016

PHONE NUMBER
(803) 734-1890

TOTAL NO. OF PAGES INCLUDING COVER:
13

YOUR REFERENCE:

Appeal - Palmetto Construction Group v. Restoration Specialists, LLC, Reuben Mark Ward, and Lynette Pennington Ward/ Case No: 2016-CP-10-1143

CASE NAME/CASE NUMBER:

Palmetto Construction Group v. Restoration Specialists, LLC, Reuben Mark Ward, and Lynette Pennington Ward/ Case No: 2016-CP-10-1143

☐

URGENT ☐

FOR REVIEW ☐

☐

PLEASE COMMENT ☐

☐

PLEASE REPLY

NOTES/COMMENTS:

DEAR MS. KITCHINGS:

ENCLOSED PLEASE FIND AN ELECTRONICALLY TRANSMITTED FACSIMILE COPY OF THE FOLLOWING DOCUMENTS IN CONNECTION WITH THE ABOVE-REFERENCED APPEAL:

- (1) COVER LETTER FILING NOTICE OF APPEAL OF APPELLANTS RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, AND LYNNETTE PENNINGTON WARD ("NOTICE OF APPEAL");
- (2) NOTICE OF APPEAL;
- (3) PROOF OF SERVICE OF THE NOTICE OF APPEAL ON THE RESPONDENT;
- (4) THE ORDER(S) WHICH ARE TO BE CHALLENGED ON APPEAL;
- (5) THE FILING FEE CHECK OF \$100.00.

WE ARE REFILEING THESE DOCUMENTS AS THE COURT REPORTER'S CERTIFICATION OF THE JULY 14, 2016 BENCH ORDER WAS INADVERTANTLY OMITTED FROM OUR OCTOBER 5, 2016 FILING WITH THE COURT OF APPEALS. THE ORIGINALS OF THESE DOCUMENTS AND THE FILING FEE CHECK WILL BE IMMEDIATELY SENT BY U.S. MAIL TO YOUR OFFICE.

BEST REGARDS,

A. BRIGHT ARIAIL

The information contained in this transmission is privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have read this communication in error, please notify us immediately by telephone and return the original message to us at the above address via the U. S. Postal Service. Thank you.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143

RECEIVED

NOV 18 2016

SC Court of Appeals

Palmetto Construction Group,

Respondent,

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward

Appellants.

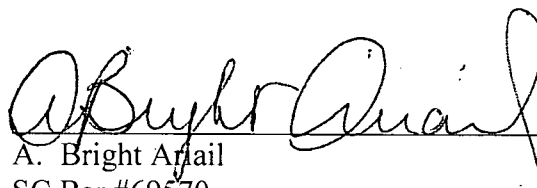
NOTICE OF APPEAL

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward appeal the Orders of the Honorable Mikell R. Scarborough dated July 14, 2016 and October 28, 2016.

The Order dated July 14, 2016 (Exhibit A): (a) Denied Appellant's Motion to Lift Entry of Default for lack of good cause; (b) Denied Appellant's Motion to Stay and Compel Arbitration on the basis of default; and (c) Set a damages hearing for October 4, 2105. Appellants received written notice of entry of this order on July 18, 2016. The parties timely filed cross-motions to reconsider the Court's July 14, 2016 Order pursuant to Rule 59, SCRCP.

The Order dated October 28, 2016 (Exhibit B), in response to the parties' cross-motions to reconsider pursuant to Rule 59, SCRCP: (a) Denied Defendants' Motion to Amend on the basis that Defendants have not shown good cause to lift the default, and (b) Denied Defendants' Motion to Stay and Compel filed July 11, 2016 on the basis that the affirmative defense of arbitration had been waived and therefore the motion was not properly made. Appellants received written notice of entry of this order on November 2, 2016.

November 14, 2016



A. Bright Ariail

SC Bar #69570

Law Office of A. Bright Ariail, LLC

125 Wappoo Creek Drive

Building E, Suite 202

Charleston, SC 29412

(843) 814-8805

Attorney for Appellants

Other Counsel of Record:

Andrew K. Epting, Jr.

Michelle N. Endemann

Andrew K. Epting, LLC

46A State Street

Charleston, SC 29401

(843) 377-1871

Attorneys for Respondent

Law Office of A. Bright Ariail, LLC

November 15, 2016

VIA FACSIMILE AND US MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED
NOV 18 2016
SC Court of Appeals

RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*
C/A 2016-CP-10-1143

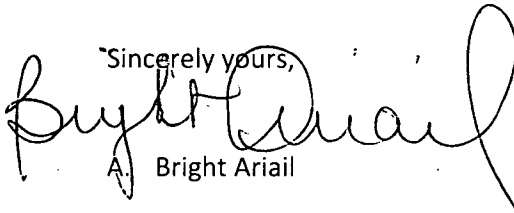
Dear Ms. Kitchings;

Enclosed, please find the original and one copy of Appellants' Notice of Appeal and Proof of Service in the above referenced case, both dated November 14, 2016, for filing. Please note that the orders that are being challenged on appeal are attached to the Notice of Appeal as Exhibits A and B. After filing, please return the clocked copy to me in the enclosed, self-addressed stamped envelope.

Also, while the Order of the Court of Appeals filed on November 10, 2016 involving a prior appeal in this case cites *Hudson v. Hudson*, 290 S.C. 215, 216, 349 S.E.2d 341, 342 (1986) which indicates that a second filing fee will not be collected from a party who has previously appealed, I am including a filing fee in case it is required for this appeal. Please feel free to return my check with the copy of the filed Notice of Appeal if it is not necessary in this case.

By copy of this letter, I am serving counsel for Respondents with same.

With kindest regards, I am

Sincerely yours,

A. Bright Ariail

Enclosures

cc: Andrew Epting, Esquire (via email and US Mail)
Michelle Endemann, Esquire (via email and US Mail)

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-10-1143

Palmetto Construction Group LLC

Restoration Specialists, LLC, et al.

RECEIVED
NOV 18 2016
SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: This matter came before the court for argument on October 11, 2016 on Cross-Motions to Reconsider pursuant to Rule 59, SCRPC. After a review of the file and memoranda submitted by counsel, the court finds as follows: 1) Defendants' Motion to Amend is respectfully DENIED, inasmuch as Defendants have not shown good cause to lift the default; and 2) the affirmative defense of arbitration has been waived and Defendant's Motion to Stay and Compel filed July 11, 2016 was not properly made.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
NA	NA	\$NA
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

Circuit Court Judge

3062

Judge Code

Date

10/28/16

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143

RECEIVED

NOV 18 2016

SC Court of Appeals

Palmetto Construction Group,

Respondent,

v.

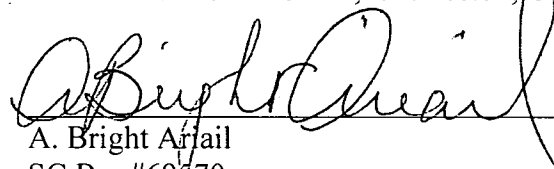
Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward

Appellants.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Palmetto Construction Group by depositing a copy of it in the United States Mail, postage prepaid, on November 14, 2016, addressed to Palmetto Construction Group's attorneys of record, Andrew K. Epting, Jr. and Michelle N. Endemann, Andrew K. Epting, LLC, 46A State Street, Charleston, South Carolina, 29401 and by delivering a copy of it to Palmetto Construction Group's attorneys of record, Andrew k. Epting, Jr. and Michelle N. Endemann, at their office at 46A State Street, Charleston, South Carolina, 29401, on November 14, 2016.

November 14, 2016



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Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 18 2019

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143

Palmetto Construction Group, LLC

Respondent

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward

Petitioners

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners hereby certifies that a Petition for Rehearing *En Banc* regarding the Opinion of the Court of Appeals that is the subject of this petition was made by the Petitioner's on July 10, 2019 and finally ruled on by the Court of Appeals on November 15, 2019.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the Master's Orders refusing to compel arbitration are interlocutory and not appealable?
2. Did the Court of Appeals err in holding that the Petitioners waived their right to arbitration?

STATEMENT OF THE CASE

This action arises out of a construction project in Augusta, Georgia. (R.p. 13, lines 1-3). On March 29, 2012, the Petitioner, Restoration Specialists ("Petitioner Restoration") was awarded a contract to construct the Charlie Norwood VAMC Parking Garage in Augusta, Georgia ("the Norwood Parking Garage Project" or the "Project"). (R.p. 94). Prior to the contract award, the Respondent entered into a Teaming Agreement with Petitioner Restoration in December 2011. (R.pp. 32-37). The Respondent entered into a Subcontract Agreement with Petitioner Restoration on September 19, 2014 in connection with the Project. (R.pp. 17-31).

Respondent filed this lawsuit on March 7, 2016, alleging a breach of the Subcontract Agreement. (R.pp. 9-41). Simultaneously with filing the lawsuit, Respondent filed a Motion to Stay and to Compel on March 7, 2016. (R.pp. 42-60). The basis of Respondent's Motion to Stay and to Compel was that the Subcontract Agreement contained

mandatory mediation/arbitration provisions requiring the Court to stay the litigation and the parties to mediate in Georgia or other agreed upon location and, if necessary, arbitrate all claims contained in Respondent's lawsuit. (R.pp. 42-60).

Respondent simultaneously served all Petitioners with both the Complaint and Motion to Stay and to Compel on March 14, 2016. (R.pp. 66-71).

Respondent filed a Motion to Refer to the Master in Equity and for Entry of Default on April 18, 2016. (R.pp. 61-71). The Circuit Court entered default against the Petitioners on April 21, 2016. (R.p. 3).

On the evening of June 2, 2016, the Petitioners were served with a Notice of Hearing scheduling the default damages hearing for June 6, 2016. (R.pp. 72-73 and 476). The Petitioners were unaware of the default status of the case and the scheduling of the damages hearing until they received this hearing Notice on June 2, 2016. (R.pp. 74-76). Upon receipt of this Notice of Hearing, the Petitioners immediately retained legal counsel on June 3, 2016. (R.pp. 74-76; R.p. 79, lines 13-14). Petitioners' counsel immediately filed a Motion for Continuance of the damages hearing and a Motion to Set Aside Entry of Default on June 3, 2016, citing the mandatory mediation/arbitration provisions and Respondent's Motion to Stay and Compel mediation/arbitration as one of Petitioners' grounds for relief. (R.pp. 77-87).

At the hearing on June 6, 2016, the Master in Equity ("Master") granted Petitioners' Motion for Continuance of the damages hearing and held the Motion to Set Aside Entry of Default in abeyance. (R.p. 466, Tr. p. 11, line 18 – p. 12, line 4). The Master then directed the Petitioners to provide financial information relative to the Project to see what could be resolved between the parties and scheduled the matter to reconvene for a status conference

on July 14, 2016. (R.p. 466, Tr.p.12, lines 6-23). Per the Master's direction, the Petitioners provided certain relevant documents and basic written discovery responses to Respondent.

On July 11, 2016, the Petitioners filed a formal Motion to Stay and to Compel on the basis of the mandatory contractual mediation/arbitration provisions. (R.pp. 88-93). In addition, the Petitioners joined in and consented to Respondent's Motion to Stay and to Compel, rendering that motion a joint Motion to Stay and to Compel mandatory mediation/arbitration ("Joint Motion"). (R.pp. 88-93). As such, Petitioners' singular and joint Motions to Stay and Compel mandatory mediation/arbitration were pending before the Master at this time.¹

The parties reconvened before the Master on July 14, 2016. (R.p. 467). The Petitioners also filed a Memorandum in Support of their Motion to Lift Entry of Default on July 14, 2016, which included Petitioners' continued assertion of their right to arbitration. (R.pp. 94-124). During the reconvened hearing the Master stated that the Clerk of Court "closed out" the Respondent's Motion to Stay and Compel. (R.p. 467, Tr. p. 9, lines 5-8). The Clerk's closure of the motion occurred despite Petitioners' joinder in the motion. The Master issued a bench ruling finding that the Clerk's action constituted an adjudication of this motion. (R.p. 467, Tr. p. 9, lines 5-9). The Master further ruled from the bench finding Petitioners in default, denying Petitioners' Motion to Lift Entry of Default and scheduling a default damages hearing for October 4, 2016. (R.p. 467, Tr. p. 9, lines 12-17 and Tr. p. 12, lines 7-8).

Upon completion of the reconvened hearing, the Master issued a formal order dated July 14, 2016. (R.p. 4). The Master's formal order: (a): Denied Petitioners' Motion to Lift

¹ While Respondent asserts that it "set aside" or "withdrew" its Motion to Stay and Compel, the record is devoid of evidence substantiating same.

Entry of Default for lack of good cause; (b): Denied Petitioners' Motion to Stay and Compel mandatory mediation/arbitration on the basis of default; and (c): Set a damages hearing for October 4, 2016. (R.p. 4). Petitioners received written notice of entry of these orders on July 18, 2016. (R.pp. 477-482).

The Petitioners filed a timely Motion to Reconsider and to Alter and Amend the Master's orders pursuant to SCRCP 59(e) and applicable case law on July 27, 2016. (R.pp. 125-129). The Master scheduled the hearing on Petitioners' Rule 59(e) motion to be held on October 11, 2016, seven days after the scheduled damages hearing on October 4, 2016. (R.pp. 483-484).

On September 7, 2016 standing on their rights to mandatory mediation/arbitration, the Petitioners requested in writing that the Master schedule the hearing on Petitioners' Rule 59(e) motion prior to the October 4, 2016 damages hearing. (R.p. 485).

On September 7, 2106, the Master replied to Petitioners' request and made the decision to switch the hearing dates, with the motions hearing to be held on October 4, 2016 and, if necessary, the damages hearing to be held on October 11, 2016. (R.pp. 486-492). The Master asked the parties to advise if this plan was acceptable. (R.pp. 486-492). The Petitioners informed the Master that this plan was acceptable. (R.pp. 486-492). The Respondent notified the Master that it would defer to the Master, but preferred the damages hearing to proceed on October 4, 2016 and the motions hearing to be held thereafter on October 11, 2016. (R.pp. 486-492).

After further consideration, the Master then reversed his decision to switch the hearing dates and informed the parties that the damages hearing would proceed on October 4, 2016 and the motions hearing would be held on October 11, 2016. (R.pp. 486-492). The

Petitioners received written notice of the Master's decision on September 12, 2016. (R.pp. 486-492).

The Master's decision to proceed with the damages hearing and not hear the Petitioners' Rule 59(e) motion prior thereto effectively denied this motion as proceeding with the damages hearing under these circumstances would severely prejudice, and potentially force a waiver of Petitioners' rights to arbitration and foreclose any appeal therefrom. Therefore, subject to, without waiving, and fully reserving their rights to arbitration, the Appellants commenced an appeal in this matter on September 30, 2016. (R.pp. 496-500).

Thereafter, the Master notified all parties that he intended to go forward with the hearing set for October 4, 2016. (R.pp. 493-495). During that hearing, the Master did not proceed with the damages hearing nor issue a ruling on the Rule 59(e) motion, stating instead, that he wished to establish a record for appellate court review of this matter. (R.p. 470, Tr. p. 9, lines 14-19). Accordingly, the Master accepted Petitioners' Memorandum in Support of Defendant's Motion to Reconsider and to Alter or Amend (R.pp. 130-136), discussed the procedural posture of the case (R.pp. 468-470), allowed the parties to proffer information related to Petitioners' Motion to Reconsider and to Alter or Amend (R.pp. 470-474) and allowed Respondent to proffer information related to damages alleged (R.pp. 474-475), to which Appellants' vehemently objected (R.p. 475). Further, pursuant to the Master's request, the parties thereafter submitted additional legal memoranda to the Court for consideration regarding Petitioners' Rule 59(e) motion. (R.pp. 149-327).

On October 27, 2016, the Respondent filed a Motion to Dismiss Appeal. (R.pp. 328-367). Thereafter, on November 10, 2016, the Court of Appeals issued an order stating

that based on the Master's actions at the October 4, 2016 hearing, it appeared the Master intended to issue a final written order on the Rule 59(e) motion. (R.p. 7). Accordingly, the Court of Appeals dismissed Petitioners' initial appeal without prejudice ruling that the Petitioners could appeal after the Master's issuance of a final, written order on the Rule 59(e) motion. (R.p. 7).

On October 28, 2016, the Master issued an order ruling on Petitioners' motion to reconsider pursuant to Rule 59, SCRPC. (R.pp. 5-6). The Master's Order: (a): Denied Defendants' Motion to Amend on the basis that Defendants did not show good cause to lift the default, and (b): Denied Defendants' Motion to Stay and Compel filed July 11, 2016 on the basis that the affirmative defense of arbitration had been waived and therefore the motion was not properly made. (R.pp. 5-6). Petitioners received written notice of entry of this order on November 2, 2016. (R.pp. 501-502).

The Petitioners commenced the instant appeal on November 14, 2016, appealing the Orders of the Honorable Mikell R. Scarborough dated July 14, 2016 and October 28, 2016. (R.pp. 501-507). The South Carolina Court of Appeals issued its opinion, dated June 26, 2019, dismissing the Petitioners' appeal finding that: (a): the Master's July 14, 2016 and October 28, 2016 orders are interlocutory and not appealable and (b): because Petitioners were in default, they waived their right to assert arbitration as a defense. (A. pp. 4-10).

ARGUMENTS

I. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE MASTER'S ORDERS REFUSING TO COMPEL ARBITRATION ARE APPEALABLE.

(A): The Master's Orders refusing to compel arbitration raise appealable arbitration issues that are immediately appealable.

The Petitioners have appealed the Master's Orders dated July 14, 2016 and October 28, 2016. The Master's July 14, 2016 Order ruled, in part, that "Defendants' motion to stay and to compel arbitration is denied as Defendant is in Default." The Master's October 28, 2016 Order ruled that "the affirmative defense of arbitration has been waived and Defendant's Motion to Stay and Compel filed July 11, 2016 was not properly made."

Both orders refuse to stay this action and deny Petitioners' application and rights to compel arbitration. Accordingly, the Master's orders raise appealable arbitration issues that is immediately appealable under both the federal and state arbitration acts.

Under the Federal Arbitration Act, an order that favors litigation over arbitration—whether it refuses to stay the litigation in deference to arbitration or refuses to compel arbitration—is immediately appealable, even if interlocutory in nature. *See* 9 U.S.C. §16(a)(1); *Stedor Enter., Ltd. v. Armtex, Inc.*, 947 F.2d 727 (4th Cir. 1991).

Under the South Carolina Uniform Arbitration Act, an order denying an application to compel arbitration is immediately appealable. S.C. Code Ann. §15-448-200(a)(1); *Cape Romain Contractors, Inc. v. Wando E, LLC*, 405 S.C. 115, 747 S.E. 2d (2013); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E. 2d 839 (Ct. App. 1999). Also, an order finding that a party waived its right to compel arbitration is immediately appealable. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E. 2d 749 (Ct. App. 1999).

In addition to the precedent set forth above, the Master's orders refusing to compel arbitration are immediately appealable in that they deny the Petitioners the right to arbitration and, therefore, affect a substantial right of the Petitioners. An order denying a party a mode of trial to which he is entitled is immediately appealable. S.C. Code Ann. §14-3-330(2); *Lester v. Dawson*, 327 S.C. 263, 491 S.E. 2d 240 (1997); *Widdicombe v.*

Tucker-Cales, 366 S.C. 75, 620 S.E. 2d 333 (Ct. App. 2005). Such orders must be appealed immediately and cannot be challenged in an appeal from final judgment. *Id.*

II. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE PETITIONERS HAVE NOT WAIVED THEIR RIGHT TO ARBITRATION.

(A): Appellate Standard of Review.

The denial of a motion to compel arbitration, based on a finding of waiver, is a legal conclusion subject to *de novo* review on appeal. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E. 2d 868 (Ct. App. 2013); *MailSource, LLC v. M.A. Bailey & Assoc.*, 356 S.C. 370, 374, 588 S.E. 2d 639, 641 (Ct. App. 2003).

(B): Public Policy Supports Contractually Agreed Arbitration.

The parties' contract is clearly an integrated and executed written agreement whereby Respondent and the Petitioners agreed to resolve their disputes through mandatory mediation, and if necessary, through arbitration. (R.pp. 17-31); *see also* Brief of Appellants, Arguments – Section II. (C): All Appellants Are Entitled to Mediation/Arbitration Under the Alternative Dispute Resolution Provisions of the Contract. (A. pp. 144-147) and Reply Brief of Appellants, Arguments – Section II. (A): The Respondent's Claims Against the Ward Appellants Relate To and Are Intertwined With The Subcontract And, Therefore, Are Subject To Arbitration. (A. pp. 71-74). Pursuant to South Carolina Code Annotated §15-48-10, such an agreement is “valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.” South Carolina Code Ann. § 15-48-10. Likewise, under federal law such an agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

Moreover, “the policy of the United States and South Carolina is to favor arbitration

of disputes.” *Tritech Elec. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E. 2d 864 (Ct. App. 2000) (quoting *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E. 2d 135, 136 (1995)). Further, South Carolina and federal courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. See *Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 569 S.E. 2d 349 (2002); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E. 2d 839 (Ct. App. 1999); see also *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (“[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense...”) *Id.* (emphasis added).

Given both the United States and South Carolina’s well recognized and articulated preference for arbitration, and the fact that the parties entered into a written agreement to arbitrate all disputes arising out of or related to the contract, this Court should accept certiorari, reverse the Court of Appeals and Master’s rulings, and stay this action and compel the matter to mandatory mediation/arbitration.

(C): The Petitioners Have Not Waived Their Right To Mediation/Arbitration Under The Mandatory Alternative Dispute Resolution Provisions Of The Contract And Applicable Law.

(1): The Court of Appeals Ruling That The Petitioners Waived Their Right To Arbitration Constitutes Reversible Error Upon A Novel Question of Law And Matter Of First Impression In South Carolina.

The Petitioner’s appeal and the Court of Appeals’ analysis herein raises a novel question of law and matter of first impression in South Carolina. Specifically, the question raised is whether the singular fact that a default is entered against a defendant constitutes a waiver of the right to compel arbitration. As a necessary corollary, this novel question

raises an additional query; specifically, whether an entry of default constitutes a bright-line dispositive factor negating and rendering irrelevant all other factors, and associated facts, related to the defendant's efforts to enforce arbitration.

In analyzing Petitioner's appeal, the Court of Appeals made the initial and improper ruling that the Master's orders did not raise any appealable issues. Therefore, the Court of Appeals dismissed the entire appeal as interlocutory.

Despite ruling that the appeal was interlocutory, the Court of Appeals issued its additional substantive ruling finding that the Petitioners waived their right to arbitration.

The Court of Appeals cited the standard for waiver as follows:

"In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." [*Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E. 2d 749, 753 (Ct. App. 1999)]...(citations omitted) (internal quotations omitted)."

Court of Appeals Opinion Number 5561, Pg. 5 (S.C. Ct. App. Filed June 26, 2019). (A. p. 8).

After citing this standard, however, the Court of Appeals' analysis ignored the issue of prejudice as well as the other well-established factors for determining waiver of arbitration under both South Carolina and federal law. Instead, the Court of Appeals cited a single South Carolina case and rendered a cursory review of several additional cases from other jurisdictions in support of its ruling that Petitioners waived their right to arbitration solely by virtue of the entry of default.

The single South Carolina case cited by the Court of Appeals is *Wham v. Shearson Lehman Brothers, Inc.*, 298 S.C. 462, 381 S.E. 2d 499 (Ct. App. 1989). The Court of Appeals citation to *Wham*, however, is prefaced with its express acknowledgment that *Wham* does not specifically address the issue at hand. *Id.* (A. p. 8). Furthermore, *Wham*

is distinguishable from the present case for the reasons set forth in Appellants' Petition for Rehearing *En Banc*. (A. pp. 43-56).

The remaining cases summarily cited by the Court of Appeals from jurisdictions other than South Carolina are equally distinguishable and inapposite to the arbitration issues before this Court. Petitioners have distinguished these cases on the grounds set forth in Appellants' Petition for Rehearing *En Banc*. (A. pp. 43-56).

In contrast to those distinguishable cases, the Petitioners presented the well-reasoned opinion of the Supreme Court of Utah in *Cedar Surgery Center v. Bonelli*, 96 P. 3d 911, 2004 UT 58 (Utah 2004) on the waiver issue for consideration by the Court of Appeals.

The *Cedar* case applies the Utah standard of waiver of the right to arbitration. Utah's waiver standard is strikingly similar to the waiver standards under South Carolina law and the federal law in the District of South Carolina and the 4th Circuit. Specifically, the Supreme Court of Utah articulated the Utah waiver standard as follows:

"This court has recognized the important policy behind enforcing arbitration agreements as an "approved, practical, and inexpensive means of settling disputes and easing court congestion." *Chandler v. Blue Cross Blue Shield*, 833 P. 2d 356, 358 (Utah 1992) (quoting *Robinson & Wells, P.C. v. Warren*, 669 P. 2d 844, 846 (Utah 1983)). In light of this policy, we have also acknowledged that there is "a strong presumption against waiver of the right to arbitrate." *Cent. Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 24, 40 P. 3d 599. Consistent with our general waiver jurisprudence, see *Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P. 2d 935, 939-40 (Utah 1993) (defining waiver as "the intentional relinquishment of a known right" (quotation omitted)), we have held that a "waiver of the right to arbitrate must be intentional," and a court may infer waiver "only if the facts demonstrate that the party seeking to enforce arbitration intended to disregard its right to arbitrate." *Cent. Fla.*, 2002 Ut 3 at ¶24, 40 P. 3d 599. Hence, for a court to find that a party has waived its arbitration right, the party alleging waiver must demonstrate (1) that the party seeking arbitration substantially participated in the underlying litigation to a point inconsistent with the intent to arbitrate; and (2) that this participation resulted in prejudice to the opposing party. *Chandler*, 833 P 2d at 360; *Cent. Fla.*, 2002 UT 3 at ¶¶ 22, 24, 40 P. 3d 599. "Whether a party has

waived the right to arbitrate is a factually intensive determination,” and we “infer the original intent of the party asking for arbitration on a case-by-case basis.” *Cent. Fla.*, 2002 UT at ¶ 23, 40 P. 3d 599.”

Id. at 914.

The *Cedar* Court framed the issue in the case before it as whether defendants waived their contractual right to arbitration when they declined to participate in the underlying litigation and filed a motion to compel arbitration only after default judgment in the amount of \$381,370 had been entered against them after a damages hearing.

Following the entry of default judgment for damages, the defendants made their first appearance in the case by filing a Rule 60(b) motion for relief from default judgment and a motion to compel arbitration based on the arbitration clause in the parties’ contract. In analyzing the defendants’ motion, the Supreme Court of Utah employed the Utah waiver standard stated above.

Applying this standard, which is extremely similar to the applicable South Carolina and federal law waiver standards herein, the *Cedar* Court stated that “[i]deally, the [defendants] would have raised the contractual arbitration clause in an answer to [plaintiff’s] complaint and then brought a motion to compel arbitration, rather than simply ignoring the district court proceedings altogether. However, we do not find that such failure evidences an intent on the part of the [defendants] to waive their right to arbitration and pursue redress through litigation.” *Id.* at 915.

The *Cedar* Court expressly acknowledged “that adherence to [the Utah waiver] standard may reward litigant who fail to respond to a complaint or district court proceeding.” *Id.* at 915. However, the *Cedar* Court stated that “[w]hile we regret this result, we nevertheless believe that such a standard is entirely appropriate in cases such as

this.” *Id.*

Accordingly, upon applying the Utah waiver standard to all of the relevant facts before it, the Supreme Court of Utah found that the defendants’ failure to participate in the underlying litigation and the entry of default judgment therefrom **did not** constitute a waiver of their right to arbitration. (emphasis added) *Id.*

In its Opinion, the Court of Appeals summary of cases from jurisdictions outside of South Carolina did not include a citation to or discussion of the *Cedar* case. Upon completing its cursory review of those cases from other jurisdictions; however, the Court of Appeals summarily and improperly concluded that, because Petitioners were in default, they waived their right to assert arbitration as a defense. Court of Appeals Opinion Number 5561, Pg. 7. (A. p. 10).

Based on the controlling authorities cited below, the Court of Appeals Opinion constitutes reversible error upon which Petitioner’s Writ of Certiorari should be granted.

2. The Court Is Required To Apply The Proper Legal Standards To The Question Of Whether Appellants Waived Their Right to Mandatory Mediation/Arbitration.

The parties’ contract contains mandatory alternative dispute resolution provisions requiring the parties to mediate, and if necessary, arbitrate their disputes. The issue in this case is whether the Petitioners have waived these rights, including the right to arbitration.

“Waiver is a voluntary and intentional abandonment or relinquishment of a known right.” *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E. 2d 388, 391 (1994). “Stated differently, waiver requires a party to have known of a right and known he was abandoning that right.” *Id.*

The determination of whether the Petitioners voluntarily and intentionally waived

their right to arbitration must be based on the application of the proper legal standards to the particular facts of this case.

State Law Standard

The standards for establishing waiver of the right to arbitration are well established in South Carolina. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E. 2d 868 (Ct. App. 2013). In South Carolina, “[i]n order to establish waiver of the right to enforce an arbitration clause, a party must show prejudice through an undue burden caused by delay in demanding arbitration.” *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E. 2d 749, 753 (Ct. App. 1999).

The Court of Appeals has recognized three factors to consider when determining whether a party has waived its right to compel arbitration. These three factors are as follows: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E. 2d 799, 807 (Ct. App. 2011) (internal quotation marks omitted).

To establish prejudice, the non-moving party must show something more than mere inconvenience. *Id.* (internal quotation marks omitted). In addition to the above factors, the Court of Appeals has also considered the extent to which the parties have availed themselves of the circuit court’s assistance. *See id.* at 133, 713 S.E. 2d at 808.

Federal Law Standard

The standards to determine waiver are equally well established in federal law

jurisprudence. *Brown v. Green Tree Services, LLC*, 585 F. Supp. 2d 770 (D.S.C. 2008). Under federal law governing arbitration agreements subject to the Federal Arbitration Act², the party opposing arbitration bears a heavy burden of proving default or waiver. *Id.* Default or waiver only arises when the party seeking arbitration “so substantially utilize[ed] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay.” *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F. 3d 200 (4th Cir. 2004); *see also*, *Brown v. Green Tree*, 585 F. Supp. 2d 770; *Rich v. Walsh*, 357 S.C. 64, 590 S.E. 2d 506 (Ct. App. 2003). Because of the strong federal policy favoring arbitration, the federal courts do not lightly infer the circumstances constituting waiver. *Patten Grading*, 380 F. 3d 200.

In the present case, the Court of Appeals improperly based its ruling on one single factor, i.e., the entry of default. The Court of Appeals did not consider the essential factors listed in either of the legal standards set forth above nor render any findings as to the case facts related relevant thereto. A proper analysis of the waiver question must consider all of these factors as well as the entire set of facts and circumstances related thereto. The court should review all of the facts of the case, including the entire course of conduct of the Petitioners, analyzed under the proper standards governing waiver of arbitration.

3. Applying The Proper Legal Standard To The Facts Of This Case Establishes Appellants Have Not Waived Nor Defaulted Upon Their Right To Mandatory Mediation/Arbitration.

As in all waiver cases, any appropriate analysis is heavily fact-driven. *Liberty Builders*, 336 S.C. at 665, 521 S.E. 2d at 753 (“There is no set rule as to what constitutes a

² The Respondent asserts that the Project involves interstate commerce and, therefore, the arbitration provisions in the subcontract agreement are governed by the Federal Arbitration Act.

waiver of the right to arbitrate; the question depends on the facts of each case.” (quoting *Hyload, Inc. v. Pre-Eng'd Prods., Inc.*, 308 S.C. 277, 280, 417 S.E. 2d 622, 624)). For this reason, and because there is no set rule as to what constitutes a waiver of the right to arbitration, the Court of Appeals finding of waiver based on the singular fact of the entry of default is improper. Motions to compel arbitration can only be resolved after a fact-intensive inquiry. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E. 2d 249 (Ct. App. 2007). Accordingly, all facts must be considered as each case turns on its particular facts. *Id.*

Only A Brief Period Of Time Passed Between Commencement Of Suit And Petitioners Initial And Continuing Efforts To Assert Their Right To Arbitration Before The Master

In the present case, the Petitioners were unaware of the default status of the case and the scheduled damages hearing scheduled for June 6, 2016 until they received the damages hearing notice on June 2, 2016. (R. pp. 72-73). Petitioners immediately retained legal counsel on June 3, 2016. (*Id.*) Petitioners counsel immediately filed a Motion for Continuance of the damages hearing and a Motion to Set Aside Entry of Default on June 3, 2016 citing the mandatory mediation/arbitration provisions and Respondent’s Motion to Stay and Compel mediation/arbitration as one of Petitioner’s grounds for relief.³ (R. pp. 77-81; R. pp. 82-27). Petitioner’s counsel took these actions within 2 ½ months after commencement of this action and within 1 ½ months after the entry of default.

The Petitioners’ counsel next raised and again put the court on notice of the application of the contractual mandatory mediation/arbitration provisions at the June 6, 2016 hearing. (R. p. 465, Tr. p. 8, lines 4-8). The Master expressly acknowledged

³ Petitioners understood that Respondent’s Motion to Stay and Compel mediation/arbitration remained pending for decision by the court at this time. (R. p. 79, line 18 – p. 80, line 2).

Petitioners' counsel's comments and the existence of the mandatory mediation/arbitration provisions. (R. p. 466, Tr. p. 12, lines 10-17). In fact, Respondent acknowledged mediation was required and requested the Court's assistance during that hearing, "if we need to go to mediation." (R. p. 465, Tr. p. 7, lines 4-9).

Thereafter, the Petitioners again asserted their right to arbitration and joined in Respondent's Motion to Stay and Compel by virtue of Petitioners' Motion to Stay and Compel mediation/arbitration filed July 11, 2016. (R. pp. 88-93). Petitioners filed their motion less than four (4) months after commencement of the action, within 2 ½ months after the entry of default and within 5 weeks of learning of the entry of default.

The parties reconvened before the Master on July 14, 2016. Petitioners also filed a memorandum in support of Petitioners' Motion to Lift Entry of Default that date. (R. pp. 94-124). Petitioners' supporting memorandum included their continuing invocation of the right to arbitration, coupled with their demand for stay of this action and submission of the matter to mandatory mediation/arbitration. (R. p. 97, lines 15-20; R. pp. 94-124).

Finally, the Petitioners timely filed a Motion to Alter and Amend the Master's orders pursuant to SCRCP 59(e) again demanding that this action be stayed and compelled to mandatory mediation/arbitration. (R. pp. 125-129).

The Petitioners actions described above show the Appellants' vigorous efforts to assert their right to mandatory mediation/arbitration early, often and continuously before the Master. Petitioners' actions were absolutely consistent with their right to arbitration and do not constitute a voluntary and intentional abandonment of their right to arbitration.

Discovery Has Been Extremely Limited In The Proceeding Before The Master

Discovery has been extremely limited in this case. No depositions have been taken

in this action. The Appellants have not served interrogatories, requests to produce nor any other form of written discovery. The Respondent has not responded to any interrogatories, requests to produce or any other form of written discovery. In fact, the only discovery to date is in the form of Appellants' answers to Respondent's basic First Set of Interrogatories and First Request for Production. This participation in discovery by Appellants was minimal and carried out pursuant to the direction of the Master. This minimal discovery does not constitute a waiver of Appellants' contractual right to arbitration. *See, Patten Grading*, 380 F. 3d at 206 (reciting precedent that the party seeking arbitration will not "lose its contractual right by prudently pursuing discovery in the face of a court-ordered deadline.").

The Master's Assistance Has Been Limited And The Petitioner's Have Not Substantially Engaged In Litigation Or Utilized The Litigation Machinery

As stated above, discovery has been extremely limited in this case. Also, the parties' availing of the Master's assistance in this proceeding has been limited to: (a) two brief motions hearings concerning motions for a continuance of the damages hearing, to lift entry of default and to stay this action and compel mediation/arbitration; and (b) one brief status conference to allow the proffer of information for the record on appeal and Respondent's alleged damages.

Respondent Has Not Been Prejudiced

Finally, the Respondent has failed to show prejudice through an undue burden caused by the short delay in Appellants' demand for arbitration. In evaluating prejudice,

our courts often examine whether the party requesting arbitration took "advantage of the judicial system by engaging in discovery." This inquiry, however, is just part of a broader, common sense approach our courts take to determine whether a motion to compel arbitration should be granted or denied: (1) if the parties conduct little or no discovery, then the party seeking arbitration has not taken "advantage of

the judicial system,” prejudice will likely not exist, and the law would favor arbitration: (1) if the parties conduct significant discovery, then the party seeking arbitration has taken “advantage of the judicial system”, prejudice will likely exist, and the law would disfavor arbitration. Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts.

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 127, 647 S.E. 2d 249, 251-52 (citation omitted) (quoting *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 548, 575 S.E. 2d 74, 76 (Ct. App. 2003)).

The lack of discovery in this case establishes that the Petitioners have not taken “advantage of the judicial system” and actual prejudice to the Respondent does not exist.

Notwithstanding the lack of actual prejudice, Respondent attempts to claim prejudice through its’ counsel’s unsworn statements alleging that “Palmetto would be severely prejudiced if the default were lifted as the passage of time pushed Palmetto closer to closing their doors, and further, Palmetto has taken actions, like withdrawal of its motion to compel arbitration and referral of the action to the Master in Equity, as a result of [Petitioners’] failure to timely answer.” See, Palmetto Construction’s Opposition To Defendants’ Motion To Reconsider Alter Or Amend. (R. p. 139, lines 12-16).

In addition, in the Final Brief of Respondent, Respondent alleges, without evidentiary support or citation to the Record on Appeal, that it faces bankruptcy due to Petitioners’ efforts in advancing the arbitration provision. (A. p. 108). Finally, Respondent asserts as a general statement in its Final Brief that it has incurred attorneys’ fees in litigation with Petitioners in the circuit court, before the Master and in the Court of Appeals, including one appeal that has already been dismissed by this Court.⁴ (*Id.*).

⁴ The dismissal by the Court of Appeals was without prejudice and expressly reserved the right of Petitioners to refile their appeal upon disposal of Petitioners’ Rule 59(e) motion. (R. p. 7).

The statement related to Respondent “closing [its] doors” as a result of Petitioner’s efforts to compel arbitration is a conclusory allegation made by Respondent’s counsel. This statement is not evidence. It references no citation to and is not supported by evidence in the Record on Appeal. Likewise, Respondent’s “bankruptcy” allegation lacks citation to and is not supported by evidence in the Record on Appeal. Proof of prejudice cannot be speculative, nor based on such conclusory allegations. *General Equip. & Supply Co., Inc. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001); *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F. 3d 200 (4th Cir. 2004); *see also* Brief of Appellants, Arguments – Section II. Because The Contract Contains Mandatory Mediation/Arbitration Provisions And The Appellants Have Not Defaulted Upon Nor Waived Their Rights To Mediation/Arbitration, The Court Erred When It Failed To Stay This Action And Compel Mediation/Arbitration. (A. pp. 142-168).

Respondent’s remaining claims of prejudice (i.e, withdrawal of Respondent’s motion to compel arbitration, referral of the action to the Master⁵, and unverified claim of expenditure of some unstated amount of attorneys fees, including the overinclusive claim of alleged fees incurred after Petitioners’ asserted their right to arbitration in the Master’s court) fail as well. These claims individually and collectively fall into one of the following categories: (1) conclusory allegations by Respondent’s counsel, (2) activities which are not supported by the Record on Appeal, (3) certain nominal/standard procedures, or (4) unsubstantiated, unquantified and overinclusive claim for attorneys fees; none of which constitute actual prejudice to Respondent. In short, Respondent’s claims are insufficient to establish “actual prejudice” under applicable South Carolina and federal law. *Id.*

⁵ Referral of the action to the Master does not constitute prejudice under South Carolina law. *General Equip. & Supply Co., Inc. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001).

Finally, the Respondent itself demanded mandatory mediation/arbitration of its claims upon commencement of this lawsuit. Certainly, in light of Respondent's own acknowledgment of the application of mandatory mediation/arbitration to the parties' dispute, as well the additional facts of this case, any claim of prejudice arising during the brief period between the date litigation commenced and when the Petitioners asserted their right to arbitration lacks merit.

In summary, the proper legal standards under both South Carolina and federal law are set forth above. Applying any other standards would be an error of law and modify the long-standing arbitration jurisprudence of South Carolina and the federal courts in the District of South Carolina and the Fourth Circuit Court of Appeals. Applying the proper legal standards to all of the relevant facts in this case, the Court of Appeals should have held that the Petitioners have not waived their right to mandatory mediation/arbitration under either state or federal law. *See Toler's Cove Homeowners Ass'n v. Trident Const. Co., Inc.*, 355 S.C. 605, 586 S.E. 2d 581; *Carlson v. South State Plastering, LLC*, 404 S.C. 250, 743 S.E. 2d 860 (Ct. App. 2013); *General Equip & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001); *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F. 3d 200 (4th Cir. 2004); *Brown v. Green Tree Services, LLC*, 585 F. Supp. 2d 770 (D.S.C. 2008); *Rich v. Walsh*, 357 S.C. 64, 590 S.E. 506 (Ct. App. 2003).

Based on the above authorities, the singular fact that default was entered against Petitioners barely a month after this litigation commenced does not constitute a waiver of Petitioners' right to mandatory mediation/arbitration of the parties' disputes. For this

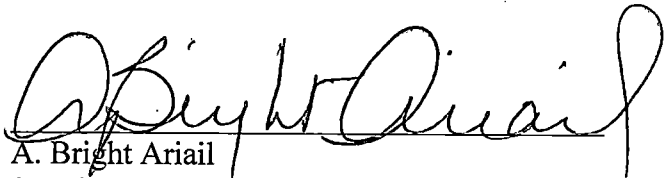
reason and under the legal authority and arguments set forth herein, Petitioners' Petition for Writ of Certiorari must be granted on the issues of appealability and waiver.

CONCLUSION

Based on the foregoing, the Court's Opinion filed June 26, 2019, is in error and therefore, Petitioners ask this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

A handwritten signature in black ink, appearing to read "A. Bright Ariail", written over a horizontal line.

A. Bright Ariail
SC License #69570
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, S.C. 29412
P: (843) 814-8805
F: (843) 266-0538
ATTORNEY FOR PETITIONERS

December 16, 2019
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
DEC 18 2019
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143

Palmetto Construction Group, LLC

Respondent

v.

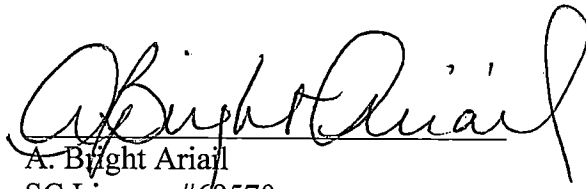
Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward

Appellants

PROOF OF SERVICE

I certify that I have served the Petitioners' Petition for a Writ of Certiorari and accompanying Appendix on Palmetto Construction Group, LLC by depositing a copy of it in the United States Mail, postage prepaid, on December 16,, 2019, addressed to Palmetto Construction Group, LLC's attorneys of record, Andrew K. Epting, Jr and Jann Rannik, Andrew K. Epting, LLC, 46A State Street, Charleston, South Carolina, 29401. and Michelle N. Endemann, Clarkson, Walsh & Coulter, PA, P O Box 2219, M. Pleasant, SC 29465.

December 16, 2019

A handwritten signature in black ink, reading "A. Bright Ariail". The signature is fluid and cursive, with a large loop at the end of the last name.

A. Bright Ariail

SC License #69570

Law Office of A. Bright Ariail, LLC

125E Wappoo Creek Drive, Suite 202

Charleston, SC 29412

843/814-8805

Attorney for Appellants



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

April 20, 2021

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Palmetto Construction Group, LLC v. Restoration Specialists, LLC
Lower Court Case No. 2016CP1001143
Appellate Case No. 2019-002052

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

Enclosures

cc: Andrew K. Epting, Jr., Esquire
Michelle Nicole Endemann, Esquire
Jaan Gunnar Rannik, Esquire
A. Bright Ariail, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PALMETTO CONSTRUCTION GROUP,
LLC

Plaintiff,

vs.

RESTORATION SPECIALISTS, LLC,
REUBEN MARK WARD, and LYNNETTE
PENNINGTON WARD

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2016-CP-10-1143

RECEIVED

Aug 31 2022

SC Court of Appeals

ORDER

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2016 JUL 20 PM 12:02

FILED

THIS MATTER CAME BEFORE ME on Defendants' motion to be relieved from default;

WHEREAS based on the record and the affidavits before me, Defendants failed to show good cause such that they should be relieved from default;

WHEREAS Defendants filed, on July 11, 2016, a motion to stay and to compel arbitration;

IT IS ORDERED THAT:

- 1) Defendants' motion to be relieved from default is DENIED;
- 2) A damages hearing is set for October 4, 2016 at 2:00pm; and
- 3) ~~No ruling is made on~~ Defendants' motion to stay and to compel arbitration

*is denied RS
as Δ is in default.*

[Signature]
The Honorable Mikell R. Scarborough
Master in Equity, Charleston County

On this 14 day of July 2016
Charleston, SC *[Signature]*

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-10-1143

Palmetto Construction Group LLC

Restoration Specialists, LLC, et al.

RECEIVED

Aug 31 2022

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: This matter came before the court for argument on October 11, 2016 on Cross-Motions to Reconsider pursuant to Rule 59, SCRCP. After a review of the file and memoranda submitted by counsel, the court finds as follows: 1) Defendants' Motion to Amend is respectfully DENIED, inasmuch as Defendants have not shown good cause to lift the default; and 2) the affirmative defense of arbitration has been waived and Defendant's Motion to Stay and Compel filed July 11, 2016 was not properly made.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
NA	NA	\$NA
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

Circuit Court Judge

3062

Judge Code

Date

10/28/16

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

RECEIVED

Aug 31 2022

SC Court of Appeals

PALMETTO CONSTRUCTION
GROUP, LLC

Plaintiff,

v.

RESTORATION SPECIALISTS, LLC,
REUBEN MARK WARD, and
LYNNETTE PENNINGTON WARD,

Defendants.

Case No. 2016-CP-10-01143

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS**

- and -

ENTERING DEFAULT JUDGMENT

This matter came before the Court on January 31, 2022, for a default damages hearing and on Defendants' motion to dismiss. The matter had previously been scheduled for a default damages hearing on October 4, 2016, but was delayed by an appeal. That interlocutory appeal having been dismissed and the case remitted to this Court, I now rule as follows.

I. Motion to Dismiss

Defendants Restoration Specialists, Inc., Mark Ward, and Lynette Ward ("Restoration") moved for a dismissal of this action on April 21, 2021, contending that Plaintiff Palmetto Construction Group, LLC ("Palmetto") had been terminated and therefore lacked the ability to pursue this action.¹ Articles of termination were filed as to Palmetto by Joanne Eaddy on March 22, 2019. It appears from the evidence before me, however, that the termination (i) was not filed by Palmetto or anyone with authority to bind Palmetto, (ii) was filed in error by a third-party who believed they were terminating the ability of a dissolved Delaware entity to perform business (*see Eaddy Affidavit*), and (iii) Palmetto has been reinstated by the Secretary of State

¹ The Court assumes that this motion was properly brought despite (i) the default status of the movant and (ii) the filing of the motion prior to remittitur from the appellate courts. As this appears to be a question of subject matter jurisdiction, the Court addresses it herein.

retroactive to its original creation date (October 30, 2000) with the filing of Articles of Correction by Palmetto on December 8, 2021, notably with a name change to Palmetto Construction Group of SC, LLC. Moreover, as there is no record from the Secretary of State that Palmetto was ever dissolved as an entity, which is a pre-requisite for termination (*see* S.C. Code § 33-44-805(a) (“At any time *after dissolution* and winding up, a limited liability company may terminate its existence”)), the termination would be improper on that ground also. But this does not end the Court’s inquiry.

The Court has also considered whether a termination is irreversible, and whether Restoration can rely on the termination and estop Palmetto from contesting its motion. I find the answer in both cases to be no. S.C. Code § 33-44-207 permits a filed record to be corrected “if the record contains a false or erroneous statement or was defectively signed.” In this case, both are true, and the filer of the articles of termination erroneously stated that she was a fiduciary of Palmetto and signed as a fiduciary. The articles of correction are effective retroactively to the date of the record being corrected “except as to persons relying on the uncorrected record and adversely affected by the correction.” It is not clear to the Court that Restoration was entitled to rely on the filing given the pendency of this litigation (stayed while on appeal) and the absence of articles of dissolution, nor that it was adversely affected by the correction of the erroneous filing. But regardless, the correction would at the very least be retroactive to the December 8, 2021 date of the filing. As this motion was heard by the Court after that date, there is no basis for the Court to hold Palmetto as a terminated entity for purposes of this motion.

The Motion to Dismiss is **DENIED**.

II. Damages and Judgment

Palmetto requests \$2,618,508.55 in damages in the following categories (i) amounts due under the subcontract, (ii) share of profits due to Palmetto, (iii) amounts owed as indemnity from claims by surety, (iv) lost profits, (v) attorneys' fees incurred as a consequence of Restoration's conduct unrelated to the fees and costs of this action, and (vi) prejudgment interest.

At the January 31, 2022 damages hearing, Palmetto's witness, Mrs. Kassy Peterson,² presented testimony and evidence that this Court found highly credible and reliable, establishing the damage to Palmetto. Counsel for Defendants was afforded the opportunity to cross-examine Palmetto's witness and object to evidence per *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241, 246 S.E.2d 880, 882 (1978).

After the hearing, Defendants filed a Motion to Exclude or Strike Evidence submitted to the Court; the Defendants' objection however was not contemporaneously made as the evidence was offered and therefore is waived. In any event, the Court finds the evidence to be relevant and admissible. See *State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (S.C. Ct. App. 2004).

Having fully considered the testimony and documentary evidence presented to the Court, Palmetto is awarded damages of **\$2,338,958.64** as detailed below.

A. **Background**

On November 28, 2011, Palmetto entered into a teaming agreement with Restoration Specialists, LLC, hoping to be awarded the contract for the construction of a parking garage for the VA Hospital in Augusta, Georgia. **Tab 2.**³ Restoration lacked the ability to obtain the

² Palmetto's controller of many years, including during the VA parking garage project.

³ The "Tab" numbers referenced in this Order correspond with the tabs of the binder of exhibits offered by Plaintiff during the damages hearing and filed with the Court.

requisite performance and payment bonds to be awarded the project, and so teamed with Palmetto who could obtain the bonds. In exchange for obtaining the bonds, Palmetto would receive a share of the project profits, estimated at around \$500,000-600,000. Restoration Specialists were to administer the project and interface with the federal government; Palmetto was to manage the construction. Subsequently, on September 10, 2014, Palmetto and Restoration Specialists entered into a subcontract agreement relating to concrete work for the project and memorializing the 50-50 profit share agreement. **Tab 3.**

As the job neared completion, Restoration Specialists stopped paying the subcontractors, despite having received payment from the federal government. The subcontractors then made claims against the payment bond (issued by The Hanover Insurance Group, **Tab 4**) in excess of \$1,000,000, and the surety then sought reimbursement from the guarantors, namely Palmetto, Restoration Specialists, the owners of Palmetto (John Kendle and Jay Handegan), Mr. Handegan's wife, and Defendants Mark and Lynnette Ward.

Palmetto filed suit against Restoration on March 7, 2016. Defendants were all personally served on March 14, 2016 and were placed in default on April 21, 2016 after failing to timely answer the complaint, and the case was referred to this Court for a damages hearing. A damages hearing was scheduled for June 6, 2016, but Defendants filed a motion for a continuance of the damages hearing as well as a motion to be relieved from default on June 3, 2016. In granting Defendants' motion for a continuance, the Court instructed Defendants' counsel to provide financial and banking records to Plaintiff sufficient to show what funds Defendants received from the VA and how those funds were used. Defendants produced certain financial records, but Plaintiff states, and the Court accepts, that no materials have been provided that demonstrate what amounts were received by Defendants from the VA and how those amounts were disposed

of. On July 11, 2016, Defendants filed a motion to compel arbitration.

Restoration's motion to be relieved from default was denied July 20, 2016. A damages hearing was then scheduled for October 4, 2016. Prior to the hearing, Defendants noticed an appeal of the order denying the motion to be relieved from default and the court's refusal to compel arbitration given Defendants' default status. The matter was then on appeal until remittitur to this Court on April 26, 2021.

Ultimately, Palmetto lacked the financial strength to pay on the guaranty; and, after claims were made on the bond, Palmetto could no longer obtain bonding and lost the majority of its work. Palmetto was forced out of business and its owners invested their personal assets into the company so it could finish the remaining projects it had started.

B. Amount Due on Subcontract

Palmetto claims amounts as due and owing for subcontract work Palmetto performed on the project, work for which Palmetto was never paid. Mrs. Peterson testified that this amounted to \$184,858.69 and was due as of September 15, 2015. Her testimony was supported by business records of Palmetto demonstrating that its total compensable costs were \$1,281,427.88, and it was paid only \$1,096,858.69. **Tab 8.** The Court finds this evidence credible and reliable and based on personal knowledge.

Restoration argues that the subcontract did not provide for payments to Palmetto above the original subcontract amount of \$1,082,342.10; however, that amounts were due under the subcontract was alleged in Palmetto's complaint, was admitted when Defendants went into default, and cannot now be contested. Further, the Court finds that the parties conduct indicates an agreement that Palmetto was due its total costs of the work. Accordingly, the Court awards Palmetto the balance of **\$184,858.69** due under the subcontract.

C. Share of Profits

The subcontract between Palmetto and Restoration includes a page entitled “PCG Subcontract Breakdown,”⁴ establishing that Palmetto would be entitled to 50% of the profits earned by the project. The testimony during the hearing established that the initial estimated profit on the job was in the \$500,000-600,000 range, because of changes in the work that expanded the scope of the work and increased the contract sum by over \$2,000,000, the estimated profit grew to around \$1,000,000.

Palmetto, using the records produced by Restoration in this action (**Tab 7A**), calculated a total job cost to be \$7,748,504.34. **Tab 7.** Palmetto used two separate approaches to calculate the job cost, both methods arriving at the same cost to the cent. *Id.* The Court finds Palmetto’s methods and calculation credible and reliable and based on both personal knowledge and Defendants’ own records. Further, the Court finds the calculation of job cost to be conservative (*i.e.*, erring on the side of greater cost and therefore less profit), because in reaching this number, Palmetto included \$531,980.80 of costs Restoration claimed it incurred, despite the absence of any evidence that Restoration actually paid those costs or that those costs related to this project.

Defendants’ counsel cross-examined the witness and objected to Plaintiff’s evidence and, during summation, argued that the lack of specificity about the amount of damages in the complaint was an obstacle to this Court awarding the requested damages. However, Mrs. Peterson testified that Defendants refused to provide accounting records during or after the job from which Palmetto could determine the financial status of the job or of Defendants. It is hard for this Court to imagine penalizing Palmetto when documents that were ordered produced were

⁴ Section 16.1.4.2.1 of the subcontract establishes that the “PCG Subcontract Breakdown” formed part of the subcontract itself.

not produced, and when any uncertainty about the job's profitability stems from the failure to produce those documents in compliance with the Court order and a lack of discovery given Defendants' default status. Defendants cannot now benefit from this uncertainty. *See Champion v. Whaley*, 280 S.C. 116, 121–22, 311 S.E.2d 404, 407 (1984) (“The defendant cannot take advantage of the uncertainty created by his own wrongdoing.”).

The Court therefore finds as follows: the total contract price for the job was \$8,199,283.96. **Tab 7B**, page 2. Subtracting the job costs of \$7,748,504.34 yields a profit of \$450,779.62. Palmetto is awarded 50% of that profit, or **\$225,389.81**.

D. Indemnity From Claims by the Surety

The Indemnity Agreement signed by the bond guarantors states that “[p]ayment shall be made to the Surety by the Indemnitors *as soon as liability exists or is asserted against the Surety, whether or not the Surety shall have made any payment therefor.*” (emphasis added). Palmetto alleged an entitlement to legal and equitable relief as a result of the myriad subcontractor claims against the surety bond in its complaint.

Plaintiff introduced into the record two letters sent to it by the surety, one from September 30, 2016, and another from January 24, 2022, demanding payment from the indemnitors. **Tab 9**. The Court finds this evidence credible and reliable. As of the September 30, 2016 letter, the surety had paid \$1,186,501.71 in claims; as of the January 24, 2022 letter, that amount had grown to \$1,307,978.71.

The Court awards Palmetto **\$1,307,978.71**.

E. Lost Profits

Palmetto requests \$250,000 in lost profits (other than on this project) as a result of being forced out of business by the conduct of Restoration. Mrs. Peterson testified that Palmetto lost

profits as the natural consequence of Restoration's conduct, and that the requested amount of lost profits was extremely conservative, because (i) Palmetto lost out on over \$500,000 in profits on three specific projects in 2016-2017, projects Palmetto did or would have won outright in the bid market but, because it could not get a bond following Restoration's failure to pay subcontractors, had to team with other contractors and share the profits with them; (ii) Palmetto, whose overhead was that of a company doing approximately \$20mm in annual business but could obtain bonds only up to \$17mm in 2016, was poised to break into the \$20mm-23mm bonding range, which would not require an increase in overhead and therefore would significantly increase profits; and (iii) the construction market in Charleston, South Carolina has boomed since 2016, whereas it was still in recovery in the years 2014-2016. Instead of asking for lost profits based on these factors, however, Palmetto instead requested a smaller amount, representing the average of its 2014 and 2015 profits (approximately \$50,000, **Tab 11**) for each of the last five years, or \$250,000.

The Court finds that the calculation of lost profits is too speculative and finds insufficient evidence in the record regarding the timing and other potential causes for the failure of Palmetto's business. Accordingly, the Court declines to award these lost profits.

F. Consequential Legal Costs

Palmetto requests \$29,564.91 in attorneys' fees and costs in matters unrelated to this one stemming from its failure as a business as a result of Restoration's conduct. **Tab 10**. For the same reasons as stated above regarding lost profits, the Court declines to award these damages.

G. Interest

Palmetto requests prejudgment interest on only two categories of its damages, as follows: \$83,674.28 as to the amounts due on the subcontract, and \$537,057.15 on the amount to

indemnify Palmetto from claims by the surety. **Tab 12.** The Court finds Palmetto is entitled to these amounts, which are both conservative calculations of interest due on sums that were demandable and certain for at least the five-and-a-half years since the date of the original scheduled damages hearing.⁵

As to the subcontract, the Court finds that Palmetto was owed \$184,858.69 as of September 15, 2015, with payment being late after October 15, 2015. However, Palmetto asks for interest beginning only as of the date of the original damages hearing, set for October 4, 2016 and using the current rate of judgment interest in South Carolina of 7.25%. The Court finds the amount due on the subcontract was a sum certain, demandable as of at least October 4, 2016. Palmetto is therefore awarded **\$83,674.28** in interest relating to the amount due under the subcontract.

The Court also finds that, as of September 30, 2016, the Surety demanded \$1,425,122 from its indemnitors and had paid claims in the amount of \$1,186,501.71. (**Tab 9**). Palmetto requests interest on this latter amount from the date of the original damages hearing. The Court finds the amount paid by the surety as of October 4, 2016 was a sum certain, demandable as of at least October 4, 2016. Palmetto is awarded **\$537,057.15** in interest relating to the amount owed to indemnify Palmetto for claims by the surety.

III. Summary

Accordingly, the Court awards Palmetto the following sums:

- \$184,858.69 owing under the subcontract;
- \$225,389.81 owing in share of the project profit;

⁵ A hearing delayed by Defendants' filing of multiple notices of appeal of an Interlocutory Order divested this Court of jurisdiction.

- \$1,307,978.71 owing in indemnity from claims by the surety; and
- \$620,731.43 in interest on the subcontract amount and indemnity from claims by the surety.

Palmetto is awarded a total of **\$2,338,958.64**, and judgment shall be and hereby is entered in that amount. **IT IS SO ORDERED.**

This ____ day of _____, 2022

The Hon. Mikell R. Scarborough
Master in Equity, Charleston County



Charleston Common Pleas

Case Caption: Palmetto Construction Group LLC VS Restoration Specialists LLC ,
defendant, et al

Case Number: 2016CP1001143

Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062

Electronically signed on 2022-02-25 16:04:37 page 11 of 11

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1001143

Palmetto Construction Group LLC
PLAINTIFF(S)

Restoration Specialists LLC 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:

After careful consideration, this Court DENIES the Defendants' Motion to Exclude and Strike Evidence, filed February 22, 2022. See the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment.

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 02/25/2022 .

Michelle Nicole Endemann for Palmetto Construction Group LLC
Jaan Gunnar Rannik for Palmetto Construction Group LLC
A. Bright Ariail for Restoration Specialists LLC, Reuben Mark Ward, Lynnette Pennington Ward

RECEIVED
Aug 31 2022
SC Court of Appeals

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: Palmetto Construction Group LLC VS Restoration Specialists LLC ,
defendant, et al

Case Number: 2016CP1001143

Type: Order/Electronic Form 4

So Ordered

s/Mikell R. Scarborough 3062

Electronically signed on 2022-02-25 15:59:16 page 3 of 3

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-10-01143

PALMETTO CONSTRUCTION GROUP, LLC

RESTORATION SPECIALISTS, LLC,
REUBEN MARK WARD, and LYNNETTE
PENNINGTON WARD,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Jaan G. Rannik, Esquire

Attorney for : ☒ Plaintiff ☐ Third-
Party Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other See attached Order
- ☐ **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:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : Defendants' Motion to Dismiss is DENIED and Default Judgment is entered as stated below.

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
PALMETTO CONSTRUCTION GROUP, LLC	Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward	\$ 2,338,958.64
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

RECEIVED
Aug 31 2022
SC Court of Appeals

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Mikell R. Scarborough
 Circuit Court Judge

3062
 Judge Code

Date

For Clerk of Court Office Use Only

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

 ATTORNEY(S) FOR THE PLAINTIFF(S)

 ATTORNEY(S) FOR DEFENDANTS

 CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, 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 judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE
(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.
2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).
4. The “Information for the Judgment Index” section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the “Judgment in Favor of” column, enter the name of the party to whom the judgment is awarded. In the “Judgment Against” column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the “Judgment Amount” column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate “N/A” in one of the boxes in this section of the form.
5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.
6. The section “For the Clerk of Court Office Use Only” should be completed by the clerk as it has been with the previous version of Form 4.
7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.
8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through “Circuit Court Judge” and indicate “Arbitrator” in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title “Circuit Court Judge” below the signature line and indicate the appropriate title.
10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.
11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the “Judgment Amount To Be Enrolled” box.
12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.
13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.
14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.



Charleston Common Pleas

Case Caption: Palmetto Construction Group LLC VS Restoration Specialists LLC ,
defendant, et al

Case Number: 2016CP1001143

Type: Master/Order/Form 4

So Ordered

s/Mikell R. Scarborough 3062

Electronically signed on 2022-02-28 11:50:35 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. 2016CP1001143

Palmetto Construction Group LLC
PLAINTIFF(S)

Restoration Specialists LLC 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:

Following the Return of the Remittitur from the Court of Appeals on April 26, 2021, Defendants filed a Motion to Reconsider/Alter/Amend the Court's Order Denying Defendants' Motion to Dismiss on March 20, 2022, a Motion to Reconsider/Alter/Amend the Court's Order Denying Defendant's Motion to Exclude on March 10, 2022, and a Motion For Stay of Enforcement of Judgment on March 15, 2022. The Court was never provided with a copy of the motions as required by Rule 59 (g), SCRPC and first received notice of these filings from Plaintiff's counsel on July 20, 2022. Having reviewed the motions, this Court DENIES each motion filed on substantive and procedural grounds.

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 08/01/2022 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

RECEIVED
Aug 31 2022
SC Court of Appeals

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: Palmetto Construction Group LLC VS Restoration Specialists LLC ,
defendant, et al

Case Number: 2016CP1001143

Type: Order/Electronic Form 4

So Ordered

s/Mikell R. Scarborough 3062

Electronically signed on 2022-08-01 12:09:27 page 3 of 3

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Aug 31 2022

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143

Palmetto Construction Group,

Respondent,

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward

Appellants.

NOTICE OF APPEAL

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward appeal various Orders of the Honorable Mikell R. Scarborough including one order dated July 14, 2016, one order dated October 28, 2016, two orders dated February 25, 2022, one order dated February 28, 2022, and one order dated August 1, 2022.

The Order dated July 14, 2016 (Exhibit A): (a) Denied Appellant's Motion to Lift Entry of Default for lack of good cause; (b) Denied Appellant's Motion to Stay and Compel Arbitration on the basis of default; and (c) Set a damages hearing for October 4, 2105. Appellants received written notice of entry of this order on July 18, 2016.

The Form 4 Order dated October 28, 2016 (Exhibit B), in response to cross-motions to reconsider pursuant to Rule 59 SCRCP denied Defendants' Motion to Reconsider, Alter or Amend on the basis that (a) Defendants have not shown good cause to lift the default, and (b) the affirmative defense of arbitration has been waived and Defendants Motion to Stay and Compel filed July 11, 2016 was not properly made. Appellants received written notice of entry of this order on November 2, 2016.

The Order dated February 25, 2022 (Exhibit C) on Defendant's Motion to Dismiss and related to a default damages hearing, both before the Court on January 31, 2022: (a) denied Defendants' Motion to Dismiss Pursuant to SCRCP 12(b)(1) finding Plaintiff was not a terminated entity for purposes of the motion to dismiss, and 2) entered judgment against Defendants in the amount of \$2,338,958.64 as detailed therein. Appellants received written notice of this order on February 28, 2022 via the SC Judicial Department's E-Filing Systems NEF transmission.

The Form 4 Order dated February 25, 2022 (Exhibit D) denied Defendants' Motion to Exclude and Strike. Appellants received written notice of this order on February 28, 2022 via the SC Judicial Department's E-Filing Systems NEF transmission.

The Form 4 Order dated February 28, 2022 (Exhibit E) provided order information for the judgment index related to the Order dated February 25, 2022 (Exhibit C) which denied Defendants' Motion to Dismiss and entered Default Judgment as stated therein. Appellants received written notice of this order on February 28, 2022 via the SC Judicial Department's E-Filing Systems NEF transmission.

The Form 4 Order dated August 1, 2022 (Exhibit F): (a) denied Defendants' Motion to Reconsider and Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment (b) denied Defendants' Motion to Reconsider and to Alter or Amend the Court's Order Denying Defendants' Motion to Exclude and Strike, and (c) denied Defendants' Motion for Stay of Enforcement of Judgment Pending the Disposition of Defendants' Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment. Appellants received written notice of this Order on August 1, 2022 via the SC Judicial Department's E-Filing Systems NEF transmission.

This Notice of Appeal is being filed and served within thirty (30) days of receipt of written notice of the Final Order. The interlocutory orders appealed from and attached hereto as exhibits have been made appealable following entry of the Final Order.

Appendix A attached hereto contains a complete list of the orders being challenged on appeal and copies of each are attached hereto as exhibits.

Respectively Submitted,

August 31, 2022

s/ A. Bright Ariail
A. Bright Ariail
SC Bar #69570
Law Office of A. Bright Ariail, LLC
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412
(843) 814-8805
Attorney for Appellants

Other Counsel of Record:

Jann G. Rannik
Epting & Rannik, LLC
46A State Street
Charleston, SC 29401
(843) 377-1871

Michelle N. Endemann
497 St. Andrews Blvd.
Charleston, SC 29407
(843) 936-5043

Attorneys for Respondent

**Defendants/Appellants Restoration Specialists, LLC, Reuben Mark Ward and
Lynnette Pennington Ward's Notice of Appeal**

Palmetto Construction Group v. Restoration Specialists, LLC et al.
Circuit Court Case No. 2016-CP-10-1143

Order Challenged on Appeal	Exhibit No.
The Order dated July 14, 2016 (Exhibit A): (a) Denied Appellant's Motion to Lift Entry of Default for lack of good cause; (b) Denied Appellant's Motion to Stay and Compel Arbitration on the basis of default; and (c) Set a damages hearing for October 4, 2105.	A
The Form 4 Order dated October 28, 2016 (Exhibit B), in response to cross-motions to reconsider pursuant to Rule 59 SCRPC denied Defendants' Motion to Reconsider, Alter or Amend on the basis that (a) Defendants have not shown good cause to lift the default, and (b) the affirmative defense of arbitration has been waived and Defendants Motion to Stay and Compel filed July 11, 2016 was not properly made.	B
The Order dated February 25, 2022 (Exhibit C) on Defendant's Motion to Dismiss and related to a default damages hearing, both before the Court on January 31, 2022: (a) denied Defendants' Motion to Dismiss Pursuant to SCRPC 12(b)(1) finding Plaintiff was not a terminated entity for purposes of the motion to dismiss, and 2) entered judgment against Defendants in the amount of \$2,338,958.64 as detailed therein.	C
The Form 4 Order dated February 25, 2022 (Exhibit D) denied Defendants' Motion to Exclude and Strike.	D
The Form 4 Order dated February 28, 2022 (Exhibit E) provided order information for the judgment index related to the Order dated February 25, 2022 (Exhibit C) which denied Defendants' Motion to Dismiss and entered Default Judgment as stated therein.	E
The Form 4 Order dated August 1, 2022 (Exhibit F): (a) denied Defendants' Motion to Reconsider and Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment (b) denied Defendants' Motion to Reconsider and to Alter or Amend the Court's Order Denying Defendants' Motion to Exclude and Strike, and (c) denied Defendants' Motion for Stay of Enforcement of Judgment Pending the Disposition of Defendants' Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment.	F

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143

Palmetto Construction Group,

Respondent,

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward

Appellants.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Palmetto Construction Group by emailing a .pdf copy of the same to its counsel of record, on this 31st day of August, 2022, addressed to the recipient attorney's primary e-mail address listed in the South Carolina Attorney Information System as shown below:

Jann G. Rannik
Epting & Rannik, LLC
46A State Street
Charleston, South Carolina 29401
jgr@epting-law.com

Michelle N. Endemann
497 St. Andrews Blvd.
Charleston, SC 29407
mendemann@clarksonwalsh.com

RECEIVED
Aug 31 2022
SC Court of Appeals

August 31, 2022

s/ A. Bright Ariail

A. Bright Ariail

SC Bar #69570

Law Office of A. Bright Ariail, LLC

125 Wappoo Creek Drive

Building E, Suite 202

Charleston, SC 29412

(843) 814-8805

Attorney for Appellants

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS COUNTY OF CHARLESTON Palmetto Construction Group, Plaintiff, vs. CASE NO. 2016-CP-10-1143 Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, Defendants. Hearing before the Honorable Mikell R. Scarborough, reported by Christine A. Smith, Court Reporter and Notary Public, at 11:29 a.m. on June 6, 2016 at 100 Broad Street, Charleston, South Carolina. Christine A. Smith, Court Reporter Master-in-Equity P.O. Box 30276 Charleston, South Carolina, 29417 (843) 958-5071 casmith@charlestoncounty.org	3 PROCEEDINGS THE COURT: This matter is captioned Palmetto Construction Group, LLC versus Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward. The case number is 2016-CP-10-1143. The matter is set today as a default damages hearing, and the matter was referred to the Court on April 18th, and entry of default was entered on that same date. It appears that service process was performed on Reuben Ward on or about March 14th, the case having been filed on March 7th, and also on Lynnette Ward on that same date it appears. I believe Mr. Ward was served as the agent for the corporation, Restoration Specialists, LLC. This Court set it for a hearing in April on damages. I did receive, and I don't know -- have you got that -- MR. FISHBURNE: That is it. THE COURT: Late last week from the Law Office of A. Bright Ariail a Motion to Set Aside the Entry of Default and also for continuance. Have you-all been provided with that as well? MS. ENDEMANN: Yes, Judge, we were served on Friday afternoon. THE COURT: Do you want to be heard first on
2 1 APPEARANCES OF COUNSEL: 2 ATTORNEYS FOR THE PLAINTIFF: 3 Andrew K. Epting, Jr., Esq. Michelle Endemann, Esq. 4 Andrew K. Epting, Jr., LLC 46A State Street 5 Charleston, SC 29401 (843) 377-1871 6 Ake@epting-law.com Mne@epting-law.com 7 8 ATTORNEYS FOR THE DEFENDANT: 9 A. Bright Ariail, Esq. Law Office of A. Bright Ariail, LLC 10 125-E Wappoo Creek Drive Suite 202 11 Charleston, SC 29412 (843) 814-8805 12 Bright@brightariailaw.com 13 14 15 16 17 18 19 20 21 22 23 24 25	4 1 the motion before we get to the subset of the aspect 2 of it, or where do we stand on that? 3 MS. ENDEMANN: Well, Judge, we were served 4 late Friday, and we are amenable to try to come to 5 some resolution of these motions. If I could give 6 you a little bit of context and background for the 7 case? 8 THE COURT: Sure. 9 MS. ENDEMANN: It's a case that arises out of 10 a project for the VA. It was completing a hospital 11 parking deck in Georgia. So Restoration Specialists 12 was the general contractor on the project with the 13 Department of Veteran's Affairs. My client, Palmetto 14 Construction Group -- I have Mr. Kendle with me here 15 today -- was approached by Restoration. 16 This was a large project for them. They 17 needed some help getting a bond in place. In order 18 to complete the job they needed help managing the 19 project. They needed help completing the project. 20 So they came to my client, Palmetto Construction 21 Group, and asked for assistance. 22 A teaming agreement was entered into. So 23 under this agreement Palmetto would manage the 24 project, they would do other certain 25 responsibilities, and Restoration would stay as the

5 1 general contractor. There would be a profit split as 2 a result of this agreement. The project started -- 3 seemingly it was going pretty well. 4 Towards the end of the project, we started to 5 get some red flags. We started to get notices that 6 some of the subcontractors, some of the suppliers, 7 are not being paid by Restoration. Unfortunately, as 8 part of this agreement with Restoration, Palmetto got 9 their bonding company to write this bond. Palmetto 10 is liable on the bond with Mr. Ward and Restoration 11 and Ms. Ward. Mr. Kendle personally is liable on the 12 bond. Mr. Handegan, another primary principal at 13 Palmetto is obligated on the bond and so is his wife. 14 So when all of these claims start coming in 15 from these subcontractors who say they're not getting 16 paid from Restoration, it becomes our problem in a 17 very large way. Hanover, the bonding company, turns 18 to us and says, You need to pay for this. You're 19 obligors on the bond. Now we have approximately 20 \$1.4 million dollars in claims on this bond for 21 subcontractors and suppliers that have not been paid, 22 and Hanover is looking to us to pay it. 23 It's impacting other jobs because obviously 24 they have this issue with the bonding company, 25 getting other bonds is becoming a problem. So	7 1 accounting that would be great. If that can't be 2 done in the short term we would like the file. We 3 would like the file anyway, but we would like that at 4 least in the next seven or so days. If we can take a 5 deposition in the next 14 days I think Ms. Ariail 6 might have some issues with the date but as soon as 7 possible, and maybe even get a hearing in front of 8 Your Honor in case any other issues come up with the 9 discovery or if we need to go to mediation. If there 10 is any kind of order that we would like the Court's 11 help with we could come back to you in order to work 12 this out as quickly as we possibly can. 13 THE COURT: Ms. Ariail? 14 MS. ARIAIL: Your Honor, I learned of this 15 matter Thursday night of last week. I have 16 represented Restoration Specialists in other matters, 17 so I am, unfortunately very new to this issue. I do 18 understand from Mr. Ward, who is the managing member 19 of Restoration Specialists, that he has been in 20 contact with the attorney -- I guess it's an in-house 21 attorney with the bonding company, and he has made 22 some payments on some of these claims that are 23 considered valid reaching back into the March 24 timeframe of this year. 25 I know that he is eager to get this issue
6 1 there's some real urgency on our clients' part to get 2 this worked out as fast as we possibly can. 3 Mr. Ward had been making some overtures. 4 Ms. Ariail was retained, and she filed the motions 5 that you discussed earlier on Friday. If we could 6 get some agreement, Judge? We need the file. We 7 need the financials. We need the bank accounts. We 8 need to get these documents in place, and we would 9 like to ask him some questions about, where are these 10 funds? You are receiving payments from the Federal 11 Government. Where is the money going because Hanover 12 is coming to us saying we need to pay it. We did our 13 part but we're going to end up in a really tough spot 14 here. So the urgency is really what we're impressing 15 here. 16 We're amenable to trying to work something out 17 on these motions, but we really need to have an 18 agreement and exchange so that we can have these 19 documents. We actually served the discovery with the 20 Complaint, so it's already pretty well overdue. I 21 actually today just served some deposition notices on 22 Ms. Ariail. Of course she's just getting involved in 23 the case. 24 We are looking to get these records as soon as 25 possible. That's a little bit about potential	8 1 resolved and behind him also. I've spoken to him 2 after speaking with Palmetto's counsel on Friday, and 3 he is willing to provide the documentation and 4 absolutely would be willing to mediate this case. I 5 believe there were -- per the contractors there was a 6 mediation and then mandatory mediation as condition 7 precedent to arbitration. So we would like to do 8 that. 9 Unfortunately it's compounded by -- I'm 10 actually leaving the country on Saturday for 11 two weeks. I had not asked for an order of 12 protection in this Court because I didn't have 13 anything active in this Court. So that unfortunately 14 is going to impact the time. I'm willing to do what 15 I need to do to try to facilitate the exchange of 16 information and move forward with this. 17 THE COURT: I think June 10th through the 24th 18 were the dates you were requesting that you would be 19 out? 20 MS. ARIAIL: Yes, sir. 21 THE COURT: Do you have information? Do you 22 have documentation from your client based on your 23 conversation you must have had last week with them? 24 Have you gotten any of this stuff? Do you have it in 25 hand I guess is my question?

9 1 MS. ARIAIL: I do not. The only thing I have 2 are a couple of affidavits that are specific to the 3 subject of the motions that I had filed. 4 THE COURT: I haven't seen any affidavits. 5 MS. ARIAIL: I just filed them this morning, 6 Your Honor. He's out of state, so I had to have them 7 overnighted to me on Saturday. 8 THE COURT: Sure. 9 MS. ARIAIL: I'll be happy to pass a copy up 10 to you. 11 THE COURT: Okay. 12 MS. ARIAIL: Again, I had filed a Motion for 13 Continuance and Protection. This is just dealing 14 with this schedule to try to give me some time to 15 figure out what's going on here and -- and then the 16 Motion to Set Aside the Default. So there's two 17 affidavits. 18 THE COURT: Okay. You have two affidavits 19 from Mr. Ward: One explaining what was going on 20 relative to the bond, and acknowledging receipt of 21 the Summons and Complaint on or about March 14th; the 22 other stating he's the managing member and just got 23 notice of this hearing on June 2, which would have 24 been last Thursday night at 6:30. 25 Ms. Endemann?	11 1 I think we noticed it on the 20th. She will be back 2 on the 26th. We can certainly move it until when she 3 gets back, but Your Honor, I would really, really 4 request that we can get these documents produced and 5 the bank account information produced in advance of 6 her going on her trip. 7 THE COURT: Ms. Arial, is that possible? 8 MS. ARIAIL: Your Honor, I will speak to my 9 client. I can't represent to you when I can do it. 10 I know he's out of the state today. He's in 11 Oklahoma. I'm not sure when he's coming back, but I 12 will absolutely do my best to make that happen. 13 THE COURT: All right. Here's what I'm going 14 to do. I'm going to see if -- you-all need to get on 15 a short timetable to see if you-all can't get a 16 little scheduling order worked out over the next 17 60 days. I'm going to bring you-all back in here. 18 I'm going to hold both of these motions under -- I'm 19 going to essentially grant your Motion to Continue 20 the Matter. Okay? Your Motion for Relief from the 21 Entry of Default I'm not going to rule on yet. 22 There's not much I saw in that affidavit that would 23 give me indication that I would grant that motion. I 24 can tell you that right now. Okay? 25 I will give you-all some time to see what
10 1 MS. ENDEMANN: Thank, you, Judge. I'm going 2 to object to these just because I haven't seen them 3 before now. One of the things I would like to point 4 out -- we did serve Mr. Ward pursuant to the Rule 5 last week with the notice of this hearing, and then 6 ever since then there's sort of been a flurry of 7 e-mail correspondence with the bonding company, and 8 there have been some payments, but my understanding 9 is that it's right near \$20,000 on the \$1.4 million 10 that's outstanding. 11 So while he's making overtures, respectfully, 12 we really need to push forward with the discovery 13 because obviously that's not even putting a dent into 14 what's owed. We're copied on most of this 15 correspondence with the bonding company since they're 16 coming to us weekly, if not daily, to get updates and 17 try to get their money. 18 THE COURT: Are you-all already out the 1.4 or 19 is that the amount of the claim. 20 MS. ENDEMANN: That's the amount of the 21 claims. The bonding company has been making demand 22 on this because they have been starting to pay these 23 claims, and so our time is running very short. Then 24 Ms. Ariail is going on vacation. I understand that. 25 We can maybe work with her on the deposition dates.	12 1 you-all can do to work out in the meanwhile, but it 2 sounds like it needs to happen sooner than later. 3 Okay? So I'll hold the Motion to Reopen the Entry of 4 Default in abeyance. 5 As it stands now, the Defendants are in 6 default. I'm going to give you some time because you 7 are going on vacation, but it sounds to me like your 8 client needs to come up with some information pretty 9 darn quick. Okay? Let's see if you-all can't get 10 this thing resolved. You indicated there was -- I 11 think I read that in your correspondence. There was 12 some sort of mandatory mediation prior to arbitration 13 was you-all's contractual arrangement; is that what 14 it was? 15 MS. ARIAIL: Yes, sir. 16 THE COURT: Well, we'll cross that bridge when 17 we get to it. Okay? I would see if you-all can't 18 set that up and get some information and get rolling 19 with this. I'm going to bring you-all back in here. 20 Let's get a date. 21 MS. BECK: We have some time July 14th. 22 THE COURT: Do you want to get a status about 23 that time? July 14th? Does that give you enough 24 time? You're going to be gone until the 24th, so 25 back in the office -- that would be -- we ought to

1 find out where we're going at that time? Why don't
 2 you-all give me a response -- what does that day look
 3 like? Is it wide open?
 4 MS. BECK: The 14th?
 5 THE COURT: Yes.
 6 MS. BECK: We have one at 11:00.
 7 THE COURT: I'll put you-all down for 11:00
 8 a.m. on the 14th of July. We'll reconvene at that
 9 time. See what you-all can resolve.
 10 MS. ENDEMANN: Thank you, Judge.
 11 (The proceedings were concluded at 11:43 a.m.)
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1 State of South Carolina)
 2 County of Charleston) C E R T I F I C A T E
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 4 I, Christine A. Smith, Court Reporter and
 5 Notary Public for the State of South Carolina at
 6 Large, do hereby certify that the foregoing
 7 transcript is a true, accurate, and complete record.
 8 I further certify that I am neither related to
 9 nor counsel for any party to the cause pending or
 10 interested in the events thereof.
 11 Witness my hand, I have hereunto affixed my
 12 official seal this 26th day of July, 2016 at
 13 Charleston, Charleston County, South Carolina.
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 18 Christine A. Smith
 19 Notary Public
 20 My Commission Expires
 21 May 12, 2021
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1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS COUNTY OF CHARLESTON Palmetto Construction Group, Plaintiff, vs. CASE NO. 2016-CP-10-1143 Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, Defendants. Hearing before the Honorable Mikell R. Scarborough, reported by Christine A. Smith, Court Reporter and Notary Public, at 10:57 a.m. on July 14, 2016 at 100 Broad Street, Charleston, South Carolina. Christine A. Smith, Court Reporter Master-in-Equity P.O. Box 30276 Charleston, South Carolina, 29417 (843) 958-5071 casmith@charlestoncounty.org	3 PROCEEDINGS THE COURT: Palmetto Construction Group versus Restoration Specialists, LLC. For the Plaintiffs is Mr. Drew Epting and Ms. Michelle Endemann. For the Defendants is Ms. Bright Ariail. Good morning, Ms. Ariail. I believe we are here on your motion, are we? Is that what got us here? MS. ENDEMANN: Judge, I think we are here on a couple of different things that were noticed. I think you set it for sort of a general status after we were here before you about a month ago. Also, there is a Motion to be Relieved from Default that Ms. Ariail has filed, as well as a Motion to Compel Arbitration. I can give you a little bit of an overview of sort of where we are from last time. I think it would be helpful. THE COURT: Sure. MS. ENDEMANN: If you recall, Judge, this is a case where my client, Palmetto Construction has sued a business associate of theirs on a project for the V.A. The agreement between Restoration Specialist and the other Defendants which are the principals of that company and Palmetto was essentially that they
2 1 APPEARANCES OF COUNSEL: 2 ATTORNEYS FOR THE PLAINTIFF: 3 Andrew K. Epting, Jr., Esq. Michelle Endemann, Esq. 4 Andrew K. Epting, Jr., LLC 46A State Street 5 Charleston, SC 29401 (843) 377-1871 6 Ake@epting-law.com Mne@epting-law.com 7 8 ATTORNEYS FOR THE DEFENDANT: 9 A. Bright Ariail, Esq. Law Office of A. Bright Ariail, LLC 10 125-E Wappoo Creek Drive Suite 202 11 Charleston, SC 29412 (843) 814-8805 12 Bright@brightariaillaw.com 13 14 15 16 17 18 19 20 21 22 23 24 25	4 1 would work together on a job with the V.A. 2 Restoration was to be the general contractor. 3 Palmetto was to aid Restoration in this job, provide 4 their expertise on a job of this size, provide the 5 bonds that were required in order to complete the 6 project. There would be a split of the profits, and 7 Mr. Ward was the one who had the contracts with the 8 V.A., and then all the subcontractors below. 9 Unfortunately what happened is Mr. Ward 10 stopped paying his subcontractors. He stopped paying 11 them it looks like all together. We started 12 receiving bond claims coming in toward the end of the 13 job. We didn't know what was going on because we 14 weren't a party to those agreements. We weren't the 15 ones that were paying them. We weren't the ones that 16 were receiving money from the V.A. 17 So Mr. Ward is getting money from the V.A. 18 He's diverting the funds. His subcontractors filed 19 claims on the bond for which Palmetto was liable, and 20 personally liable, all of its principals, their 21 wives, and now Hanover, the bonding company with 22 surety is looking to us to pay over a million dollars 23 in bond claims. 24 We were here before you last time for a 25 damages hearing because we had served discovery with

5 1 our Complaint and the Complaint went unanswered. 2 We're here for a damages hearing. We served Mr. Ward 3 with notice of that hearing pursuant to the Rules, 4 and it was then that he had hired Ms. Ariail. 5 She came and actually had a vacation planned, 6 so we kind of came to an agreement. She was able to 7 get us some of the documents that were owed. The 8 discovery is not complete. In particular we're 9 missing some pretty important things like the 10 payments from the V.A. to Mr. Ward and then where 11 that money went. 12 From the documents that we have received it 13 appears that the project was pretty profitable with 14 all the subcontractors being paid, and then still 15 some hundreds of thousands of dollars in profit. So 16 we're left looking at records that show there should 17 be a surplus of funds. 18 Instead we're faced with the surety coming to 19 us and saying, Hey, you owe us over a million 20 dollars. The other problem that my client has is 21 they do a lot of bonded work. They have a surety 22 that says, You owe us over a million dollars. Nobody 23 wants to bond any projects. So time is really, 24 really of the essence here because we can't get work. 25 If we can't get work our business goes under, and all	7 1 with the facts, but I think the thing that disturbs 2 me the most is the statement that we haven't provided 3 payments from the V.A. We have provided 4 documentation of the amount of payments that have 5 been made. 6 When we were in front of you a month or so ago 7 there was a -- and there still is a standing Motion 8 for Compelling Arbitration by the Plaintiff. They 9 actually filed that. The contract requires it, and 10 there is a motion that has not been heard that was 11 filed by the Plaintiff for compelling arbitration. 12 In the meantime, despite the requirement for 13 mediation and arbitration, and based on direction 14 from the Court at the last hearing, we have complied 15 with discovery. We have answered discovery. We have 16 been continuously providing documents as we've 17 compiled them, and at my direction my client has 18 concentrated on the financial records rather than the 19 voluminous information that is compiled on a 20 two-or-three-year construction project. 21 That being said, I think it's proper to hear 22 the Motion to Compel Mediation and Arbitration today. 23 We merely joined what the Plaintiff's have already 24 filed. For that reason I would ask that you go ahead 25 and hear that motion.
6 1 of our people don't have jobs, so we're really sort 2 of in dire straits here. 3 THE COURT: Okay. 4 MS. ENDEMANN: We were served with this Motion 5 to Compel Arbitration this week, and Your Honor has 6 set it probably for expediency today. We don't 7 think, Your Honor, that we can go forward on that 8 motion. First, we don't think that he can bring the 9 motion, period, because he's in default; and second, 10 it's not properly before this Court as we only got 11 notice of it a couple of days ago. 12 We think that the tapat here might be to try 13 to get relief from default, get this motion heard, 14 and get it appealed if Your Honor does not rule in 15 their favor and ties this up for several years. If 16 that happens, again, my client's out of business. 17 What we would like to see happen here today is 18 have a damages hearing set because Mr. Ward is in 19 default. He's not provided the Court with any 20 reasonable explanation for being in default and is 21 not entitled to make this Motion for Arbitration 22 since he is in default. Thank you, Your Honor. 23 THE COURT: Ms. Ariail, let me hear from you 24 on that one. 25 MS. ARIAIL: Your Honor, I don't totally agree	8 1 THE COURT: You want to get out of Default 2 first, don't you? I didn't rule on that last time I 3 don't think? 4 MS. ARIAIL: You did not. 5 THE COURT: You're right. Mr. Epting and 6 Ms. Endemann, it looks like there was a motion filed 7 back in March to Compel. Is it mediation or 8 arbitration? Is it contract specific? 9 MS. ENDEMANN: Your Honor, it's a standard 10 Form AIA contract, so there is a provision in there 11 having to do with mediation and arbitration. We did 12 file that motion assuming that we were going to get a 13 responsive pleading and that we would send it to 14 arbitration. That's not what happened in this case. 15 Instead we set aside that motion and asked for an 16 order referring this case to you for a damages 17 hearing which was granted by the Circuit Court. 18 THE COURT: I've got it. This was filed 19 March 7th. That motion was with those -- that was as 20 a result of the matter to referral. Mr. Ward was 21 served on the 14th of March. The Motion to Set Aside 22 the Entry was there. I recall we had a quick meeting 23 and then you-all did some discovery and I haven't 24 been able to resolve anything. Basically, it's a 25 Motion for a Continuance which we granted. And then

9 1 Mr. Ward's affidavit. All right. That rings a bell. 2 Well, Ms. Ariail, I think the first thing you 3 have to do is get out of default before you can bring 4 affirmative relief. It does appear that the matter 5 was referred over here. I think that took care of 6 the -- the clerk closed out the Motion to Compel the 7 Arbitration because of the fact that it was referred 8 over here. So that based some adjudication on that 9 motion is how the Court considers that. 10 I think what we were wrestling with last time 11 was whether or not you-all could resolve it. That 12 doesn't look like it's been done. I find that 13 because it was not shown by Mr. Ward in his 14 affidavits that that supported why he was in default 15 I find the Defendant in default and I so order. 16 So this will be a question of a damages 17 hearing to be set. How much time do you-all want? 18 MS. ENDEMANN: Your Honor, we probably need 19 about an hour to two hours for the hearing, and we 20 can hear it whenever the Court is available. 21 THE COURT: Okay. 22 MS. ARIAIL: Your Honor, I would ask since I 23 have in good faith participated in discovery that I 24 at least be allowed to serve some form of discovery 25 related to damages so that I can prepare properly for	11 1 I've seen nothing they have. They have discussed an 2 indemnity agreement in the Complaint. I don't have 3 that. My client doesn't have that. 4 THE COURT: Well, it may expedite the matter 5 to move forward so everybody's talking with the same 6 thing. We don't have to read documents when we're 7 here. I would ask that you-all share what you can in 8 that regard. I'm not going to mandate it because I 9 don't think that's proper. If we don't get it worked 10 out we'll have a hearing in the next, what, 60 days 11 or so? 12 MS. BECK: I didn't know if this might be 13 something you might want to put on the trial term as 14 a possibility. If not, we've got some time the first 15 week in October. 16 THE COURT: I can bring you-all back -- I've 17 got some trials coming up. I've been squeezing stuff 18 in there. I've got a trial term in August and one in 19 September. The last week of September? 20 MS. BECK: Yes, sir, or if they prefer a date 21 certain we can do the first week of October. 22 MS. ARIAIL: Your Honor, I have a 23 Court-ordered mediation the last week of September, 24 so if we could move it to the first week of October 25 that would be helpful.
10 1 the damages hearing. 2 THE COURT: Ms. Endemann? 3 MS. ENDEMANN: I don't think we're in a 4 position, Your Honor, to consent to that. Ms. Ariail 5 can certainly Cross the Plaintiff on any damages that 6 we present at the hearing as is allowed by the Rules, 7 but she isn't allowed to present her own evidence in 8 any event. 9 We're happy to try to -- most of the documents 10 that we would use in support of our case are her 11 clients and also Hanover's, which are the bond claims 12 spreadsheets and everything, which Hanover is sending 13 directly to her client and which we're happy to 14 provide if that's not happening. I think she has 15 everything that she would need. It would just be the 16 testimony, and of course, she's entitled to Cross 17 under the Rules. 18 THE COURT: All right. I think that's the 19 case. All right? I'm assuming you've got what 20 you've got. You're entitled to participate in a 21 damages hearing. There's no doubt about that by 22 Cross-Examination but not by putting forth in 23 evidence. 24 MS. ARIAIL: Right, Your Honor, but to 25 properly prepare to Cross-Examine their witnesses,	12 1 THE COURT: Okay. 2 MS. BECK: The afternoon of the 5th, after 3 those allocation hearings that you set, we can do the 4 rest in the afternoon. 5 THE COURT: What's going on on the 4th? 6 MS. BECK: Nothing. That would be fine, too. 7 THE COURT: Why don't we set this for October 8 4th at 2:00 p.m. Let's just set it up. That's a 9 Tuesday afternoon the first week of October. Okay? 10 MS. ENDEMANN: Thank you, Judge. 11 MR. EPTING: Thank you, Judge. 12 THE COURT: Very good. I'm just going to do a 13 Form 4, and I'll put that in there. If you-all want 14 to follow up with an order you can. 2:00 p.m. 15 MS. ENDEMANN: Thank you. 16 (The proceedings were concluded at 11:11 a.m.) 17 18 19 20 21 22 23 24 25

1 State of South Carolina)
2 County of Charleston) C E R T I F I C A T E

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4 I, Christine A. Smith, Court Reporter and
5 Notary Public for the State of South Carolina at
6 Large, do hereby certify that the foregoing
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to
9 nor counsel for any party to the cause pending or
10 interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 26th day of July, 2016 at
13 Charleston, Charleston County, South Carolina.

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Christine A. Smith
Notary Public
My Commission Expires
May 12, 2021

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1 STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Palmetto Construction Group, Plaintiff, vs. CASE NO. 2016-CP-10-1143 Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, Defendants. Hearing before the Honorable Mikell R. Scarborough, reported by Christine A. Smith, Court Reporter and Notary Public, at 10:57 a.m. on October 4, 2016 at 100 Broad Street, Charleston, South Carolina. Christine A. Smith, Court Reporter Master-in-Equity P.O. Box 30276 Charleston, South Carolina, 29417 (843) 958-5071 casmith@charlestoncounty.org	3 <u>P R O C E E D I N G S</u> THE COURT: We're back on the record. This is the case that is captioned Palmetto Construction Group versus Restoration Specialists, LLC, and Ruben and Lynette Ward. The case number is 2016-CP-10-1143. The case is in a bit of an unusual posture, and that's really why I got you-all here today. We had it scheduled for a damages hearing. I know there's a motion outstanding for a Rule 59 Motion, I think it was, that Ms. Ariail had sent. Then I was informed yesterday, I believe it was, that the case was on appeal. Ms. Ariail, let me start with you on the Defense side, and then I'll come to the Plaintiff's side and just figure out where we are. Okay? MS. ARIAIL: Yes, sir, Your Honor. Bright Ariail for the Defendants. Quite frankly, based on the scheduling of the damages hearing and the hearing for the Motion to Alter or Amend, I filed a Notice of Appeal basically taking the position that the failure of the Court to rule on that motion prior to the damages hearing was essentially a denial. Case law supports that.
2 APPEARANCES OF COUNSEL: ATTORNEYS FOR THE PLAINTIFF: Andrew K. Epting, Jr., Esq. Michelle Endemann, Esq. Andrew K. Epting, Jr., LLC 46A State Street Charleston, SC 29401 (843) 377-1871 Ake@epting-law.com Mne@epting-law.com ATTORNEYS FOR THE DEFENDANT: A. Bright Ariail, Esq. Law Office of A. Bright Ariail, LLC 125-E Wappoo Creek Drive Suite 202 Charleston, SC 29412 (843) 814-8805 Bright@brightariaillaw.com	4 THE COURT: What case do you have for that? MS. ARIAIL: There are so many issues, Your Honor. I have things everywhere. THE COURT: Mainly we need to talk about the procedural aspect of where we are. Okay? MS. ARIAIL: Okay. THE COURT: Let me do this while you look for that case. Let me just sort of make sure I get -- I want to do the timeline down here. I think one of the questions is, where's jurisdiction? I fully understand that the filing of a Notice of Appeal is designed to divest the Court of jurisdiction. I'm just trying to figure out what is being appealed. So we had a hearing on the 6th of June, our first hearing. From that an order was issued on the 14th of July. Notice appears to have been sent and received on July 18th. MS. ARIAIL: Yes, sir. THE COURT: And that order set the damages hearing for today. MS. ARIAIL: Yes, sir. THE COURT: And then a 59(e) Motion appears to have been timely filed on July 27th. That's within ten days. That hearing was then scheduled by my office for a week from today, October 11th. Then we

5 1 went back and forth the week of September 7th. 2 Defendant requests that the 59(e) come before the 3 damages hearing. 4 Plaintiff's objected, and I kept the schedule 5 the same, and then apparently an appeal was filed on 6 September 30th, which would have been last Friday. 7 Today is Tuesday, the 4th of October. I'm trying to 8 figure out what it is you're appealing because 9 clearly the order of July 14th is well past the 30 10 days. 11 I'm not familiar with any law which says that 12 the failure to obtain a motion in a timely fashion 13 would total the time to appeal, so that's what I'm 14 trying to get at. 15 MS. ARIAIL: All right. 16 THE COURT: My initial reaction is that you're 17 too late on the appeal, but you're not too late on a 18 59(e). The Court is not entertaining a 59(e). So we 19 have the cart before the horse on one, and we have it 20 after the fact. 21 MS. ARIAIL: The issue is this: There is a 22 three-prong test whereby my clients can waive their 23 right to arbitration. One of those includes 24 proceeding with litigation, and this hearing, this 25 damages hearing, is a potential item that may end up	7 1 If this had been a lawsuit that had been 2 answered and taking the normal course of litigation, 3 we would just barely be in the discovery phase. So 4 the point is that the wrong standard was used to deny 5 the Motion to Compel Arbitration, and that by going 6 forward today we are potentially -- we are in danger 7 of waiving the Defendant's right. 8 THE COURT: But you still have your 59(e) 9 outstanding. Doesn't that protect you? 10 MS. ARIAIL: If the 59(e) had been heard 11 before this damages hearing, but potentially not. 12 That's why I asked to have them switched. 13 THE COURT: All right. Let me hear from 14 Ms. Endemann. 15 MS. ENDEMANN: Thank you, Judge. I think 16 you've sort of hit the nail right on the head. Her 17 objections are preserved under the 59(e) Motion. The 18 Notice of Appeal is -- according to the Rules on its 19 face defective, because it's supposed to include the 20 order appealed from. There is no order subject to 21 appeal at this point in the case. 22 As you indicated the first order -- first, 23 Judge, it's interlocutory because it's denying a 24 motion to lift the defaults and the associated 25 affirmative defense that they tried to raise, which I
6 1 waiving my client's rights for an arbitration. 2 THE COURT: Wouldn't default do that as well? 3 MS. ARIAIL: Your Honor -- 4 THE COURT: Wouldn't that be the principal 5 test? You have to demand it, and then you have to do 6 it in a timely fashion. 7 MS. ARIAIL: The decision that the right for 8 arbitration or the Motion for Arbitration was denied 9 to stay the case and send it to arbitration was 10 denied was based on -- according to your order, the 11 Defendant's being in default, that is not one of the 12 standards for not allowing arbitration to go forward. 13 There are other prongs. There are other tests. It's 14 the length of time between the initiation of the 15 lawsuit and the Motion to Compel Arbitration which 16 was very short in this case. It's whether or not 17 there has been any litigation, anything has gone 18 forward. 19 Our position is at this point, no, but I have 20 to preserve my client's rights for arbitration, and 21 that's why I'm concerned that they would be 22 prejudiced if we went through with this -- went 23 forward with this damages hearing. And the third one 24 is whether or not the Plaintiff has been prejudiced 25 because of some delay.	8 1 think Your Honor, it's clear in the transcript said 2 you weren't really ruling on the merits of that. 3 What you were saying is that they had to be out of 4 default in order to bring it. So the order denies me 5 from default. That is not immediately appealable 6 until after final judgment and there is black letter 7 South Carolina law on that point. 8 Number two, the 59(e) Motion that she's trying 9 to appeal from remains outstanding before you. There 10 is no order entered on that issue, and so this 11 argument about waiver and arbitration -- there are 12 cases, Your Honor, that I'm happy to provide the 13 Court that state that arbitration is an affirmative 14 defense, and if you're in default and you failed to 15 raise that affirmative defense you can't bring it 16 until you're in default just like you ruled. 17 There is no ruling. The point is there is no 18 ruling yet to be appealed. This notice is defective 19 on its face because it doesn't attach an order 20 pursuant to the rule, and there's nothing to appeal 21 from. 22 THE COURT: I'm just not sure it's final yet, 23 Ms. Ariail. I understand your concern and your 24 desire to preserve your clients' rights, and you seek 25 arbitration. I fully understand that. I just don't

9 1 see where the -- other than the default I don't see 2 where your clients have waived it. I don't see where 3 you've waived it at all. We covered that back in 4 June, as I recall, about the default and what 5 happened there. I fully understand that. My 6 recollection is that you acted timely. I'm not sure 7 that your clients did, but I think you did. I think 8 that's to your credit, but that doesn't get us to a 9 final -- my opinion is it doesn't get us to a final 10 order. Unless you can show me something that says 11 that having a damages hearing before having a 59(e) 12 hearing results in finality and no written order has 13 been issued, I'm not sure I really fully understand. 14 I'm going to defer to the Rules because you 15 have a Notice of an Intent to Appeal out there, but I 16 need you all to sort of make a record because I think 17 that's what you-all need to take up to the Appellate 18 Court because they're not going to have an 19 evidentiary hearing. Okay? 20 You-all need to be able to argue this by 21 motion to the Appeals Court as to whether or not, in 22 fact, there is jurisdiction or there's a technical 23 violation of it or whatever if the order is not 24 attached. All that stuff is within their purview. 25 This notice was filed at 2:40 on Friday afternoon,	11 1 they're going to do is they're going to send it right 2 back here, and we're going to do it again. All 3 right? 4 So you went into your argument. Let me do 5 that. You went into your argument about the 59(e). 6 Go ahead and tell me why the 59(e) should be granted? 7 MS. ARIAIL: I have a memorandum prepared that 8 I would like to pass up. 9 THE COURT: All right. 10 MS. ARIAIL: Your Honor, I have five different 11 arguments to make on this point. Honestly the one 12 that I mentioned prior is probably the most important 13 which is the one that is actually listed as Item 5 in 14 my memorandum, and that is that the wrong -- the test 15 for whether or not this case should have gone to 16 arbitration the wrong standard was applied. 17 Specifically the Court applied a standard that -- 18 because the Defendants were in default that they 19 could not compel arbitration. 20 Case law gives you in South Carolina -- both 21 the Federal the State Courts mirror each other 22 somewhat. I mention the three standards. One is 23 that a substantial length of time did not transpire 24 between commencement of the action and commencement 25 of the Motion to Compel Arbitration; two, the
10 1 and like I said, I just got wind of it yesterday. 2 Ms. Ariail? 3 MS. ARIAIL: Your Honor, as I understand 4 you're going to allow us to continue with the appeal 5 at this point? 6 THE COURT: That's not within my purview. 7 That's within the purview of the Court of Appeals. 8 MS. ARIAIL: And there will not be a damages 9 hearing today? 10 THE COURT: What I'm going to do is I'm going 11 to have them proffer what their damages are, and I'm 12 going to have you proffer what you consider your 13 59(e) to be, and I'm going to let you-all take that 14 up there. I'm just going to do it as a proffer. I'm 15 not going to take testimony. They're going to tell 16 me how much their damages are so it's in the record. 17 You are going to tell me why I should overturn my 18 underlying order, and then you-all can go forward 19 from there. Okay? 20 MS. ARIAIL: Yes, sir. 21 THE COURT: And if they decide they don't have 22 jurisdiction and they want to send it back to me, 23 we'll have a full-blown hearing. If they decide it's 24 proper for appeal then they can hear it. All right? 25 I'm just making them a record because otherwise what	12 1 Defendants did not engage in extensive discovery or 2 litigation; three, the Plaintiff has not been 3 prejudiced through an undue burden caused by any 4 delays seeking arbitration. 5 So those are the three standards that the 6 Court should have applied to determine whether or not 7 arbitration was proper rather than the fact that the 8 Defendants at that point were in default in this 9 case. 10 THE COURT: Do any of the cases you've cited, 11 Toler's Cove, Carlson, or General Equipment deal with 12 default matters? 13 MS. ARIAIL: No, sir. Well, actually the case 14 that I have that deals with the default matter is 15 actually a case out of another jurisdiction. 16 THE COURT: Okay. 17 MS. ARIAIL: If you look on -- unfortunately 18 my memo is not numbered, but if you look at the 19 paragraph just before the conclusion, it's the Cedar 20 Surgery Center versus Bonelli case out of Utah. Why 21 that's important to us is they essentially have the 22 same three-prong test, or their test is very similar 23 to that test in South Carolina case law. 24 In that case, not only did the -- in our case 25 an entry of default has been entered, but in that

13 1 case they actually went through the entry of default 2 damages hearing all the way to default judgment, and 3 when the Defendants filed a motion to send it to 4 arbitration, the Court found that arbitration was 5 proper even though they went through all of these 6 steps. 7 THE COURT: Okay. 8 MS. ARIAL: Other arguments that I have -- 9 THE COURT: So in that case, I don't know if 10 you have a copy of that, but in that case what you're 11 telling me is the Defendant was in default. They had 12 the damages hearing. Instead of an order of default 13 they had the damages hearing subsequent to that, and 14 then the demand for arbitration was made? 15 MS. ARIAIL: Yes, sir. In fact, the Defendant 16 didn't show up through any of the Court hearings. 17 THE COURT: Was a judgment issued prior to? 18 THE WITNESS: They had a judgment issued 19 against them, and then after that judgment had been 20 entered against them they filed an arbitration, and 21 the Court held that it was proper. 22 THE COURT: And that was under Utah state law? 23 MS. ARIAIL: Yes, sir. And again, their test 24 is very similar to our test. 25 THE COURT: Okay.	15 1 Interestingly, not only did the Defendants in 2 this case file a Motion to Compel Arbitration, but 3 the Plaintiff actually filed it, contemporaneously 4 with their Complaint. Now, in an earlier hearing 5 Your Honor found that because the Clerk of Court 6 basically -- once the entry of default was submitted 7 or filed, that the Clerk of Court essentially just 8 took that motion out of the case records, and it was 9 never heard. 10 Obviously, by submitting that to the Court in 11 the first place the Plaintiffs acknowledged that 12 there was a requirement for mandatory mediation and 13 arbitration, and it was something that was put before 14 the Court. It's not something that the Clerk can 15 just merely remove from the docket because an entry 16 of default has been entered. I think the language 17 that came out of the transcript was that the Clerk of 18 Court closed it out. 19 THE COURT: Okay. I'm reviewing the June 6th 20 transcript. Is it alternative mandatory mediation 21 prior to arbitration, or are they both obligatory 22 under the contract? Which are you telling me? 23 MS. ARIAIL: Let me pull it. The contract 24 says -- this is Article 6 -- this is a standard AIA 25 subcontract document, but there are certain things,
14 1 MS. ARIAIL: My other argument -- again, 2 that's the -- in my opinion that's the most 3 significant issue that's before us. 4 Also, I believe that we showed good cause that 5 the entry of default should be lifted because we did 6 assert our right to mandatory mediation and 7 arbitration. It is a contract requirement. It's 8 very specific in the contract. It's not, as it's 9 been suggested, just a form contract. It's one where 10 you actually have to check the box and select the 11 dispute resolution procedures that you're going to 12 use. 13 In addition to that, not only was 14 arbitration -- mandatory mediation and arbitration 15 selected, but the contract also calls for it to be -- 16 any mediation, any alternative dispute resolution 17 take place in the state where the project occurred 18 which is the State of Georgia and not the State of 19 South Carolina. 20 THE COURT: All right. 21 MS. ARIAIL: There is a question -- once a 22 case has been submitted to an arbitrator or a 23 mediator under both federal and state law, then the 24 State Court no longer has jurisdiction over this 25 proceeding.	16 1 as I said, that you have go in and select for your 2 particular contract. You have the name of the 3 project, who the parties are, what have you. 4 In Article 6, the first paragraph addresses 5 mediation. It says, Any claim arising out of or 6 related to the subcontract except those waived in the 7 subcontract shall be subject to mediation as a 8 condition precedent to binding dispute resolution. 9 Also, it basically says that they will use the AAA, 10 be administered by AAA, and they will use the 11 construction industry rules of AAA. 12 As I've mentioned before it says, Mediation 13 shall be held in the place where the project is 14 located unless another location is mutually agreed 15 upon. The next paragraph is binding dispute 16 resolution, and it says, For any claim subject to but 17 not resolved by mediation pursuant to Section 6.1, 18 the method of bonding dispute resolution shall be as 19 follows. That's where it gives you various choices. 20 The first one is arbitration pursuant to 21 Section 6.3 of this agreement. That's the one that 22 was selected. The other two are litigation, and then 23 it's got just an other, and it lets you fill in the 24 blank. If you go to -- 25 THE COURT: So the other was not filled out

17 1 either, so it's arbitration -- 2 MS. ARIAIL: The only thing that's been 3 checked -- and the subcontract is actually attached 4 to the Complaint. 5 THE COURT: Okay. 6 MS. ARIAIL: The only thing that's been -- 7 there's a big "X" in the block by arbitration 8 pursuant to Section 6.3 of this agreement. 6.3 says, 9 If the contractor and subcontractor have selected 10 arbitration as a method of binding dispute resolution 11 in Section 6.2, any claims subject to but not 12 resolved by mediation shall be subject to arbitration 13 which, unless the parties agree otherwise, shall be 14 administered by AAA. It goes on and talks about the 15 procedure itself. 16 THE COURT: The preceding paragraph said, 17 Except as waived. Is there a definition of what 18 waiver is constituted in there? 19 MS. ARIAIL: Say that again? I'm sorry. 20 THE COURT: The paragraph just prior to that, 21 when you get into the -- it said, Except as waived. 22 Is there a provision in the contract that talks about 23 a waiver? 24 MS. ARIAIL: There is a paragraph that talks 25 about Waiver of Subrogation.	19 1 MS. ARIAIL: Waiver is -- yes, sir, 13.9 which 2 is on Page 14. 3 THE COURT: Anything further on that? 4 MS. ARIAIL: Your Honor, I would like to 5 clarify one thing while we're looking at the 6 subcontract. On Page 1 it does say that Restoration 7 Specialists is a South Carolina corporation. That is 8 not correct. That is a typo. They do have a local 9 field office, but they are actually a Georgia 10 corporation. 11 THE COURT: Page 1 of the subcontract you 12 said? 13 MS. ARIAIL: Sir? 14 THE COURT: Of the subcontract? 15 MS. ARIAIL: Yes, sir. The first page of the 16 subcontract. I'm not sure -- why it reads that way, 17 but the reality is that they are a Georgia 18 corporation. 19 THE COURT: Okay. 20 MS. ARIAIL: I have a stack of cases that are 21 cited in my memo, which I'm happy to share with all. 22 THE COURT: Very good. 23 MS. ARIAIL: I don't believe they're in the 24 order that they appear in the memo, but the Cedar 25 Surgery Center, which is the Utah case that I
18 1 THE COURT: Waiver of subrogation? 2 MS. ARIAIL: Yes, sir. So what the 3 paragraph -- the site to waiver that you asked me 4 about, when it says, Any claim arising out of or 5 relating to the subcontract except as waived in the 6 subcontract. So it's the Waiver of Subrogation. 7 That appears in Paragraph 13.9 of the subcontract, 8 and again, Article 6 is Mediation and Binding Dispute 9 Resolution. 10 THE COURT: Take me back. Which paragraphs 11 are you reading from? 12 MS. ARIAIL: Article 6, which appears on 13 Page 8 of the subcontract as Attachment A to the 14 Complaint. 15 THE COURT: I've got it. 16 MS. ARIAIL: Page 8, if you look at the top, 17 it's Article 6, Mediation and Binding Dispute 18 Resolution. 19 THE COURT: I've got it. 20 MS. ARIAIL: 6.1 addresses the mediation. 6.2 21 is where they determine which method of dispute 22 resolution will be used after mediation. Then below 23 is where it describes the arbitration process. 24 THE COURT: I've got you. And you said waiver 25 was found in Section 13?	20 1 mentioned that deals with the default, is on the top. 2 THE COURT: Thank you. That would be great. 3 All right. Ms. Endemann, let me hear from 4 you. Let's first talk about where we are 5 procedurally, and then we'll go into the damages 6 question. Okay? 7 MS. ENDEMANN: Thank you, Your Honor. Let me 8 just respond to Ms. Ariail. I apologize. I don't 9 have a memorandum with me. We just received hers 10 now, and I wasn't prepared to go forward on this 11 today, so I'm happy to provide the cases to Your 12 Honor in a reply memorandum if you would like. 13 I am not aware of the Utah case. I've just 14 been handed a copy that Ms. Ariail is referring to, 15 but there are cases in other jurisdictions -- I have 16 found several -- that state that affirmative defenses 17 are waived by default, and that arbitration is an 18 affirmative defense. It's true that the Plaintiffs 19 with their Complaint did, in fact, move to compel 20 arbitration. That motion was withdrawn when no 21 answer was received. 22 We served notice of everything including the 23 arbitration demand. Obviously it was with the 24 Complaint. Mr. Ward never made any appearance. Once 25 no appearance was made default was entered. We asked

1 the Circuit Court, Judge Young, to send it here for a
2 damages hearing and withdrew our Motion to Compel
3 Arbitration.

4 Our position, Judge, without getting into the
5 specific defenses is simply that, it's an affirmative
6 defense. They can't raise it. They're in default.
7 I think that's what your original order said. We
8 don't even reach the merits of the arbitration
9 argument. It's simply that they are in default.
10 There was no good cause why the default should be
11 lifted, which is what Your Honor found in your
12 discretion in the first order, and that we never
13 reached this question.

14 The motion is not properly brought. If they
15 were going to answer, go into arbitration, we would
16 have done that. We have been unduly prejudiced even
17 under this test. A long substantial period of time
18 has not eclipsed. We served discovery with the
19 pleadings. We served our motion with the pleadings.
20 We did everything we could because this is such a
21 time sensitive case.

22 In this specific case though there wasn't a
23 great lapse of time. The time that has lapsed has
24 caused substantial harm to my client who was going to
25 get ready to testify to that before Your Honor today.

1 So there has been prejudice even under the waiver
2 test, not even considering the default question, But
3 Your Honor, it's not properly before you. They're in
4 default. It's been waived.

5 THE COURT: Thank you. So what I'll do is
6 I'll give you -- what would you like? Ten days? Is
7 ten days sufficient time to get me some sort of
8 responsive memo?

9 MS. ENDEMANN: Yes, Your Honor.

10 THE COURT: Let's just do that. I'm worried
11 about the courthouse closing at the end of this week,
12 by the way, and we all may have to leave town, so
13 maybe 14 or 15 days. Mr. Epting?

14 MR. EPTING: Judge, just a couple of practical
15 observations. One of the nice things about having
16 done this for now almost 40 years I feel comfortable
17 standing up here and having a conversation with you
18 and just saying, in essence, have you thought about
19 this? In that category have you thought about this?
20 We'd move to dismiss this appeal.

21 THE COURT: Has that already been filed up
22 there?

23 MR. EPTING: Yes.

24 THE COURT: Okay.

25 MR. EPTING: And the probabilities are high

1 Judge -- high, high, high -- that this is coming back
2 to you. Number one, I'm hoping that what we do here
3 today, if that is what happens, that in essence this
4 Court can move forward and decide the merits of this
5 damage hearing on the record that is before you.

6 Secondly, Judge, and I don't know if this
7 works or not, but if of course, this notice is
8 defective for failure to appeal from an order because
9 that's what the Rule says, Judge. It has to be an
10 order. The only order was an interlocutory one and
11 the 30 days has run. If the notice is defective this
12 Court has jurisdiction, and this Court could proceed,
13 and this Court could rule.

14 Now, here's the piece, Judge that, I'm not
15 able to conceptualize down the road, but if this
16 Court were to enter an order that said, If I had
17 jurisdiction then this would be my ruling. Maybe the
18 whole thing could simply go and be decided in this
19 one appeal, because I think, Judge, what you were
20 trying to do is to make a record here so that
21 hopefully this could be all done at one time somehow,
22 some way. I'm simply observing to you without some
23 sort of rule -- it won't be possible because there
24 will have been no ruling by the lower Court for the
25 Appellate Court to address the merits.

1 I don't know, Judge. In the back of my head
2 something tells me that the contingency of a ruling
3 perhaps doesn't work, but I may be confusing it with
4 something else because if the Court does have
5 jurisdiction, and you say if I was not divested of
6 jurisdiction and having everything before me my
7 ruling would be thus and so.

8 Then one of two things happens. Either they
9 send it back and it's before you, or they can say,
10 this is enough. We'll just go forward. I'm not
11 making a legal argument, Judge. You've been doing
12 this for quite a while yourself. It didn't occur to
13 me until I was sitting here listening to other
14 lawyers talk that that might be of some interest to
15 the Court and for that reason I mention it.

16 THE COURT: Thank you, Mr. Epting.

17 MR. EPTING: Thank you, sir.

18 THE COURT: I'll tell you, the main reason I
19 wanted to go forward today was because I'm well aware
20 that the Appellate Courts are not going to have an
21 evidentiary hearing. They're going to get it on
22 whatever record there is. From my perspective it
23 doesn't look like there's any kind of record, so
24 that's the problem that we've got going forward here.
25 They get to make that call. I've had them send me

25 1 stuff and say, Make me a record, and then it turns 2 around and goes right back up there. I'm trying to 3 avoid that. So to the extend you-all can get a 4 transcript out of today's hearing when you go up 5 there and argue that point, then at least you can 6 have something to argue upon. 7 What I did, once I got notice of this 8 yesterday, I just went back through the record and 9 procedurally created my own timeline, which is where 10 I started out in my production today. I sort of was 11 scratching my head as to where we got on that 12 particular matter. 13 So what I'll do is I'm going to give you-all a 14 chance to read these, and give myself a chance to 15 read these cases. I'm happy to read the one from 16 Utah and see how it is, but just in going back 17 through the record here, it looks like this case was 18 filed March 7th, I think it was. Service of process 19 was perfected some time in March, and then default 20 was in April, and then it got sent over here, I 21 believe, in early May. 22 The Motion to Refer was the 18th of April, and 23 then we had our first hearing the 6th of June, and 24 then July 11th was the date that the Motion to Stay 25 and Compel Arbitration was filed. Then we had our	27 1 prepared some Exhibit notebooks if you would like me 2 to hand one up to you so you can have it in front of 3 you. I'm happy to go over it. Our damages being 4 claimed today -- our actual damages being claimed are 5 \$1.681 million. The figures are hard. They are 6 comprised of three components. The first are 7 receivables that are due to Palmetto Construction 8 pursuant to the subcontract, so that includes 9 actually a subcontract of theirs for some work that 10 was performed and some costs that have not been 11 reimbursed. 12 The figures match up to Mr. Ward's documents, 13 so it doesn't appear that there will be any question 14 there. The next, Your Honor, is the current due to 15 Hanover. That's the surety that you recall has made 16 demand upon all the indemnitators for all of these 17 claims of subcontractors and suppliers that 18 Restoration did not pay even though they were paid by 19 the Federal government for the projects. So the 20 demand that has been made is \$1.4 million. 21 THE COURT: That's from the -- 22 MS. ENDEMANN: The surety has made demand on 23 the indemnitators for the full amount, \$1.4 million. 24 Yes, Your Honor, there are two open claims that total 25 about \$44,000, but the surety has actually
26 1 hearing on the 14th of July. That's what the order 2 came from essentially was at that time and on that 3 date. That's what's got us here. As I said before, 4 it was timely. The 59(e) Motion was timely filed. I 5 don't have any question about that. That issue came 6 up this morning. This one was clearly timely filed. 7 That's sort of what I was waiting to see, and 8 this one just sort of surprised me as to where we 9 were and how it got on appeal as quickly as it did. 10 I understand Ms. Ariail wanted to protect her 11 client's interest in that regard. 12 The Motion to Compel Arbitration filed by the 13 Plaintiff was withdrawn at the time the matter there 14 was referred here; is that my understanding, 15 Ms. Endemann? 16 MS. ENDEMANN: That's correct, Your Honor. 17 THE COURT: Very good. Let me hear about your 18 damages. What do you-all contend your damages are 19 first off? Give me a figure and how you calculated 20 them. We can either take testimony or not. I want 21 to get that figure. I'm not going to rule on that 22 today. I just want you to know I'm not going to rule 23 on any of this, but I'll take this under advisement 24 for ten days or so. 25 MS. ENDEMANN: Yes, Your Honor. We've	28 1 paid \$1,186,501.71 in claims. In our Exhibit 2 notebook we've got the check numbers that they used. 3 That's money that's actually been paid. Then there 4 are some outstanding claims actually paid which make 5 up the \$1.4 million, the difference. That demand was 6 recently reiterated by the surety on the 30th of 7 September. 8 THE COURT: Is that Hanover? 9 MS. ENDEMANN: Yes, that's Hanover. The final 10 element of our damages, Your Honor, is the 50/50 11 profit split under the teaming agreement that was 12 entered into between our clients. It was agreed that 13 50 percent of the proceeds would be split. There 14 should have, under Mr. Ward's own documents, been a 15 profit of \$221,000. We have some dispute with that 16 figure. There is some overhead and some inflated 17 costs in there that we have adjusted somewhat. 18 Even under his own math we are owed a 19 significant amount of money. We are actually 20 claiming under the 50/50 profit split \$221,730.46. 21 Our total damages are made up of those three. We've 22 got -- if you would like me to hand up the Exhibit 23 notebook I'm happy to do so. Mr. Kindle (phonetic) 24 is here and can provide some testimony if Your Honor 25 would like.

29 1 THE COURT: Ms. Ariail? 2 MS. ARIAIL: Your Honor, I'm going to object 3 to any of this information being put in the record. 4 Again, this is essentially the damages hearing as 5 going forward. I've essentially got Counsel for the 6 Plaintiff testifying with no -- 7 THE COURT: Well, I asked for a proffer and 8 that's just what I got. That's what I was wanting. 9 Okay? I want that to be on the record when you-all 10 take that up there. 11 MS. ARIAIL: Well, I don't agree with anything 12 that she said. 13 THE COURT: You don't have to. 14 MS. ARIAIL: I've got problems with a lot of 15 the documents that are contained herein. Her 16 representation that Mr. Ward has admitted -- they 17 admitted that. I object to that. I object to the 18 amount that she says is receivable due to PCG. I 19 object to the profit sharing. 20 THE COURT: Is the teaming agreement the basis 21 for the profit share? Is that what that is? 22 MS. ARIAIL: The teaming agreement expressly 23 says there is no profit sharing. That is in dispute. 24 There is no profit sharing. The teaming agreement 25 specifically says --	31 1 company. They've had entrapments. I think that's a 2 nightmare, some of the things that they've done 3 trying to -- you know, they got a good report from 4 the VA, so they have gone over and above to make sure 5 that the VA's happy with his work, and it includes 6 taking care of some defective work. 7 THE COURT: Is the project complete at this 8 time or not? 9 MS. ARIAIL: Yes, sir. Yes, sir. 10 THE COURT: Give me the full amount of your 11 damages again? I'm sorry, Ms. Endemann. 12 \$1.4 million or something? 13 MS. ENDEMANN: \$1,681,000, Your Honor. 14 THE COURT: 681, okay. Thank you. That's the 15 1.186 -- the 221, was it? 16 MS. ENDEMANN: I'll give you the exact 17 figures. The receivables due to the construction are 18 \$184,858.69. The profit share is \$221,730.46, and 19 due to Hanover is \$1,230,888.71 for a total of 20 \$1,681,864.86. 21 THE COURT: Okay. I've got it. 22 MS. ENDEMANN: Thank you. 23 THE COURT: I'm just going to take that as the 24 proffer, but again, just so you-all have it in the 25 record and the Court understands what this case is
30 1 THE COURT: That's all. You don't have to 2 agree. And there's an indemnification agreement here 3 as well? 4 MS. ARIAIL: Actually, the indemnification is 5 with Hanover, who was the bonding company. There is 6 a line in there that says that the parties can't even 7 seek contribution against each other until they've 8 satisfied the bonding company, so all of this is 9 premature. 10 THE COURT: Is your client getting notices 11 from the sureties as well? 12 MS. ARIAIL: No, Your Honor. He's gotten one 13 Affidavit of Claim. He's gotten one. The majority 14 of this has been negotiated by Palmetto. My client 15 has not had the opportunity to review these claims. 16 Some of them that -- Hanover has shared some 17 information by e-mail with Mr. Ward, and he has 18 disputed some of these claims. Regardless of his 19 disputes with these amounts owed Hanover has gone 20 ahead and made some of these payments as late as the 21 summer. Restoration Specialists has been back on the 22 project repairing work that was performed improperly 23 by Palmetto. They've incurred expenses with that. 24 They've incurred a lot of expenses related to 25 the elevator. They've had to actually hire another	32 1 about. Okay? So what I'm going to do is I'm just 2 going to take it under advisement. I'm going to ask 3 that they give a responsive memorandum within ten 4 days. Ms. Ariail, if you want to respond to that you 5 can within five. Okay? 6 MS. ARIAIL: Yes, Your Honor. 7 THE COURT: I don't know when or how long they 8 will take to make a decision on this thing. I would 9 think it will be relatively quickly, and we may well 10 be back here for this damages hearing. They're 11 entitled to cross-examine the witness, and that's 12 what they're going to do. I'm just trying to give 13 them a picture because otherwise they won't have any 14 idea what's going on. 15 The question as I see it is whether or not the 16 question for the appeal is procedural, whether or not 17 there's a final order from which you can appeal. I 18 think that's number one. The second thing has to do 19 with whether or not there's finality to that, and I 20 don't think there's finality until a determination of 21 damages has been held. 22 Ms. Ariail is concerned about waiver of the 23 right to arbitration or mediation, and I understand 24 that. Okay? I'm going to do that and we'll go from 25 there.

1 MS. ARIAIL: Your Honor, one housekeeping
2 thing. We do have a motion hearing next Tuesday.
3 I'm assuming that that is not going forward?

4 THE COURT: We're to going to need to go
5 forward on that one.

6 MS. ARIAIL: Thank you. I just wanted to
7 confirm that.

8 THE COURT: Unless you-all get a remittor down
9 here that quick, but I can't imagine that's going to
10 happen.

11 MR. EPTING: And Judge, it probably will be
12 six months. The Court of Appeals regrettably on
13 these Motions to Dismiss, they're way backed up.

14 THE COURT: I understand. I understand. I'm
15 concerned about that. I just think they will want
16 something to look at. You will have a transcript,
17 and you can go from there, so you can provide them
18 with something, but my understanding is it's a motion
19 practice at this point in time with the Appellate
20 Court. I'm well aware of that. Okay?

21 (The proceedings were concluded at 3:03 p.m.)
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24
25

1 State of South Carolina)

2)
3 County of Charleston) C E R T I F I C A T E

4 I, Christine A. Smith, Court Reporter and
5 Notary Public for the State of South Carolina at
6 Large, do hereby certify that the foregoing
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to
9 nor counsel for any party to the cause pending or
10 interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 24th day of October, 2016 at
13 Charleston, Charleston County, South Carolina.
14
15
16
17

18 _____
19 Christine A. Smith
20 Notary Public
21 My Commission Expires
22 May 12, 2021
23
24
25

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1 STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON
FOR THE NINTH JUDICIAL CIRCUIT

3 PALMETTO CONSTRUCTION)
4 GROUP, LLC,)
Plaintiffs,) Case No.
5) 2016-CP-10-1143
-versus-)
6)
7 RESTORATION SPECIALISTS, LLC,)
REUBEN MARK WARD AND LYNNETTE)
8 PENNINGTON WARD,)
Defendants.)

10 -----
Hearing before the Honorable Mikell R.
11 Scarborough, reported by Jennifer M. Huggins,
12 Court Reporter and Notary Public, at 2:00 p.m. on
13 January 31, 2022 at 100 Broad Street, Courtroom
14 2A, Charleston, South Carolina.

15 Jennifer M. Huggins, Court Reporter
Master-in-Equity
16 P.O. Box 80711
Charleston, SC 29416

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1 THE COURT: Okay. So we're on the
2 record in the case captioned Palmetto
3 Construction Group, LLC, vs. Restoration
4 Specialists, LLC, Reuben Mark Ward and Lynnette
5 Pennington Ward. The case number on this is
6 2016-CP-10-1143.

7 And present for the plaintiff today is
8 Mr. Jaan Rannik of the Charleston County Bar, and
9 for the defendants is Ms. Bright Ariail, also of
10 the Charleston County Bar. The matter before the
11 Court is Ms. Ariail's motion to dismiss the
12 matter pursuant to rule 12(b)(1) that you
13 filed -- was that filed in April --

14 MS. ARIAIL: Yes, sir.

15 THE COURT: -- of last year? April
16 21 of '21 to which the -- Mr. Rannik, on behalf
17 of the plaintiffs, has filed its memorandum in
18 opposition January 27 of '22. This case has been
19 before the Court before. The Court found the
20 defendants in default. Move to reopen default.

21 I kept them in default. The case went
22 on appeal. Ultimately, it was determined to be
23 an interlocutory order and is back before this
24 Court today. And I'm assuming for that would be
25 the damages hearing; is that correct?

1 MR. RANNIK: That's correct, Your
2 Honor.

3 THE COURT: Are y'all wishing to
4 proceed with that hearing today as well?

5 MR. RANNIK: We are, yes, Your
6 Honor.

7 THE COURT: All right. Well, then
8 we've got to overcome -- we've got to overcome
9 the motion to dismiss. Now, that's interesting.
10 All right. So I appreciate that. I've got a
11 memorandum from both of you, and I've got
12 Ms. Ariail's memorandum just this afternoon. I
13 assume you've got a copy?

14 MR. RANNIK: I do, thank you.

15 THE COURT: All right. Well, I'm
16 looking forward to an education. Ms. Ariail?

17 MS. ARIAIL: All right.

18 THE COURT: You get to go first.

19 MS. ARIAIL: Thank you so much. In
20 April, as you mentioned, I filed a motion to
21 dismiss based on lack of subject-matter
22 jurisdiction in this case.

23 THE COURT: Which is always subject
24 to review, is it not?

25 MS. ARIAIL: Absolutely, yes, sir.

1 THE COURT: All right.

2 MS. ARIAIL: And in fact it can be
3 sua sponte.

4 THE COURT: I've seen the State
5 Supreme Court do that in order to avoid having to
6 make a decision.

7 MS. ARIAIL: The motion is based on
8 the fact that Palmetto Construction Group -- I
9 will refer to them as PCG. I will just lapse
10 into that.

11 THE COURT: Okay.

12 MS. ARIAIL: But they filed with
13 the Secretary of State on March 22nd of 2019,
14 articles of termination for a domestic
15 corporation. Their original articles of
16 organization were October 30th of 2000.

17 The date of their dissolution, per this
18 article of termination, was February 22nd of
19 2019, and then the effective date of the
20 termination was actually the March date. Since
21 that time -- so in April of last year, I filed a
22 motion to dismiss. Since that time --

23 THE COURT: It was still on appeal
24 at that time, though, was it not?

25 MS. ARIAIL: Yes, sir. I think the

1 remittitur was a couple of -- about a week later.

2 THE COURT: Okay. All right. Just
3 before a decision then?

4 MS. ARIAIL: Yes, sir.

5 THE COURT: Okay. All right.

6 MS. ARIAIL: Actually, the decision
7 had been issued, it just hadn't --

8 THE COURT: It just had not been
9 processed? Okay.

10 MS. ARIAIL: Yeah. It hadn't been
11 handed down.

12 THE COURT: That motion was not
13 filed while it was -- really while it was on
14 appeal?

15 MS. ARIAIL: No, that's correct.

16 THE COURT: All right.

17 MS. ARIAIL: And then -- that's
18 correct. Since that time, plaintiff's counsel
19 has filed some filings with the Secretary of
20 State, and this is where it gets really
21 confusing.

22 They filed a correction, which first of
23 all, my position is that a correction for
24 termination is not proper. It's not allowed by
25 the Limited Liability Act.

1 There is a process in that act that
2 allows, if the LLC is dissolved, administratively
3 dissolved, there is actually a two-year period in
4 which you can file a certificate of correction
5 and have it administratively reinstated.

6 THE COURT: That's the 811 section,
7 right?

8 MS. ARIAIL: Yes, sir. There is
9 nothing in the Limited Liability Act that allows
10 for correction of a termination. That being
11 said -- and this is from plaintiff's memorandum,
12 on December 8th of 2021, Palmetto filed Articles
13 of Correction to undo the improper termination
14 and reinstate Palmetto.

15 And what they indicate that they
16 filed -- and this is actually something I just
17 discovered in the last little bit. What they
18 filed, they're showing as exhibit -- they filed
19 Exhibit E to their memo, which is the Articles of
20 Correction.

21 Interestingly, it was executed
22 apparently by Mr. Rannik, but there's no
23 signature on that document, which is a statutory
24 requirement. In addition to Exhibit E, it
25 indicates -- the memo indicates that they also

1 submitted Handegan and Eadie affidavits, which
2 are Exhibits B and C. Exhibit B --

3 THE COURT: All right. One second.
4 Are we in your exhibits?

5 MS. ARIAIL: We're in --

6 THE COURT: Mr. Rannik's?

7 MS. ARIAIL: -- in the plaintiff's,
8 yes, sir.

9 THE COURT: Okay. All right.

10 MS. ARIAIL: Exhibit B is an
11 affidavit of Mr. Handegan. He indicates that he
12 held the position of vice president of Palmetto
13 Construction Group. He indicates that he learned
14 through his lawyer that the -- Palmetto's
15 existence was terminated through the Articles of
16 Termination filed with Secretary of State, which
17 I mentioned.

18 And then he references -- includes that
19 as Exhibit A to his affidavit, and then he
20 mentions an affidavit from Ms. Eadie, who
21 indicates that -- which indicates that she
22 improperly filed that affidavit.

23 But what's disturbing to me is the
24 representations that are made in the plaintiff's
25 memorandum are not consistent with what was

1 actually filed with the Secretary of State's
2 office, and I actually included that as Exhibit J
3 to my memorandum. Exhibit J is a certified copy
4 that I received from the Secretary of State on
5 January 17th of this year.

6 THE COURT: Okay.

7 MS. ARIAIL: It includes the
8 Articles of Correction, again, not signed. It
9 includes the affidavit of Ms. Eadie. We will
10 talk about that in a little bit.

11 THE COURT: All right. Is that
12 Exhibit J to your -- to your memorandum?

13 MS. ARIAIL: That is Exhibit C to
14 the plaintiff's memorandum.

15 THE COURT: Okay. Exhibit C to the
16 plaintiff. You're referring to the affidavits
17 then?

18 MS. ARIAIL: Yes, the affidavit of
19 Ms. Eadie.

20 THE COURT: All right. I'm sorry.

21 MS. ARIAIL: But the certified copy
22 that was filed with the Secretary of State
23 actually includes the exhibit to -- it does not
24 include -- I'm getting myself confused.

25 The information that's provided by

1 plaintiff's memorandum includes Exhibit A to
2 Mr. Handegan's affidavit as Exhibit A to
3 Ms. Eadie's affidavit. Mr. Handegan's affidavit
4 was never filed with the Secretary of State, only
5 the affidavit, Exhibit A.

6 THE COURT: And that was Ms. Eadie?

7 MS. ARIAIL: And it was attached to
8 Ms. Eadie's -- if you look at the file, the way
9 that it's submitted to the Secretary of State, it
10 was filed as an attachment to -- it implies that
11 it's an attachment to Ms. Eadie's.

12 THE COURT: Okay.

13 MS. ARIAIL: All right. So let's
14 get back to the termination.

15 THE COURT: And Ms. Eadie, was she
16 the one that filed the original termination?

17 MS. ARIAIL: Ms. Eadie filed the
18 original termination.

19 THE COURT: Okay.

20 MS. ARIAIL: So the original
21 termination was filed in March of 2019. In April
22 of 2019, a lawsuit was filed in Charleston County
23 by Nathalia Mateus, I believe is the name,
24 against both Palmetto Construction Group,
25 Mr. Handegan, personally, and some other

1 companies.

2 In those pleadings, if you look at the
3 complaint against Palmetto and Mr. Handegan, at
4 that time, there was indications that Palmetto
5 Construction had been dissolved. Specifically,
6 and this is my Exhibit E, paragraph three of the
7 complaint indicates that Palmetto is or was a
8 company organized and operated under the laws of
9 the State of South Carolina.

10 Exhibit F is Palmetto Construction Group
11 and Mr. Handegan's answers. Defendant Palmetto
12 admits the allegations contained in paragraph
13 three.

14 Paragraph 5 of the complaint, Handegan
15 is or was a member of Palmetto and College Fund
16 and exercised control and direction over their
17 operations in Charleston, South Carolina.

18 Palmetto and Handegan's response and
19 their answer. The allegations contained in
20 paragraph 5 are admitted upon information and
21 belief.

22 Paragraph 8 of the complaint, the South
23 Carolina Secretary of State's records show
24 Palmetto and College Fund as having been
25 dissolved. The response and the answer of PCG

1 and Mr. Handegan. With regard to those
2 allegations contained in paragraph 8, the
3 defendants would crave reference to the Secretary
4 of State.

5 To the extent of information asserted in
6 paragraph 8 is incongruent or conflicting with
7 the Secretary of State's records, each conflict
8 or incongruity is denied.

9 Paragraph 9, Handegan was a member of
10 Palmetto and College Fund at the time of their
11 dissolutions. The answer, the Defendant Handegan
12 admits the allegations contained in paragraph 9.

13 So here we are less than a month after
14 the Articles of Termination were filed with the
15 Secretary of State. Palmetto and Mr. Handegan
16 are sued. He's sued personally in this case, and
17 they admit that the company has been dissolved.
18 Here we are two and a half years later, and we've
19 got an affidavit from Mr. Handegan that says, I
20 just found out about this.

21 The other thing that they provided is an
22 affidavit from this lady named Joanne Eadie.
23 Ms. Eadie is apparently some type of financial
24 person with comps and construction up in Sumter.
25 According to her LinkedIn information, she's got

1 a master's degree in accounting from Darla Moore.

2 She, in her affidavit, admits that she
3 filed these documents. She filed them for a
4 domestic corporation. She filed them citing the
5 very specific date that this company, Palmetto
6 Construction Group, LLC, a domestic corporation,
7 was -- filed their articles of -- their original
8 articles.

9 Her excuse is that she was trying to
10 terminate a company that is -- was incorporated
11 in Delaware, and in her affidavit, she says, upon
12 winding up the Delaware LLC's business affairs, I
13 filed a certificate of cancellation with respect
14 to the Delaware LLC with the State of Delaware's
15 Secretary of State.

16 Attached to my memorandum is that
17 dissolution, which doesn't take place for another
18 15 months. It's just -- these affidavits are all
19 over the place. Their credibility, the -- you
20 know, unfortunately the Secretary of State
21 doesn't do a review of the documents or what have
22 you. They just basically rubber stamp it and
23 move it along.

24 THE COURT: They could have filed
25 it with the Charleston County ROD, and it would

1 have been a different -- we'd have been in a
2 different ball game, wouldn't we? But we don't
3 need to go there.

4 MS. ARIAIL: Well, I won't go
5 there. Anyway, my point is this: They've
6 been -- they were terminated. There's no
7 statutory relief that allows them to correct a
8 termination.

9 The affidavits and the information that
10 they have supplied to support the correction that
11 was submitted to the Secretary of State are, at
12 best, confusing and conflicting. And,
13 accordingly, I would ask that you dismiss this
14 case based on their terminations.

15 THE COURT: Let me ask you before
16 you sit down. Ms. Eadie, in her affidavit, which
17 I'm certain was obtained by Mr. Rannik on behalf
18 of his client, she does state that she was in
19 error, does she not?

20 MS. ARIAIL: Yes, sir.

21 THE COURT: Okay. And are there
22 same or similar named entities? Is that what --
23 I think that's what she alleged in her affidavit,
24 did she not?

25 MS. ARIAIL: Yes, sir.

1 THE COURT: Well, one was a
2 Delaware corporation, and the other one was a
3 South Carolina --

4 MS. ARIAIL: Right.

5 THE COURT: -- company corporation.

6 MS. ARIAIL: Yes, sir.

7 THE COURT: A limited liability
8 company.

9 MS. ARIAIL: Right.

10 THE COURT: And so they filed it in
11 South Carolina. She's in South Carolina.

12 MS. ARIAIL: She is in South
13 Carolina.

14 THE COURT: And it was filed both
15 here first and then filed some time later in
16 Delaware?

17 MS. ARIAIL: Right.

18 THE COURT: Is that what we -- the
19 timing was?

20 MS. ARIAIL: Right, yes, sir.

21 THE COURT: All right. Very good.

22 Mr. Rannik, the ball is in your court.

23 MR. RANNIK: Thank you very much,
24 Judge. Let me start where Ms. Ariail started as
25 well, saying that she was disturbed by some of

1 the things in these affidavits. I couldn't agree
2 more. Our clients found that their company had
3 been terminated, and they didn't do it.

4 Someone claimed to be a fiduciary, who
5 they had never heard of, who works for another
6 construction company in the upstate, and filed
7 Articles of Termination. No Articles of
8 Dissolution were ever filed. You can tell that
9 by looking at the Secretary of State's website,
10 which I believe I included the printout as
11 exhibit E to my memorandum.

12 THE COURT: OKAY.

13 MR. RANNIK: And it says here, the
14 effective date of this corporation is October the
15 30th, 2000. It says, Articles of Correction were
16 filed in 2021. Articles of Termination were
17 filed in 2019. The previous filing was a change
18 of registered agent in 2006. There's no filing
19 for Articles of Dissolution.

20 THE COURT: Okay.

21 MR. RANNIK: A company cannot be
22 terminated until it has dissolved and then states
23 that it is finished it's winding up process.
24 That's -- according to the statute, that's when
25 you can terminate, and then the existence,

1 apparently, of the corporation has ended.

2 There's actually nothing in the statute
3 that says what effect, if any, that has on
4 existing claims or pending claims. I know it has
5 to dissolve corporations. You can sue and be
6 sued for 10 years after dissolution. There's
7 just nothing about what the effect is on a
8 terminated entity. But the fact is, Palmetto
9 never terminated its existence.

10 When this error was brought to the
11 attention of the Secretary of State, they said,
12 okay, well, yeah, we don't have a mechanism to
13 really check this, so we just rubber stamped it,
14 as Ms. Ariail said.

15 Here's what you need to do, file
16 Articles of Correction, get an affidavit from the
17 original filer and from someone in the company
18 saying that this person was not a fiduciary or an
19 agent or a representative of the company, and we
20 will reinstate the corporation as if it never
21 went out of existence.

22 The difficulty that arose, in the
23 meantime, someone else started using the name
24 Palmetto Construction, LLC.

25 THE COURT: I saw that. That just

1 adds more problems here.

2 All right. So what was the -- take me
3 through the process of how you located Ms. Eadie
4 and what y'all did to correct the record. How
5 did that happen?

6 MR. RANNIK: Of course.

7 THE COURT: And what put y'all on
8 notice of that?

9 MR. RANNIK: When we found that
10 Articles of Termination had been filed, we
11 requested a copy of them. The copy of them, of
12 course, had as a signature, Joanne Eadie, finance
13 director. So we Googled Joanne Eadie, and she
14 came up as finance director of Thompson
15 Construction.

16 So I wrote a letter to Thompson
17 Construction saying, this has happened. I assume
18 and hope this is an error and not intentional.
19 There's -- you're on notice of a potential claim.
20 I suggest that you get in touch with your E&O
21 coverage.

22 And the next thing that happened, I got
23 a call from a lawyer saying, we will write an
24 affidavit. How's this? And they sent it over
25 the next day.

1 THE COURT: Okay. All right.

2 MR. RANNIK: I would also like to
3 address two things, if I may, that Ms. Ariail
4 said.

5 THE COURT: All right.

6 MR. RANNIK: She said that the
7 Articles of Correction were not signed, but
8 that's not true. When you file them online, you
9 have to enter your name, and that is as effective
10 as a signature. They say, I am an attorney in
11 fact or I am a fiduciary.

12 THE COURT: This is signed by you,
13 is it not --

14 MR. RANNIK: It is.

15 THE COURT: -- by attorney in fact
16 for the LLC, Palmetto Construction Group?

17 MR. RANNIK: Yes, sir.

18 THE COURT: Okay.

19 MR. RANNIK: The other thing, I
20 would note that dissolution was not admitted to
21 in this Mateus suit. Specifically, the
22 allegation is that the South Carolina Secretary
23 of State's records show Palmetto as having been
24 dissolved.

25 The answer was, to crave reference to

1 the Secretary of State and to deny the
2 allegations to the extent that any of them are
3 incongruent with the Secretary of State's
4 records.

5 As we've seen, the Secretary of State's
6 records show no dissolution. So we just said,
7 no, we crave reference to the Secretary of State.

8 THE COURT: And as the attorney for
9 the Palmetto Construction, have y'all been in
10 existence and carried on business all this time?

11 MR. RANNIK: Palmetto Construction
12 Group was actually put out of business by the
13 case that brings us here today.

14 THE COURT: Okay.

15 MR. RANNIK: The damages to them
16 were so substantial that they ceased operations.
17 Now, they still have -- they're still in
18 existence. They've still been trying to pay out
19 various claims that have accrued against them
20 over the years, but they are not currently doing
21 business, no.

22 THE COURT: As that entity?

23 MR. RANNIK: Correct.

24 THE COURT: All right. The tail
25 just twists and turns even more, does it not?

1 MR. RANNIK: It does, Judge.

2 THE COURT: But to resurrect --
3 your argument is, to resurrect the Palmetto
4 Construction Group because someone else had
5 grabbed the name in this interim period, y'all
6 are now, what, Palmetto Construction Group of SC,
7 LLC?

8 MR. RANNIK: That's right, Judge.

9 THE COURT: You add the "of SC" on
10 there, and filed with the Secretary of State.
11 Did your filing go back to the original date of
12 2000, or was it created as a new entity when
13 y'all re-filed?

14 MR. RANNIK: It went back to the
15 original effective date, and if I could approach?

16 THE COURT: All right.

17 MR. RANNIK: Here's a copy of my
18 exhibit. I believe this is Exhibit E to my memo.

19 THE COURT: Okay.

20 MR. RANNIK: And I put a little
21 mark there, and you can see in the bottom, it
22 says, former names, Palmetto Construction. Now,
23 at the top, it's Palmetto Construction Group of
24 LLC (sic), and the effective date remains October
25 30th, 2000.

1 THE COURT: Yeah. I was trying to
2 find out why John Kendle was relevant. It was
3 previously known as John Kendle, LLC?

4 MR. RANNIK: It was. And he is one
5 of the partners of Palmetto. He's here today.

6 THE COURT: Okay. All right. I
7 gotcha. This is what you see when you go online
8 today?

9 MR. RANNIK: It is, Judge.

10 THE COURT: All right. Effective
11 date, 10/30/2000. I'm assuming the agent changed
12 when it went from Kendle to Palmetto in 2006, or
13 was there something else?

14 MR. RANNIK: I think it might have
15 just been a change of registered agent or
16 address.

17 THE COURT: Okay. All right, sir.
18 So y'all's position is, we're reinstated with a
19 new name but basically the same entity; is that
20 right?

21 MR. RANNIK: Yes, Judge.

22 THE COURT: All right. Ms. Ariail?

23 MS. ARIAIL: Your Honor, just
24 briefly. Mr. Rannik, he's addressing the Court
25 and telling them that there was no indication

1 that -- of when it was dissolved, when the
2 company was dissolved. That's clearly a part of
3 the Articles of Termination. It was a different
4 date than the -- than the termination itself.

5 So there is a filing that was on -- in
6 the record at the Secretary of State as of March
7 22nd that said, dissolution occurred on February
8 22nd of 2019, so when --

9 THE COURT: Let me see that.

10 MS. ARIAIL: This is Exhibit A.

11 THE COURT: This is the one that
12 Ms. Eadie prepared?

13 MS. ARIAIL: No. This is the
14 Secretary -- yes, yes. I'm sorry.

15 THE COURT: All right. Okay. She
16 states the date the dissolution was?

17 MS. ARIAIL: Yes, sir.

18 THE COURT: Okay. Okay.

19 MS. ARIAIL: So there was a date of
20 dissolution on the Secretary of State's records
21 that were in place when that other lawsuit was
22 brought merely, you know, a month later. So I
23 don't know how there's an argument that there
24 isn't an indication that they were dissolved
25 prior to the termination.

1 THE COURT: Okay. Well, it does
2 state that.

3 MR. RANNIK: And, Judge, it states
4 that. Ms. Eadie states that.

5 THE COURT: Right.

6 MR. RANNIK: She also states that
7 she's the fiduciary for Palmetto, which she
8 acknowledges in her affidavit that she was not.
9 The Secretary of State does not show a record of
10 dissolution.

11 THE COURT: All right.

12 MS. ARIAIL: And Mr. Handegan,
13 obviously in his pleadings filed in this Court,
14 indicated that, yes, he agreed with that filing
15 at that time.

16 THE COURT: Yeah, with the -- they
17 didn't deny whatever was at the Secretary of
18 State's office.

19 MS. ARIAIL: Right. They admitted
20 it.

21 THE COURT: Very interesting. All
22 right. Well, y'all made me go look in the book.
23 That's what I did when I came out here at 2
24 o'clock, thinking y'all were at 2 and not 2:30.
25 First, I had to go looking for 811, which I

1 found. Because we are in the Uniform Limited
2 Liability Company Act, which is part of our
3 business corporation statutory scheme, which I
4 was around when they passed that thing.

5 That was some time in the '80s, if I
6 recall, the '88 Act, I think, is the one that
7 created all this stuff. LLCs were in '96.
8 33-44-811, which Ms. Ariail, it had been
9 referenced as being 33-33, but I knew that was --
10 found that to be a typo because it had to be in
11 the LLC.

12 MS. ARIAIL: Yes, sir.

13 THE COURT: So it does read,
14 reinstatement following administrative
15 dissolution. A limited liability company
16 administratively dissolved may apply for
17 reinstatement within two years after the
18 effective date of dissolution.

19 Well, the administrative dissolution is
20 part of the administrative procedures that were
21 done, and I guess -- of course, a term of art in
22 the winding up of the company's business, which
23 is Article 8 of the LLC Act. Events causing
24 dissolution.

25 It says the -- 801 defines what the

1 events are; 802 does not specifically state
2 administrative dissolution, 802. The company
3 continues after dissolution; 803, have a right to
4 wind up the business.

5 Then you get to 805, which is the
6 Articles of Termination. 806, distribution of
7 assets; 807 is known claims. That's that purpose
8 of the 10-year statute, and then 808, other
9 claims. 809 states grounds for administrative
10 dissolution.

11 The Secretary of State may commence a
12 proceeding to dissolve a limited liability
13 company administratively if the company does not
14 pay a fee, tax, or penalty imposed by this
15 chapter or other law within 60 days after due.

16 Procedure for and effect of
17 administrative dissolution. The Secretary of
18 State is the moving party in the event of an
19 administrative dissolution, under 810. And under
20 811, the reinstatement requires that the limited
21 liability company act if they have been dissolved
22 administratively within two years after the
23 effective date of dissolution.

24 The comment to 809 as the grounds for
25 administrative dissolution is that it's an

1 effective enforcement mechanism for a variety of
2 things and avoids the more expensive judicial
3 dissolution process.

4 When applicable, administrative
5 dissolution avoids wasteful attempts to compel
6 compliance by a company abandoned by its members.
7 There's no evidence in the record that the
8 members of this company have abandoned the
9 company.

10 In fact, Mr. Rannik has alleged just the
11 opposite. So then I go to -- frankly, I looked
12 at the form. These numbers -- these documents
13 that y'all submitted, they each have their own
14 form. I guess that's a statewide procedure.

15 Articles of Termination, last revised in
16 October of '18 is Form 45. The Articles of
17 Correction, that looks like August of '16 to me,
18 it was revised, and that's Form 36. You find
19 that in the bottom right-hand margin of those.
20 So the Articles of Correction lead you to
21 33-44-207, which, of course, is going to be under
22 the organizational section of the LLC Act.

23 207 says, correcting a filed record. A
24 limited liability company or a foreign limited
25 liability company may correct a record filed by

1 the Secretary of State if the record contains a
2 false or erroneous statement or was defectively
3 signed, Section A.

4 Section B, a record is corrected by
5 preparing an Article of Correction that described
6 the record, specified the incorrect statement,
7 and correct the incorrect statement and deliver
8 the corrected record to the Secretary of State
9 for filing.

10 Section C, Articles of Correction are
11 effective retroactively on the effective date of
12 the record they correct except as to persons
13 relying on the uncorrected record and adversely
14 affected by the correction. As to those persons,
15 the Articles of Correction are effective when
16 filed.

17 So it may have been, if I read that
18 correctly on the way that it operates, it
19 would -- I would assume that it would mean, your
20 client having relied upon the record and its
21 motion to dismiss would have been appropriate up
22 until the time they did take the effort to
23 correct the record, which was just done in
24 December.

25 Was that December of this past year?

1 MR. RANNIK: It was, Judge.

2 THE COURT: All right. So it's
3 unusual -- this is a very unusual situation, but
4 I think frankly Ms. Eadie's affidavit explains
5 what happened, and I think -- I don't know.

6 And you raised the question of
7 credibility, and you can't really get that from
8 an affidavit, but it seems to me that she
9 intended to dissolve the group out of Delaware --
10 Palmetto Construction Group, LLC, out of Delaware
11 and mistakenly filed it in the State of South
12 Carolina.

13 It makes sense to me that they would try
14 to do that because while it was formed in --
15 while that entity was formed in March of '05,
16 according to the Delaware record you submitted in
17 Exhibit I, that company didn't merge apparently
18 in February '06. So it didn't even have an
19 existence for much more than a year, and then
20 they cancelled it in June of 2020.

21 I'm assuming they cancelled it at some
22 point in time when they became aware -- or
23 somebody became aware that it was not previously
24 cancelled. And so that was done in Delaware with
25 the Certificate of Cancellation.

1 MS. ARIAIL: Well, her affidavit
2 actually says that, upon winding up the Delaware
3 LLC's business affairs, I caused to be filed a
4 Certificate of Cancellation. She never states
5 the date, and that's why I did include the
6 Delaware documents.

7 THE COURT: Yeah, yeah. Right,
8 which was after this event; so clearly, that's
9 why I say, I mean, I think it lends credence to
10 the fact that she filed the dissolution articles
11 in the wrong state.

12 She should have filed them in Delaware,
13 when in fact, they were filed in South Carolina,
14 which would have gotten rid of the entity in this
15 state known as Palmetto Construction Group, LLC.

16 Somebody comes along in the meanwhile
17 and decides it's a great name, and they want that
18 name. They grab the name, and so y'all have got
19 to come back and create Palmetto Construction
20 Group of SC, LLC. I assume that was only found
21 out after you had filed initially to get it
22 written and stated as a company.

23 MR. RANNIK: You're exactly right,
24 Judge.

25 THE COURT: Okay. Well, this is

1 just one of those weeks, I guess. I've got to
2 try a domestic case at the end of the week. I
3 just can't wait.

4 All right. So based on that, I do think
5 that -- my reading of Section 207 allows the
6 record to be corrected, correcting the filed
7 record. It appears to me that the plaintiffs
8 have done that properly.

9 I understand your issue with that,
10 Ms. Ariail, but it seems to me that, upon filing
11 that record, there's no time limitation that I
12 could see in this section. You could request,
13 under Section 208 of the Secretary of State, to
14 furnish a Certificate of Existence, if you'd
15 like.

16 But it seems to me that that would be --
17 under 207, be granted easily because, as to those
18 persons, Articles of Correction are effective
19 when filed. Had they not been filed as of
20 today's date, as of the date of this hearing, I
21 don't think I would have any choice but to grant
22 your motion.

23 But that has been done; therefore,
24 effective December, I think it was the 8th, if I
25 remember right -- December 8th of 2021, the

1 filing became effective. It makes it retroactive
2 back to the date of dissolution, the erroneous
3 dissolution, let's just call it, of 2019, March
4 of 2019.

5 It would be effective as to anyone, but
6 as to those who could be adversely effected,
7 which would clearly include your clients, your
8 defendants. It would be effective once it's
9 filed. So on that basis, I'm going to deny that
10 motion to dismiss.

11 Any other matters to take up before we
12 start? Mr. Rannik, how do you wish to proceed,
13 sir?

14 MR. RANNIK: Thank you, Judge. I
15 would like to call as a witness, Ms. Kathryn
16 Peterson.

17 THE COURT: All right.
18 Ms. Peterson, come on up. You're now qualified
19 to testify.

20 (KATHRYN PETERSON, having first
21 been duly sworn, testified as follows:)

22 THE COURT: And give me your full
23 name and address, please.

24 THE WITNESS: It's Kathryn Ann
25 Peterson, K-A-T-H-R-Y-N. My address currently is

1 1906 Yardley Road in Yardley, Pennsylvania.

2 THE COURT: All right. I know
3 exactly where you are.

4 THE WITNESS: It's a nice little
5 town.

6 THE COURT: It is a nice little
7 town. 19037?

8 THE WITNESS: 19067. Very good.

9 THE COURT: I have some good
10 friends that used to live in Yardley until very
11 recently. It's a nice little town.

12 THE WITNESS: It's a very cute,
13 little town.

14 THE COURT: You've got a great
15 little inn in that town, as a matter of fact.

16 THE WITNESS: Yep. They do.

17 THE COURT: Okay. Mr. Rannik, you
18 may proceed, sir.

19 MR. RANNIK: Thank you very much,
20 Judge.

21 DIRECT EXAMINATION

22 BY MR. RANNIK:

23 Q. Good afternoon, Ms. Peterson. Thank you
24 so much for being here today. Can you tell the
25 Judge a little bit about yourself?

1 A. Yeah. My name is Kathryn Peterson. I
2 am a mother of five. My husband is currently
3 active duty in the US Air Force, and I came to
4 Charleston for school back in '03.

5 Q. And where did you go to school?

6 A. College of Charleston.

7 Q. And what was your degree?

8 A. Mathematics.

9 Q. What did you do after college?

10 A. I actually went back to college while I
11 was working at Palmetto Construction Group; so I
12 continued my job at Palmetto Construction Group
13 after college.

14 Q. Okay. And was Palmetto Construction
15 Group your first job after college?

16 A. No. I actually -- well, I had a job
17 before Palmetto Construction Group. My first job
18 was for G&S Home Remodeling, a residential
19 construction company in North Charleston. They
20 did anything from additions to window
21 replacements, roofs, anything like that.

22 Q. And when did you join Palmetto
23 Construction?

24 A. I joined Palmetto Construction in 2006.

25 Q. What was your position?

1 A. Originally I was hired as an accounting
2 manager to handle receivables and payables,
3 payroll, anything like that. Eventually, I
4 became their controller. I handled all internal
5 financial statements, all bond communications
6 with the bonding agents.

7 I would update the members of the
8 company on a monthly basis, how we were tracking
9 what we were doing, and then I also handled
10 contract administration, so any subcontracts or
11 purchase orders, I would issue, maintain, and
12 follow.

13 Q. Tell the Judge a little bit about
14 Palmetto Construction. At first, how many people
15 were employed by Palmetto at its height?

16 A. 17 or 18 people, approximately.

17 Q. And when would that have been?

18 A. That would have been from when I started
19 there, or closely thereafter. I was -- I started
20 when we were kind of at our -- starting to head
21 towards our peak. So I would say throughout
22 until 2014 or '15.

23 Q. And then, what were the numbers like in
24 2014 to '15?

25 A. So we started to have to make some

1 severe cutbacks because of situations and
2 projects that were not going the way we wanted
3 them to.

4 Q. Okay. We'll touch on that a little bit
5 later, but what kind of work did Palmetto do and
6 for what kinds of clients?

7 A. So Palmetto Construction Group works in
8 the bid market in the Charleston area or
9 surrounding areas. That means we would do
10 anything from \$500,000 to \$17 million in general
11 commercial construction.

12 We -- anything. Anything that was a
13 bid, we would do. And the bid market, you're
14 compiling a bunch of prices, and then you're
15 managing the actual bills.

16 Q. And would that be a general contractor?

17 A. Yes.

18 Q. Okay. And was this bonded work?

19 A. 90 percent of our work was bonded,
20 correct, maybe even more, yes.

21 Q. Let's talk specifically about the
22 project that brings us here today, that Palmetto
23 performed with Restoration Specialists and Mark
24 Ward. First, what was that project?

25 A. That was the VA parking garage. It was

1 originally contracted, I believe, in 2012. I
2 know it was a 2012 job.

3 We had some issues at first in regards
4 to where people would park while we were building
5 the garage. Since it was design builds, we had
6 to design a plan to determine where people would
7 park. I know that we went as far as pricing up
8 shuttles to get people to the hospital.

9 When we finally determined -- and it was
10 accepted -- how we would get people to the
11 hospital and where they would park, some time had
12 passed. We had price increases and we had a
13 temporary parking lot to build; so we had some
14 change orders.

15 Q. Okay. What was the original contract
16 price from the VA?

17 A. It was approximately \$6 million.

18 Q. And where did it end up?

19 A. 8.5, I believe, 8.4.

20 Q. Okay. Now, how did Palmetto
21 Construction Group come to be involved in this
22 project?

23 A. I'm not a hundred percent sure how we
24 met with Mark or how we met Mark. I know that we
25 were in a period of growth and we were trying to

1 delve into different markets, the negotiated
2 market, the Federal market. Somebody knew Mark.
3 Mark came in, and we decided to price this job
4 together.

5 Q. And what was the sort of split of
6 responsibility between Restoration and Palmetto?

7 A. Restoration was supposed to be the point
8 of contact for the federal government, and we
9 were supposed to do what we do best, which is
10 build the garage, physically build it.

11 Q. And so did that involve any subcontract
12 work on the part of Palmetto?

13 A. We did. We had the concrete contractor
14 below us.

15 Q. Okay.

16 A. Yes.

17 Q. Now, did Palmetto -- did you have any
18 concerns going into this project about working
19 with Restoration?

20 MS. ARIAIL: Your Honor, I'm going
21 to object. This is a damages hearing. The
22 defendants are in default, and the admissions
23 that are contained in the complaint are what we
24 should be dealing with.

25 I understand, you know, giving her a

1 little leeway with kind of setting up the
2 relationship between the parties, but, when we
3 get into more specific stuff, I believe we need
4 to stay within the four corners of the complaint.

5 MR. RANNIK: And I can bring it
6 right back there, Judge.

7 THE COURT: Okay. All right. I
8 will allow it.

9 BY MR. RANNIK:

10 Q. Who procured the bond for this project?

11 A. Palmetto Construction Group did.

12 Q. Why is that?

13 A. Payment and performance bonds are
14 required for federal jobs or any job that you're
15 working for, like Charleston County and a ton of
16 jobs for Charleston County because you can't file
17 liens on federal property.

18 So in order to get payment and
19 performance bond, you have to have a history and
20 you have to show that you're capable of doing the
21 job. Bonds are not given out to anyone. Mark
22 Ward could not get a bond or a Restoration.

23 MS. ARIAIL: I'm going to object
24 again. Same objection, Your Honor. We're
25 steering way off of the four corners of the

1 complaint. We are here to talk about damages.

2 THE COURT: I'm going to allow it.

3 Go ahead.

4 THE WITNESS: Restoration

5 Specialists could not get a bond, and

6 therefore --

7 MS. ARIAIL: Objection, Your Honor.

8 THE COURT: Overruled.

9 THE WITNESS: Palmetto Construction

10 Group and Restoration Specialists decided to do

11 the project together.

12 BY MR. RANNIK:

13 Q. Was there any financial incentive to
14 Palmetto to obtain the bond on Restoration's
15 behalf?

16 MS. ARIAIL: Objection. Again
17 outside the four corners of the complaint.

18 THE COURT: Overruled.

19 THE WITNESS: Besides the profit
20 share, no, there was no benefit to supplying
21 payment and performance bond.

22 MS. ARIAIL: Objection. Again --

23 THE COURT: Overruled. You will
24 have a --

25 MS. ARIAIL: I request that her

1 answer be stricken.

2 THE COURT: You'll have a
3 continuing objection; so I don't need to go
4 through it all the time.

5 MS. ARIAIL: Thank you, Your Honor.
6 I appreciate that.

7 THE COURT: Yeah.

8 BY MR. RANNIK:

9 Q. All right. Well, why don't we delve
10 into the agreements between Palmetto and
11 Restoration so we can steer this towards the
12 amount of the damages?

13 MR. RANNIK: Your Honor, may I
14 approach --

15 THE COURT: You may.

16 MR. RANNIK: -- the witness and the
17 bench?

18 THE COURT: Just watch your step.

19 BY MR. RANNIK:

20 Q. Would you please turn with me to tab 2
21 of this binder and would you describe for the
22 Court what is behind this tab?

23 A. This is a teaming agreement between
24 Restoration Specialists and Palmetto Construction
25 Group to do work together.

1 Q. Okay. And is this a document that would
2 be kept in the ordinary course of business by
3 Palmetto?

4 A. Yes. For work with others, yes.

5 Q. Okay. Now, you mentioned a profit
6 share. Is that agreement in writing anywhere?

7 MS. ARIAIL: Objection.

8 THE COURT: Overruled. Go ahead.

9 THE WITNESS: I believe it's in tab
10 3. There's an AIA document, which is a standard
11 subcontract agreement, and it states the profit
12 share on the subcontract breakdown.

13 MS. ARIAIL: Objection. The
14 subcontract is an attachment to the complaint.
15 There is not an attachment that she's referencing
16 that's included as the attachment A to the
17 complaint.

18 THE COURT: Are you trying to limit
19 him to just what was in the four corners of the
20 document, the complaint?

21 MS. ARIAIL: Yes, sir, Your Honor.
22 I mean, they've got the teaming agreement, I
23 admit. It's attached to here. The subcontract
24 is attached to here. The document that she's
25 referencing is not a portion of the subcontract

1 that was filed with the Clerk of Court when the
2 complaint was filed. It's not there.

3 THE COURT: All right.

4 MR. RANNIK: Several things, Your
5 Honor.

6 THE COURT: Can you form a basis
7 for that?

8 MR. RANNIK: Several things.
9 First, I do not believe we are limited to the
10 four corners of the complaint or else, how could
11 we have a damages hearing with live testimony?

12 THE COURT: Right.

13 MR. RANNIK: Secondly, the document
14 that is being referenced right now is
15 specifically listed on page 15 of the version
16 that was filed with the complaint as an addendum.
17 It's the next page in this copy. I don't know
18 why it wasn't filed with the complaint, but it's
19 part of the original contract, and it's
20 referenced therein.

21 THE COURT: Okay. All right.

22 MS. ARIAIL: Your Honor, the
23 reference in the subcontract has a dated
24 document. The document that's attached at tab 3
25 is not a dated document. I would submit that

1 it's not -- you know, it hasn't been
2 authenticated. It's not even the same document
3 that's referenced in the subcontract. I would
4 object to it being used in this hearing.

5 THE COURT: All right. I'm going
6 to overrule the objection, and then you have to
7 tell me which document you're referring to.

8 MR. RANNIK: Thank you, Judge.
9 We're in tab 3 on the very last page.

10 THE COURT: All right. The
11 itemized list on the last page?

12 MR. RANNIK: Yes, Your Honor.

13 THE COURT: All right. Lay some
14 foundation for that for me so I know what it is.
15 BY MR. RANNIK:

16 Q. Ms. Peterson, can you describe, what is
17 this document, this page?

18 A. This is PCG's subcontract breakdown. It
19 basically states approximations for our costs,
20 and the Atlantic Concrete contract. And then it
21 says down at the bottom, the total, which is the
22 amount in the subcontract on page 10.

23 Q. Have you ever been involved in preparing
24 such --

25 MS. ARIAIL: I'm going to, again,

1 object, Your Honor. There's been no indication
2 who prepared this document. It's not dated as
3 required by the subcontract. The subcontract was
4 very specific that the document -- a document
5 attached --

6 THE COURT: All right. I'm going
7 to stop you because I understand you're making an
8 objection, and you're entitled to do some
9 objecting.

10 But, basically, when you're in default,
11 a defaulting party is allowed to cross-examine
12 the witness. I'm going to give you full ability
13 to do that. But right now, it's beyond that. So
14 I want them to make a record, and we will
15 proceed. Okay? So overruled.

16 MR. RANNIK: Thank you, Your Honor.

17 BY MR. RANNIK:

18 Q. Ms. Peterson, are you familiar with
19 contract breakdowns of this kind?

20 A. Yes.

21 Q. And you've prepared them in your career?

22 A. I have.

23 Q. Okay. Now, where on this page does it
24 refer to the profit sharing?

25 A. Almost the very bottom of the itemized

1 items. It says, spec section not applicable
2 RSPCG projected 50 percent profit share to be
3 determined.

4 Q. Okay. And that's referring to a split
5 of the profits from this job?

6 A. From the job, yes.

7 Q. Were there anticipated profits from this
8 job?

9 A. There were anticipated profits,
10 definitely.

11 Q. And in about what range?

12 A. We were expecting this job, if I'm -- I
13 want to say 10 percent is what we were --

14 MS. ARIAIL: Your Honor, I hate to
15 interrupt again, but I assume my standing
16 objection is still --

17 THE COURT: Sure.

18 MS. ARIAIL: Thank you.

19 THE WITNESS: I remember that
20 because this was a federal job, and we were
21 trying to break into that market. And it was the
22 more attractive market than the bid market. At
23 that time, I believe the bid market was sitting
24 anywhere between 4 and 7 percent.

25 BY MR. RANNIK:

1 Q. Okay. Can I get you to turn to the
2 previous page of the same tab?

3 A. Yes.

4 Q. And can you tell me -- actually, sorry,
5 it's not there. The first page of tab 3.

6 A. Okay.

7 Q. Can you tell me what the date of this
8 document is up at the top there?

9 A. September 10th, 2014.

10 Q. And can you remind the Court what the
11 date of the teaming agreement was?

12 A. November 28th, 2011.

13 Q. So this subcontract was later?

14 A. Yes.

15 Q. You've mentioned a bond and Palmetto's
16 obtaining a bond. Will you turn to tab 4,
17 please, and describe what's behind tab 4 to the
18 Court?

19 A. Tab 4 is an indemnity agreement signed
20 by all parties -- let's see -- all parties of
21 PCG, and I think the Wards as well. I'm not
22 sure. Yep. Jill, John, Carrie. Yes, this is
23 the indemnity agreement signed by all parties
24 involved.

25 Q. Okay. And if you keep turning back, is

1 there a performance and payment bond also behind
2 this?

3 A. Yes.

4 Q. And are these the performance and
5 payment bonds and indemnity agreement associated
6 with this project?

7 A. Yes, they are.

8 Q. How did Palmetto find out the claims
9 were being made against the bond on this project?

10 A. So on this project, we actually brought
11 a lot of our own subcontractors. It was a little
12 further away, but a lot of our subcontractors
13 were willing to go to Augusta, Georgia. So what
14 happened at first was, we started getting phone
15 calls specifically from people we knew on-site.
16 That was brief.

17 Almost very rapidly after that, we
18 started getting bombarded with letters from the
19 surety, phone calls from the surety, demands for
20 meetings. Any communication, whatsoever, in
21 regards to why people weren't getting paid. Was
22 there a problem.

23 The bond company first thought maybe
24 there was a discrepancy with the payments because
25 that does happen at times. We reached out to

1 Mark. Very little to no communication. And,
2 eventually, he just told us to pay it.

3 Q. Okay. Had Palmetto previously ever had
4 to -- or had a claim on one of its bonds?

5 A. So Palmetto Construction Group, from
6 time to time, because of notices of furnishing
7 and the way the South Carolina law requires a
8 notice of furnishing when a notice of
9 commencement is filed, we, from time to time, had
10 discrepancies that we had to work through, but
11 never did we have the bonding company have to pay
12 on our behalf, never.

13 Q. Let's turn, if you would, please, to tab
14 6, and let's talk about the specific amount of
15 damage that Palmetto is seeking today. Can you
16 describe this document for the Court and what the
17 categories of damages are?

18 A. All right. So the first category, due
19 to Palmetto for subcontract work. This is
20 strictly costs we incurred that we were never
21 compensated for. The second item is the share of
22 profits, and I would say that's a conservative
23 figure. Due to surety, 1.3 million was what
24 Hanover paid out on this project.

25 Lost profits. First, I would say that

1 is an incredibly conservative figure over the
2 course of five years. I know for a fact that in
3 2016, Palmetto Construction Group lost \$490,000
4 on two projects and then an additional \$250,000
5 on a project because they could not bond because
6 of what was happening at the VA and the jobs had
7 to go elsewhere.

8 Q. Okay. And we'll come back to the
9 specifics on there in a moment. What are the
10 other categories of damages?

11 A. Damages, attorney's fees and other
12 matters. That is -- there was a lot of fallout
13 when this job failed, and Palmetto Construction
14 Group could no longer function.

15 There were other subcontractors on other
16 projects that went south. So we had to pay
17 attorneys and different ways to help us settle
18 things out. And then interest.

19 That interest figure is just on the
20 balance due to Palmetto, the cost, and then the
21 amount due to Hanover because those two figures
22 are not debatable.

23 Q. Okay. Now, there's one thing I realized
24 that I just glossed over. What was the effect on
25 Palmetto of these claims being made on the bond?

1 A. Palmetto Construction Group went from a
2 15 to 17 million dollar company every year --
3 that's how much revenue we generated -- to not
4 being able to get bonds.

5 You know, 90 percent of our work was
6 bonded work. When you have no bonds, you don't
7 have work. So the effect, the direct effect was
8 we -- they went out of business. Like, they went
9 out of business.

10 Q. Let's dive into these numbers with a
11 little more specificity now.

12 A. Uh-huh.

13 Q. Let's start with the profit share.

14 A. Okay.

15 Q. Would you please turn to tab 7. And
16 explain to the Judge what these first couple of
17 pages here show.

18 A. Okay. So this shows the total contract
19 price sitting at 8.199283. It's going to show a
20 list of all the subcontractor contract sums, and
21 then down below that, it has verified job costs
22 and unverified job costs.

23 Q. Now, when you say verified and
24 unverified, what do you mean?

25 A. Verified job costs -- so we didn't have

1 access to Mark's costs. Verified job costs is
2 just what we've received since all of these cases
3 or lawsuits or whatever they're called, this --
4 these are copies of checks we've received.

5 Q. And are those the documents behind tab
6 7A?

7 A. Yes.

8 Q. Okay. And these are all the checks
9 that --

10 A. Yes.

11 Q. -- were received on the job?

12 A. Yes.

13 Q. Okay. And what would -- what is the
14 purpose of this first page? What is it trying to
15 achieve?

16 A. It's trying to achieve how much profit
17 this job made. So if you look down, there's a
18 contract sum, and then you back out all of the
19 total job -- all of the costs. So the 7.1, the
20 100 and the 530, it looks like. Your total
21 profit ends up being \$450,000.

22 Q. And Palmetto's 50 percent share of that
23 would be?

24 A. 225.

25 Q. Okay. And let's look at pages 2 and 3.

1 Is this doing the same kind of thing?

2 A. Yes. This has to do with the amounts
3 paid. So these -- this is tallying all of the
4 checks that we received from Restoration
5 specialists, the copies, and then the amounts
6 owed based on the contract sum, showing the
7 balance due.

8 And, once again, your total contract
9 minus your unverified job cost, subs for which,
10 you know, records -- payment records were
11 received, and your total job costs on the bottom
12 line.

13 Q. And it's the same number?

14 A. Same number.

15 Q. Two different methods, same number?

16 A. I will say that this is the most
17 conservative you can be because I know for a fact
18 some of these people settled for not getting a
19 check.

20 Q. And are you referring to some of the
21 unverified job costs?

22 A. Yes, I am.

23 Q. And so for purposes of this document,
24 Restoration was given the benefit of the doubt,
25 as if they had paid these full amounts?

1 A. Yes, as if they paid the full amount.

2 And I know for a fact -- I remember, I believe it
3 was -- it was either Peachtree or Maynor, because
4 of his relationship with John Kendle, took
5 pennies on the dollar.

6 Not pennies. Probably, if I remember,
7 maybe 70 cents on the dollar. A lot of these
8 subcontractors, because of their relationship
9 with John, settled. So this is conservative.

10 Q. So less gets paid, more is left for
11 profit?

12 A. Yes.

13 Q. Okay. Now, what, if any, agreement was
14 there between the parties to apply internal costs
15 to costs -- as costs of the work?

16 A. I believe it stated in the teaming
17 agreement to not -- indirect costs is not job
18 costs, and that's, in my opinion, an industry
19 standard.

20 Indirect costs, that's -- so basically,
21 my general rule of thumb in construction is, if
22 the cost -- let me make sure I'm saying this
23 right. If the cost doesn't exist without the
24 job, it's not job cost.

25 So, for example, quality control, one

1 job doesn't make quality control go away. One
2 job doesn't make the owner go away. So direct
3 cost is cost that would go away if the job didn't
4 exist.

5 Q. Okay. And so you're referring to the
6 agreement. Are you referring to the article 8?

7 MR. RANNIK: This is tab 2, Judge.

8 THE COURT: Tab 2.

9 THE WITNESS: Each party shall
10 perform its obligations --

11 MR. RANNIK: Let's hang on just one
12 moment.

13 THE WITNESS: Sorry.

14 MR. RANNIK: I want the Judge to be
15 able to --

16 THE COURT: Give me a second to
17 flip over to there.

18 BY MR. RANNIK:

19 Q. Would you just read article 8 from tab
20 2?

21 A. Each party shall perform its obligations
22 hereunder at its own costs unless the parties
23 agree in writing to other cost sharing
24 arrangements.

25 Q. Was there ever a cost sharing agreement

1 with regard to internal costs of Restoration
2 Specialists?

3 A. No, not that I was made aware of.

4 Q. So are there any costs that are shared
5 costs that do not appear on these spreadsheets in
6 the start of tab 7?

7 A. So there was a spreadsheet we received
8 from Mark Ward. It's in the section 7. This is
9 the only cost report we received on this job from
10 Mark Ward.

11 Q. And is this the one that -- it's about
12 four pages into tab 7, and it says, contract log
13 for VMAC at the top? Is that what you're
14 referring to?

15 A. I was actually referring to the next
16 one, but that does actually summarize everything.
17 I was referring to the Restoration Specialists'
18 indirect expenses that they've accumulated
19 \$387,000? It's the page -- it's the spreadsheet
20 that says, Restoration Specialists at the top,
21 August VA monthly expenses.

22 THE COURT: Is it July '13 to
23 October of '14?

24 THE WITNESS: Yes.

25 THE COURT: And this the only one

1 you ever received?

2 THE WITNESS: Yeah. I don't --
3 that's the only thing I've seen.

4 THE COURT: Okay.

5 THE WITNESS: We asked for job cost
6 reports on a monthly basis, monthly. The first
7 two months we received a total from Mark, never a
8 job cost report that I've seen or that I
9 remember.

10 BY MR. RANNIK:

11 Q. And just to -- there again, there's no
12 agreement that the costs, the \$387,000 on this
13 page were to be considered --

14 A. There was no agreement that is overhead
15 or anything you would label on here. The only
16 item on here that I would say could potentially
17 be a job cost item for the VA would be Jack
18 Ellison, project manager, estimator, super. And
19 that's because he was on-site.

20 But I will say, there's a caveat to
21 that. He wasn't -- they weren't supposed to have
22 a supervisor on-site. So that's an expense that
23 we weren't accounting for on our estimate.

24 Q. And hadn't agreed to?

25 A. No, we did not agreed to that.

1 Q. Let's turn to the next category of
2 damages, which is behind tab 8. And this is the
3 amount owed to Palmetto for its work as a
4 subcontractor on this job.

5 A. Correct.

6 Q. Can you tell the Judge what's behind
7 this tab?

8 A. Okay. So behind this tab, you're going
9 to see a very old report from our first software.
10 That's the one with all of the funny items on it.
11 Our software system upgraded. The same company,
12 just a different software -- or style.

13 And then you're going to see what a job
14 cost report looked like for us. And this is
15 going to detail every cost we charged to this
16 job. The first section is our billing to
17 Restoration Specialists. So you can see, we
18 billed 1,281,427.88, and then you can see our
19 cost starts.

20 So we have a superintendent. That's
21 somebody on-site managing the job. That's their
22 cost. Apartment. We had an apartment set up for
23 our guys while they were down there. And it
24 continues on.

25 Q. Now, before we move on too far, the

1 superintendent for Palmetto and the costs there,
2 what was -- what did that total? Just the labor
3 costs for the supers.

4 A. Our labor costs for the superintendent
5 totals \$93,572.54.

6 Q. Now, was there an agreement between
7 Palmetto and Restoration that that cost should be
8 shared or that it would -- that Palmetto would be
9 entitled to that cost?

10 A. Yes. That's on the breakdown of the
11 subcontract, which states that we will be
12 supervising the job. What tab is that?

13 Q. That's tab 3, the last page.

14 A. So the very last page of that, now,
15 there is a typo. We are human. But if you tally
16 up at the bottom, you can see that it's a typo.
17 And you can see the very first line item says,
18 supervision, \$1,200 per week, PCG. 7600 is a
19 typo. But when you do the math, it's
20 approximately 48 weeks of a superintendent
21 on-site, which is what we were tracking this job
22 to take.

23 Q. And if you look down at the bottom,
24 where it says, PCG superintendent amount, what's
25 the amount listed there?

1 A. Oh, yeah, there it is. \$93,900.

2 Q. Okay. So it actually -- you were
3 even -- came in a couple hundred dollars under
4 budget here?

5 A. The 1,200 would be before burden. So
6 burden is workers' comp, payroll taxes, normal
7 payroll burden. So that's where you get your 93.

8 Q. Okay. Now, so can you just restate --
9 summarize for the Court, how much was Palmetto
10 due and how much was it paid and how much is
11 owing?

12 A. All right.

13 Q. And it's just the beginning of tab 8
14 there.

15 A. Okay.

16 Q. Sorry, I have you moving around all over
17 the place.

18 A. All right. So our total project cost
19 was 1,281,427.88, just costs. We were paid
20 1,096,569.19 with a cost due of 184,858.69.

21 Q. And that amount has been firm and due
22 for a very long time, correct?

23 A. Yes.

24 Q. And in fact, if we look at page 2 of
25 your old school cost report with the funny A

1 characters --

2 A. Uh-huh.

3 Q. -- when does it say that \$184,000 was
4 owing?

5 A. Well, it looks like tab 9. So September
6 15 of '15 would be the date the invoice was
7 generated. So it would be due 10/15/15.

8 Q. October of 2015?

9 A. Yep.

10 Q. All right. Let's move to the next
11 category of damages, which is the -- to do with
12 the surety.

13 A. Okay.

14 Q. How much does the surety demand from
15 Palmetto?

16 A. Anything that they've paid out.

17 Q. Okay.

18 A. And this was a very intense accounting
19 issue. There were spreadsheets. There was
20 constant communication with the bonding company,
21 constant trying to get records to determine who
22 was actually doing what.

23 They ended up having to pay out because,
24 if somebody files a bond claim and you don't
25 respond within a certain time frame and you don't

1 have a reason you're not paying them, they're
2 obligated to pay it.

3 Q. And when the bond company is obligated
4 to pay, the guarantors are obligated to bond for
5 them?

6 A. Yep, yep, everything. Anyone who signed
7 the indemnity agreement.

8 Q. If you'll turn to tab 9.

9 A. Okay.

10 Q. Does this reflect the total amount that
11 Hanover is claiming?

12 A. I would imagine so. Hanover was capable
13 in the accounting department.

14 Q. And what is that number?

15 A. \$1,307,978.91.

16 Q. And if Palmetto gets a recovery from
17 Restoration, 1.3 million of whatever it recovers
18 for, if it doesn't recover that much, all of it
19 will get paid to him?

20 A. That's correct.

21 Q. Okay. You mentioned that there were
22 some other lawsuits and things that Palmetto
23 incurred costs defending. Can you flip to tab
24 10?

25 A. Uh-huh.

1 Q. And this is an affidavit that I prepared
2 because, as the Court knows, we've represented
3 Palmetto for a number years. What is the amount
4 of fees unrelated to this case that Palmetto has
5 paid since 2017?

6 A. \$29,564.91.

7 Q. And Palmetto is claiming that as damages
8 as well because of the conduct of Restoration?

9 A. Yes.

10 Q. Now, lost profits. You've touched on
11 this a little bit. According to tab 6, Palmetto
12 is asking for \$250,000 in lost profits, but
13 you've identified well over \$500,000?

14 A. Uh-huh.

15 Q. Over \$700,000?

16 A. Yes, over \$700,000, that I know of.

17 Q. Now, why is Palmetto only asking for 250
18 and how did it come to that number?

19 A. Construction can be volatile. If you
20 look at 2014 and 2015, the reviewed financial
21 statements --

22 Q. And where is that? Is this tab 11?

23 A. That is on tab 11. You can see in 2014
24 and '15, that there was a net income of \$72,617
25 and \$20,621, so an average of that roughly to be

1 very conservative. However, I will say 2014, '15
2 and '16 in the Charleston County, there's no
3 question that construction was booming.

4 Q. Okay. Now, let me just drill down on
5 that a little bit.

6 A. Yeah.

7 Q. So the net profit in 2015, according to
8 this statement, was \$72,000?

9 A. Uh-huh.

10 Q. The net profit in 2014 was \$20,600, and
11 so you took a loose average of those two
12 numbers --

13 A. Yes.

14 Q. -- multiplied it by the five years since
15 Palmetto -- well, since this time?

16 A. Uh-huh.

17 Q. And that's how you got to \$250,000?

18 A. Yes, over five years. But I would like
19 to draw your attention to the general and
20 administrative expenses. Do you see how in 2014,
21 there is \$913,000 in overhead? And in 2015,
22 there's 1.3 million.

23 During the course of 2014, we were
24 gearing up for the next bracket. We were trying
25 to be in the 20 to 25 million range. We had

1 hired two business development people to break
2 into the negotiative market.

3 The negotiative market in Charleston in
4 that time frame was earning about 15 percent,
5 plus it was overall just more desirable work.
6 You chose your contractors instead of having to
7 take the lowest bidder. So the chance of a
8 subcontractor going under was far slimmer. The
9 liability was very attractive.

10 So we geared up. We hired a business
11 development. I remember two guys, and we also
12 had Jay and John taking courses to break into the
13 negotiative market and just communication and how
14 you interact and like meet people. And we spent
15 money on that.

16 Q. So Palmetto was gearing up to be able to
17 do 20 to 23 million dollars worth of --

18 A. 20 to 25.

19 Q. -- work and then it lost its bonding
20 capacity and couldn't really do any work?

21 A. The moment a bonding company has to pay
22 on a bond, it's -- I've never seen them issue
23 another bond for that contractor. I'm sure
24 there's an instance where it's possible, but I
25 worked for Jay and John for 10 years. You don't

1 mess with the bond company.

2 Q. Now, I want to go back to -- I know
3 we're only asking for -- or Palmetto is only
4 asking for \$250,000. You referred to some bigger
5 numbers that you said --

6 A. Yep.

7 Q. -- with confidence, Palmetto would have
8 gotten.

9 A. No question.

10 Q. How can you be so sure?

11 A. I can be sure because I started my own
12 business in 2016, and there were two jobs in 2016
13 that John and Jay approached me about doing with
14 them. They couldn't bond it, and I could. So we
15 split the profit. They priced it. They were
16 low. It was profitable to the budget, and we
17 both split the profit 50/50.

18 The first job was the USC indoor track
19 and field facility in Columbia, South Carolina.
20 I ended up making, I believe, 290 on that, and
21 they made 290 on that. And then the other job
22 was the Oceanside Academy. It's a charter school
23 in Mt. Pleasant, and we split the profit on that
24 as well.

25 And then there was a third project that

1 we couldn't turn the bid in because we didn't
2 have a bid bond because the bond company said we
3 weren't allowed to bid it. So we actually
4 partnered with somebody else. They took the job.

5 The job was profitable. The job split
6 the money. PCG got 175, and the other company
7 got 250. So I know 250, 290 and another 290,
8 they -- it would have been all their's. That
9 job -- I would not have been able to do that job
10 by myself.

11 Q. Okay. Let's touch on the last category
12 of damages, and if you will turn to tab 12. Will
13 you just explain to the Court what we have here?

14 A. Okay. This is the interest calculation.
15 This is based on, it looks like, interest started
16 on the date of October 4, 2016. I think that's
17 the date that the -- that this all went into
18 default, if I'm -- or this is when claims were --
19 or we started calculating damages.

20 Q. It's the date from the original damages
21 hearing?

22 A. Original damages hearing. Sorry, it
23 gets crazy. It's been a while. So 2016,
24 \$184,850.69. That's just the cost that was due
25 to us.

1 Q. And it was due actually a full year
2 before that?

3 A. Oh, absolutely, yep. I believe October
4 15th.

5 Q. But were you asking for interest from
6 2016?

7 A. Nope. We're asking for interest from
8 the day it was determined that we were due
9 damages. And then it's compound interest through
10 to this year, 268.

11 And then down at the bottom, you have
12 2016. That's the amount paid out by the surety
13 as of that date, and we'll say that accounting
14 with the sureties can be -- can roll. The amount
15 will -- usually only increases.

16 And as people come forward or document
17 different things, it looks likes now we're at
18 1.3. But originally, it was 1.186, 501.71, and
19 then you have your interest calculated on top of
20 that.

21 Q. And the total amount of interest that
22 Palmetto is asking for is?

23 A. \$620,731.43.

24 Q. One final question, Ms. Peterson. Why
25 did you come down here today?

1 A. I came down here today because what that
2 company did to Palmetto Construction Group is
3 wrong. Palmetto Construction Group wasn't just a
4 contractor.

5 They -- so when I first started at
6 Palmetto Construction Group, I didn't even have
7 my college education. They put me back in
8 school. They wanted me to study what I wanted to
9 study. I asked if they wanted me to do
10 accounting, and they said, no, do what you want
11 to do.

12 I chose math. That's what I was on
13 originally. That's the path I went down. They
14 grew people. They taught people. And what
15 happened to them was not fair. It needs to be
16 stopped from happening again to somebody else. I
17 don't know if he's still in business, but it
18 needs to be stopped.

19 What happened to them and the unraveling
20 of everything that they put in to that company --
21 I know both of them put everything they had
22 trying to save that company, everything they had.
23 And when it was clear that the company was going
24 down, he -- the two of them made sure every
25 single employee had a job to go to. It was not

1 right.

2 I flew down here today of my own accord
3 because I wanted to make sure that was clear. I
4 handled the books during that time and what
5 happened was not okay.

6 MR. RANNIK: Thank you very much.
7 Nothing further, Judge.

8 THE COURT: Okay. All right. Just
9 one second. Ms. Peterson, I'm going to let her
10 cross-examine you. We have one small thing we
11 need to knock out. If we could do -- just take a
12 break.

13 If you'd like to step down and take a
14 break.

15 THE WITNESS: Okay. Thank you.

16 THE COURT: I'm going to ask you
17 not to consult with Mr. Rannik over there in the
18 meanwhile. But if you want to take a break and
19 come right back.

20 THE WITNESS: Okay.

21 THE COURT: This shouldn't take
22 long.

23 (A recess transpired.)

24 THE COURT: All right.

25 Ms. Peterson, come on back up. And when you get

1 settled in, I'll turn to Ms. Ariail.

2 Ms. Ariail?

3 MS. ARIAIL: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MS. ARIAIL:

6 Q. Hi, Ms. Peterson, my name is Bright
7 Ariail, and I represent all of the defendants in
8 this case. And as I understand it, you were
9 involved in the financial side of things for PCG
10 for 20 years, I believe, is what you said?

11 A. 10 years.

12 Q. 10 years, okay. And are you familiar
13 with the subcontract that was between Restoration
14 Specialists and PCG; is that right?

15 A. Correct.

16 Q. And that is item tab 3 --

17 A. Uh-huh.

18 Q. -- of the notebook?

19 A. Correct.

20 Q. And that agreement was executed on the
21 10 of September, 2014, correct?

22 A. Yes. It wasn't dated on the signature
23 line; so, yes, it goes by that date.

24 Q. And on page 11 of that document, by
25 article 10, it indicates that the subcontract sum

1 is 1,038,342 -- let me start over. 1,082,342,10.

2 Would you agree with that?

3 A. Correct.

4 Q. And as I understand your testimony, you
5 are testifying that, regardless of the
6 subcontract sum, that PCG is somehow owed their
7 actual cost on the project; is that right?

8 A. We were due the 1,082,342, which was our
9 estimated cost and then a profit share, which we
10 didn't know what the profit share -- we didn't
11 know what the profits were going to be; so that's
12 why we have the attachment to the subcontract.

13 Q. I'm not asking about the profit sharing.

14 A. Okay.

15 Q. I'm asking about your claim specific to
16 the subcontract work for Palmetto. At tab no. 7,
17 you indicated due to Palmetto for subcontract
18 work, Palmetto is somehow due another \$184,000;
19 is that right?

20 A. That's correct. It was our cost.

21 Q. But isn't it true that this is a
22 stipulated sum contract? This is not a cost-plus
23 contract? This is not a time and material
24 contract, right?

25 A. This is a stipulated sum contract, and

1 had he signed any kind of a change order, we
2 would have had it in writing.

3 Q. And there were no change orders to your
4 subcontract, were there?

5 A. That's correct because he refused to
6 sign anything.

7 Q. Okay. And by article 5 on page 7 of
8 your subcontract, it indicates that changes in
9 the work are only supposed to be made upon a
10 written direction from the prime contractor; is
11 that right?

12 A. That's correct. But in the fields and
13 in construction, that's not always the case.

14 Q. So PCG is claiming \$184,000 for costs
15 that it occurred, that you allege it incurred,
16 regardless of the fact that it's actually been
17 paid over its subcontract amount, hasn't it?

18 A. If there's no change order --

19 Q. Right.

20 A. It's because he did not sign one.

21 Q. And there was no change order, was
22 there?

23 A. We can't force them to sign a change
24 order.

25 Q. There were no change orders?

1 A. Not that I saw.

2 Q. Okay.

3 A. There was no communication towards the
4 end of the job either.

5 Q. And by tab number 8, you've got an all
6 right history report, and it shows that you
7 actually received 1,096,569.19; is that correct?

8 A. That's correct.

9 Q. That's payments from Restoration
10 Specialists to PCG; is that correct?

11 A. That's correct.

12 Q. And so that actually exceeds the amount
13 of the subcontract; is that right?

14 A. Correct. He also got 2.2 million in
15 change orders. There were changes on this job.
16 He just refused to send us change orders.

17 Q. There were change orders between
18 Restoration Specialists and --

19 A. And the federal government.

20 Q. Excuse me. And the government, correct?

21 A. Correct.

22 Q. But there were no change orders between
23 PCG and Restoration Specialists on that
24 subcontract, correct?

25 A. Correct.

1 Q. And so PCG has actually been paid 14,000
2 and change more than its contract amount; is that
3 right?

4 A. More than the contract amount, yes, not
5 what we're due.

6 Q. Okay. Thank you. Let's look at tab 2.
7 Tab 2 is the teaming agreement, which I believe
8 you said you were familiar with that, correct?

9 A. Uh-huh.

10 Q. You were not a party to this teaming
11 agreement; is that right?

12 A. Did I sign it? No.

13 Q. And you were not a party either, were
14 you?

15 A. What do you mean, "a party"?

16 Q. Under the teaming agreement, it lists
17 the parties to this agreement. Under the first
18 page, it lists, this agreement is between
19 Restoration Specialists, Palmetto Construction
20 Group, each a party. Do you see that?

21 A. Each a party, yes.

22 Q. So you were not a party and you did not
23 sign it on behalf of any of the parties; is that
24 right?

25 A. No. Nope. I just worked for Palmetto

1 Construction Group.

2 Q. Okay. And on page -- let's go to -- I
3 think it's the third page, article 7. Article 7
4 addresses termination of this partnering
5 agreement; is that right?

6 A. Yep.

7 Q. And it gives -- it's got A through H
8 different little subparagraphs under that
9 termination, and it states, all rights and
10 obligations of the party under this agreement
11 shall terminate on one of earliest of the
12 following.

13 Item E is execution by both parties
14 hereto of the contractual arrangement between
15 themselves contemplated by this agreement. So
16 this teaming agreement actually terminated once
17 the subcontract was entered into; is that
18 correct?

19 A. Seems that way.

20 Q. Is that a yes?

21 A. Yes.

22 Q. All right. And let's look at page 10 of
23 the subcontract; again, your tab 3. I believe
24 you testified earlier that Restoration
25 Specialists was just supposed to manage the

1 project and PCG was supposed to bill the parking
2 deck; is that correct?

3 A. No. Restoration Specialists was the
4 point of contact for the VA. We were supposed to
5 manage this project.

6 Q. Interesting. Okay. Look at portion of
7 works on page 10.

8 A. Correct.

9 Q. Provides supervision and management of
10 the concrete subcontractor.

11 A. Uh-huh.

12 Q. Atlantic Coast Contractors. Now, that's
13 not the same thing as building the whole project,
14 is it?

15 A. Correct.

16 Q. Okay. And then this attachment that you
17 want to claim as part of the subcontract --

18 A. Uh-huh.

19 Q. -- if you look at that, all it has is
20 supervision, some general conditions-type items.
21 Do you understand what that means, general
22 condition items?

23 A. Absolutely.

24 Q. Okay. And then it's got the Atlantic
25 Coast -- Atlantic Concrete subcontract. That's

1 all that PCG's scope of work included, according
2 to at least this undated document; is that right?

3 A. That's correct.

4 Q. Okay.

5 A. Why would we get 50 percent profit if
6 we're just managing the contract?

7 Q. And the subcontract at page 10, when it
8 says, provides supervision management of concrete
9 subcontractor. See PCG subcontract breakdown
10 spreadsheet dated 9/5/14 provided and attached.
11 Do you see a date on this document?

12 A. I do not see a date. I'm sure there's
13 Metadata on it, though, and on the additional
14 documents that are added to the --

15 Q. That was not -- my question was whether
16 or not you saw a --

17 A. I do not see a date on this.

18 Q. Thank you. And let's go back to the
19 teaming agreement real quickly. Let's look at
20 Exhibit A. Do you have that?

21 A. Yes.

22 Q. It would be tab 2, Exhibit A. And it's
23 got -- on that page, it lists areas of
24 responsibility, and it says that, Restoration
25 Specialists will serve as prime contractor on

1 this project. Do you see that?

2 A. Oh, I do, yes.

3 Q. And then it says, PCG shall provide
4 field project managers and superintendents and a
5 qualified labor force to build construction of
6 the new parking deck. Do you see that?

7 A. Uh-huh.

8 Q. And then at the top, it says, the
9 following represents the general description of
10 project participation. As the project develops,
11 this exhibit will be modified as required as
12 detailed scope of work responsibilities and
13 specific contractual arrangements are determined.

14 So this document is terminated upon
15 execution of that subcontract, right? We already
16 established that?

17 A. I think you could interpret it
18 differently, but --

19 Q. And so the scope of work for PCG on page
20 10 of its subcontract is supervision and
21 management of the concrete subcontractor. That's
22 it, isn't it?

23 A. That's how it reads.

24 Q. Excuse me?

25 A. That's how it reads.

1 Q. Okay.

2 A. I sat in that room with everyone,
3 though, and that's not what they agreed upon.

4 Q. It's what they signed, isn't it?

5 A. It is what they signed.

6 Q. Okay. Let's look at tab 4. I'm going
7 to look at the bonds first. They're at the back.

8 A. Uh-huh.

9 Q. Specifically the payment bond is what is
10 at issue in this litigation; is that correct?

11 A. Correct.

12 Q. Do you see a signature on that bond
13 anywhere?

14 A. I do not.

15 Q. And let's look at the indemnity
16 agreement that is at the beginning of that tab.
17 You did not sign that indemnity agreement, did
18 you.

19 A. I did not. I did notarize it, though.

20 Q. You memorized it?

21 A. Notarized it.

22 Q. Notarized it.

23 A. I witnessed John Kendle's signature, and
24 it looks like I witnessed Jill and Jay's
25 signature as well.

1 Q. All right.

2 A. Or notarized it. I didn't just witness.
3 I notarized it.

4 Q. This isn't a PCG document, is it? This
5 is a Hanover document?

6 A. This is a Hanover document, correct.

7 Q. All right. And has PCG made any
8 payments to Hanover for the 1.4, I believe it
9 was, that your exhibit says they're
10 now demanding?

11 A. It's 1.3, and I don't believe any
12 payments have been made.

13 Q. No payments have been made by PCG to
14 Hanover?

15 A. Huh-uh.

16 Q. Okay. And let's look at paragraph 20 of
17 the indemnity agreement. It says the indemnitors
18 waive and subordinate all rights of indemnity,
19 subrogation and contribution.

20 MR. RANNIK: Judge, if I might
21 object. This sounds like this is an argument
22 about whether there is liability as opposed to
23 the amount of damages.

24 In our compliant, we said that we are
25 indebted to the surety, and therefore, we are

1 entitled to recover as a matter of equity from
2 Restoration. That has been conceded because
3 they're in default. I don't see the relevance of
4 this question for the amount of damages.

5 THE COURT: Okay.

6 MS. ARIAIL: Your Honor, it all
7 goes back to, again, the complaint, what's plead
8 in the complaint.

9 THE COURT: Right. I was just
10 reviewing that. Let's go back through it, just
11 for the record.

12 So causes of action, one. Breach of
13 agreements, which is plural. Restoration
14 received funds from USA and has not paid those
15 funds as required by the agreements with Palmetto
16 as well as other subcontractors for the work for
17 Restoration. As a consequence, they're in
18 default for damages.

19 Second cause of action, negligent
20 misrepresentation. Third is constructive and
21 actual fraud. Four is other legal and equitable
22 relief, their claims on the surety bond.
23 Plaintiff requests legal and equitable relief
24 against defendants as they're contractually bound
25 to pay those.

1 Finally, injunction and then accounting.
2 We hadn't got to the accounting because there's
3 been no discovery to speak of, right? We are in
4 default. Okay. Those are them. But go ahead.

5 MS. ARIAIL: Okay. So I can
6 continue my questions about the indemnity?

7 THE COURT: I'm going to allow it.
8 Go ahead.

9 MS. ARIAIL: Okay.

10 THE COURT: But as it relates to
11 liability, that's been established on the -- it
12 would only be relevant to the issue of damages.

13 MS. ARIAIL: And, again, Your
14 Honor, and my point today will be and will
15 continue to be that, we're in default, and we
16 admit what is contained within a well pled
17 complaint. There are a lot of things missing
18 here, and what I'm --

19 THE COURT: Okay. I'm with you.

20 MS. ARIAIL: Okay. Thank you.

21 BY MS. ARIAIL:

22 Q. All right. So paragraph 20.

23 A. Uh-huh.

24 Q. It indicates that the indemnitors waive
25 and subordinate all rights of indemnity,

1 subrogation, and contribution, each against the
2 other until all obligations to the surety have
3 been first satisfied in full.

4 So you agree the obligations of PCG to
5 the surety have not been satisfied in full,
6 correct?

7 A. Correct.

8 Q. You talked about that, when you first
9 worked for PCG, that there was 17, 18 people
10 employed by the company and that soon there in --
11 in about 2014, '15 time, there were cutbacks due
12 to situations on other projects or on projects, I
13 think is what you said; is that right?

14 A. Roughly around that time, yes.

15 Q. And you are aware of the other
16 litigation that PCG was involved in?

17 A. Which one?

18 Q. Well, there's a bunch of them.

19 A. Uh-huh.

20 Q. During that time frame, there was a
21 lawsuit brought by the Housing Authority of the
22 City of Charleston?

23 A. Uh-huh.

24 Q. That was quite a substantial litigation,
25 wasn't it?

1 A. Agreed, termites.

2 Q. And that was filed in June of 2016?

3 A. Uh-huh.

4 Q. There was also litigation related to
5 Charles Prezioso -- I'm probably not saying that
6 right -- South Carolina Insurance, Palmetto
7 Promotions. That was filed in July 2016; is that
8 correct?

9 A. That one I'm not familiar with.

10 Q. You're not familiar with that one?

11 A. I don't know what that is.

12 Q. Were you aware of a project to build
13 certain athletic facilities at the University of
14 South Carolina adjoining Rosewood Drive, the
15 track and field facilities?

16 A. Track and field, yes.

17 Q. Is that the job you were involved with?

18 A. From an accounting perspective,
19 absolutely.

20 Q. Okay. So this isn't the job that you
21 were talking about that you partnered with PCG?

22 A. No, absolutely not.

23 Q. All right. But were you aware of this
24 litigation?

25 A. I was not aware of that litigation. I'm

1 not familiar with that one.

2 Q. All right.

3 A. There was an indoor track and an outdoor
4 track.

5 Q. Were you aware of litigation with
6 Coogler Construction?

7 A. Recently, I've been made aware. They --
8 they gave us a final amount due, and their
9 accounting was incorrect.

10 Q. So there were a number of projects that
11 were in trouble in that kind of time frame?

12 A. Actually, outdoor track made great money
13 and so did -- what was the other one you
14 mentioned? Coogler? That was outdoor track.
15 Yeah. Both of those jobs made good money. That
16 was a discrepancy. I'm sure they've been settled
17 by now.

18 And the City of Charleston, I believe
19 they didn't renew their termite bond, and they
20 had termite damage, if I remember correctly. We
21 built it in '05, and we were obligated to
22 maintain the termite bond, I think, for two years
23 based on close outs. But, again, that was quite
24 some time ago.

25 Q. Let's look at tab 7.

1 A. Okay.

2 Q. I just want to look at this first sheet.

3 A. Okay.

4 Q. So, as I understand this, the first line
5 item is due to Palmetto for subcontract work.

6 That's the \$184,000 that was for the actual cost
7 rather than what the stipulated sum was, correct?

8 A. I'm not sure I'm looking at the same
9 page as you. You said section 7, but I don't see
10 that.

11 Q. This page. It's the first page in my
12 tab 7. I hope we have the same notebook because
13 I've been through that before.

14 A. I remember that page, but it's not page
15 7. It's page 6 for me, I think. Let me see.
16 Yeah, that's tab 6.

17 Q. Okay. And then, if I understand your
18 testimony, the second item is share of profits,
19 50 percent. That's the profit sharing that you
20 are indicating that was because of this sheet
21 that's not attached to the subcontract in the
22 pleadings; is that correct?

23 A. That's correct.

24 Q. That's the basis of your claim for that?

25 A. There's other basis.

1 Q. What's the other basis?

2 A. There's our pay applications each month
3 that we submitted to Mark to be paid.

4 Q. That showed a profit split on it?

5 A. It did. And he paid the correct amount,
6 I believe, for the first three months.

7 Q. Are those in this?

8 A. I don't think it's in here.

9 Q. All right. And then, due to the surety,
10 the \$1.3 million, again, that has not been paid,
11 correct?

12 A. Correct.

13 Q. The lost profits, I want to make sure I
14 understand that.

15 A. Uh-huh.

16 Q. You are alleging that because of some
17 lost bonding, that Restoration Specialists is now
18 somehow liable to PCG for lost profits on
19 projects that they didn't even -- weren't even
20 awarded to them?

21 A. They would have been awarded.

22 Q. Is that not -- is that correct?

23 A. That's correct.

24 Q. What I'm saying is correct?

25 A. What did you say?

1 Q. That's what your allegation is here,
2 that the lost profits are related to projects
3 that were never awarded to PCG, and somehow
4 that's the fault of Restoration Specialists and
5 the Wards?

6 A. That's exactly the fault of Restoration
7 Specialists.

8 Q. Okay. But these profits are not related
9 to the VA project?

10 A. Correct.

11 Q. That's what I'm trying to get to.

12 A. That is a very conservative figure.

13 Q. All right. And to your knowledge, is
14 there any attorney's fees cut -- there's no
15 attorney's fees provision in the subcontract, is
16 there?

17 A. I would have to review the subcontract.

18 Q. All right. This, if I understand it, is
19 again related to other issues, other legal fees,
20 not related to this litigation; is that correct?

21 A. The 29,000?

22 Q. Yes.

23 A. Correct.

24 Q. All right. Tab 8. We've talked about
25 the cover sheet on how you get to the 184. I

1 want to talk about -- and then we talked about
2 the accounts receivable report. I want to talk
3 about the job costs and billing detail.

4 A. Okay.

5 Q. And this is, again, as I understand it,
6 this is just simply a tally of all of the money
7 that PCG says it spent on this project; is that
8 correct?

9 A. Correct.

10 Q. And I don't believe that you have
11 included any of the checks, vouchers, payroll
12 sheets. There's no information here that
13 substantiates those charges; is that right? It's
14 just a tally?

15 A. Just a tally, yep.

16 Q. Okay.

17 A. But the same system will generate all of
18 that easily.

19 MS. ARIAIL: Your Honor, if I could
20 have just one minute.

21 THE COURT: Okay.

22 MS. ARIAIL: Okay. I think I'm
23 done.

24 THE COURT: All right. Any
25 follow-up?

1 MR. RANNIK: Very briefly, Judge,
2 if I may.

3 THE COURT: All right.

4 REDIRECT EXAMINATION

5 BY MR. RANNIK:

6 Q. Ms. Peterson, the Palmetto subcontract
7 sum increased with the other costs that increased
8 over the course of this job, correct?

9 A. Correct. It started as a \$6 million job
10 and ended as an \$8.2 million job.

11 Q. And what were some of the increases
12 specifically to Palmetto's subcontract?

13 A. Well, the temporary parking lot alone,
14 we managed.

15 Q. And that was -- about what cost did that
16 add to the job, to the best of your recollection?
17 Not just to PCG, but it was a big thing, right?

18 A. It was a big thing. I want to say the
19 temporary parking lot was a \$900,000 value, but I
20 haven't reviewed those job reports in a long
21 time.

22 Q. Okay. Now, Palmetto did all of the work
23 that it claims in tab 8, correct?

24 A. 8?

25 Q. All of those line items and --

1 A. Everything on the job cost report?

2 Q. Yes.

3 A. Yes, absolutely. I managed the job cost
4 report. I managed entering all costs. That's
5 what a job cost report should look like instead
6 of handwritten checks when you're managing an \$8
7 million job.

8 Q. And Palmetto did its work well?

9 A. The customer is happy. The parking
10 garage is complete, yes.

11 Q. And Mark Ward at Restoration did pay you
12 more than the --

13 A. Yes.

14 Q. -- original subcontract amount, right?

15 A. Correct.

16 Q. And is that -- did that conduct indicate
17 to you that he was in agreement, that the
18 agreement was to pay PCG's costs?

19 A. Correct; however -- oh, that form is
20 here. Sorry.

21 Q. I'm going to get to that.

22 A. However, ask your question again because
23 I just lost my total train of thought here.

24 Q. So we were talking about payment of more
25 than the original subcontract amount. And did

1 that indicate to you that Mark Ward was in
2 agreement that PCG was entitled to its costs?

3 A. Yes, absolutely.

4 Q. And you submitted all of your amounts of
5 work for payment?

6 A. Correct.

7 Q. And did Mark Ward ever tell you that he
8 disagreed or would not pay any particular amount?

9 A. Mark Ward stopped all communication.
10 There was no -- I was taught that the job comes
11 first. The biggest liability is the job not
12 being complete; so when communication was cut and
13 we were no longer getting any information from
14 him or any paperwork of any kind, John's focus
15 was finishing the job.

16 We have a much larger exposure not
17 finishing the job. The performance bond is --
18 you have to finish the job. So even though we
19 knew something was awry, there was nothing we
20 could do. We had to finish the job.

21 Q. Now, did Palmetto have responsibilities
22 on this job outside of what is enumerated in the
23 subcontract?

24 A. Yes, absolutely.

25 Q. And remind us, what were some of those

1 responsibilities?

2 A. Everything. We were on-site every day,
3 all day. John visited that site more than -- at
4 least once a week. We had aerial photos done.
5 We had -- we managed the job.

6 We supervised everything, all
7 subcontractor communications. Well, not all.
8 I'm sure there was some communications between
9 Restoration and subcontractors, but we managed
10 the job.

11 Q. So the subcontract didn't replace PCG's
12 other obligations, it supplemented them? It was
13 in addition to, correct?

14 A. Correct.

15 Q. And so, if the teaming agreement says,
16 any future agreement about the teaming
17 arrangement might replace the teaming agreement,
18 that's not what this subcontract does? This
19 subcontract is a separate scope of work?

20 A. Yes. It almost seems like that
21 statement is there in case a new teaming
22 agreement comes around, but again teaming
23 agreements were relatively new for me.

24 Q. All right. You found a document that
25 you had been looking for earlier at the end of

1 tab 8. I think it's the last two pages.

2 A. Uh-huh.

3 Q. And what is this showing, and why did
4 you want to find it?

5 A. So this is another reference to the
6 50/50 split, which we would not have been
7 warranted a 50/50 split if we'd just managed
8 concrete.

9 This was something I would attach to the
10 front of our pay applications each month. So we
11 knew what the pay applications were. We were in
12 the meetings, so we knew what Restoration
13 Specialists was applying for, and we would list
14 our cost. He would tell us his costs, and then
15 there would be a balance.

16 So, for example, on pay application 1,
17 the temporary parking lot, you have a balance of
18 20,000. I divided it in half to show the
19 10,031.59. So we had the 10,047.90 in our costs
20 and then the 50/50 split. And if you look,
21 \$20,070 or \$79.49, it should be the check he
22 issued. He was paying off of that figure or
23 should have been.

24 And it looks like -- you can see where
25 the balance went to question marks because he

1 stopped. I wrote in, unsure of Restoration
2 Specialists' cost because he stopped giving us
3 any information or any communication.

4 Q. And that was as of the third pay
5 application?

6 A. That was the third pay application, it
7 looks like.

8 Q. Out of 11?

9 A. Well, what are you going do, walk off
10 the job? You're the bond. You're the bond.

11 MR. RANNIK: Thank you,
12 Ms. Peterson. Nothing further.

13 THE COURT: Any questions about
14 that?

15 MS. ARIAIL: Yes, sir, Your
16 Honor.

17 RE CROSS-EXAMINATION

18 BY MS. ARIAIL:

19 Q. Ms. Peterson?

20 A. Yes.

21 Q. This document you were just talking
22 about that is tab 8, there's no indication on
23 here that any of these pay applications included
24 a portion for a profit split, is there?

25 A. The difference divided by two. So

1 that's how much profit he had on pay app 1.

2 Q. So before a project is finished, how do
3 you know how much profit has been gained?

4 A. Well, you know based on the estimate, a
5 rough figure. So, for example, the first pay
6 application, you're talking \$10,000.

7 Q. So you want the pay applications to be
8 based on an estimate, but you want the
9 subcontract to be based on your actual cost; is
10 that correct?

11 A. No. The subcontract, for the same
12 reason we couldn't put in a total figure with a
13 profit, we didn't know what it was. But until
14 you come close to the 400 or 500,000 we were
15 expecting to make on this job, a \$10,000 payment
16 acknowledging the 50/50 split isn't going to
17 hurt.

18 Q. But you can't possibly know if profit is
19 actually going to be profitable or not --

20 A. Absolutely.

21 Q. Excuse me -- until it's finished, can
22 you?

23 A. You cannot.

24 Q. And in fact, after PCG finished working
25 on the project, there were all kinds of

1 construction projects that Mark Ward and
2 Restoration Specialists took care of and PCG did
3 not; is that correct?

4 A. You mean on this job?

5 Q. Yes.

6 A. I'm unaware of any of those.

7 Q. Okay.

8 A. Communication was not existing.

9 MS. ARIAIL: That's all I have.

10 THE COURT: All right. So let me
11 keep -- stay right there with those last two
12 pages of tab 8 just so I can read this somewhat
13 and make sure I'm clear.

14 THE WITNESS: Okay.

15 THE COURT: So you've itemized on
16 pay application no. 1, the basis for the
17 \$244,545; is that correct?

18 THE WITNESS: Sorry, start again, I
19 was getting there.

20 THE COURT: Good. I did to you
21 what you did to me.

22 THE WITNESS: Sorry.

23 THE COURT: Turnabout is fair play.
24 All right. Start at the top.

25 THE WITNESS: Okay.

1 THE COURT: Pay application no. 1.
2 It reads, temporary parking.

3 THE WITNESS: Right.

4 THE COURT: I'm in the bold in the
5 box.

6 THE WITNESS: Correct.

7 THE COURT: And it has a total
8 number of 244,545.08?

9 THE WITNESS: Correct.

10 THE COURT: That's how much that
11 pay app was for?

12 THE WITNESS: That was the pay
13 app the Restoration Specialists submitted to the
14 VA, yes.

15 THE COURT: Okay. And then you --
16 1 through -- line items 1 through 6 is --

17 THE WITNESS: Uh-huh.

18 THE COURT: -- the breakdown of how
19 you get to that figure?

20 THE WITNESS: I do not know how
21 Mark Ward got to that figure.

22 THE COURT: Okay.

23 THE WITNESS: So he would have
24 pulled the schedule of values, and he would have
25 determined what had been complete or what he

1 could bill for.

2 THE COURT: Okay.

3 THE WITNESS: So, for example, the
4 bond premium. The bond is due before we start;
5 so he would have had that cost. This information
6 would have been given to me by him.

7 THE COURT: Okay.

8 THE WITNESS: 1 through 5.

9 THE COURT: 1 through 5 came from
10 him?

11 THE WITNESS: Him. I would not
12 know that otherwise.

13 THE COURT: Okay. And your pay app
14 is the 10,000?

15 THE WITNESS: Correct. That's my
16 cost.

17 THE COURT: And so, then you take
18 the -- then you got to the \$20,000 figure, and
19 you're assuming that to be profit?

20 THE WITNESS: I'm not assuming it
21 to be profit.

22 THE COURT: Where does that figure
23 come from?

24 THE WITNESS: That figure comes
25 from 244 minus 8,800, 3,875, 36.

1 THE COURT: Those numbers?

2 THE WITNESS: Those numbers.

3 THE COURT: Okay. All right. I
4 knew there was a basis. I just wasn't sure how
5 you got there.

6 THE WITNESS: Yes.

7 THE COURT: And then you split
8 that --

9 THE WITNESS: Split that.

10 THE COURT: 50/50 because it was a
11 50/50 split?

12 THE WITNESS: Uh-huh, yep.

13 THE COURT: All right. Very good.
14 And then on line item number 1 there under pay
15 app 1, it says, USI invoice bond premium,
16 increased contract to 7.1, right?

17 THE WITNESS: Yeah.

18 THE COURT: And the original
19 contract was some 6 --

20 THE WITNESS: 6, yeah. I want to
21 say it's on this spreadsheet -- or maybe it's
22 not. Yes, originally it was 6 and change.

23 THE COURT: And then you testified
24 earlier that there was an additional \$2.2 million
25 paid.

1 THE WITNESS: Correct.

2 THE COURT: How do you know that?
3 What's the basis for that?

4 THE WITNESS: Well, I've seen the
5 last pay application that Mark Ward submitted to
6 the VA. I also know that, when everything went
7 squirrely, I called the VA myself and -- because
8 per FAR regulations or whatever it is, we had to
9 notify the VA within -- after a certain time
10 frame, that we weren't seeing funds.

11 So I knew that their balance at the time
12 that I called was approximately \$80,000 on the
13 contract. So I know he got paid at least 8.2
14 minus \$80,000.

15 THE COURT: Okay.

16 THE WITNESS: I've not seen how
17 much he's actually been paid, but I'm assuming
18 he's been paid; otherwise, I think we would have
19 heard about it.

20 THE COURT: That would have been
21 some retainage of some sort?

22 THE WITNESS: Yes.

23 THE COURT: Okay. All right.

24 THE WITNESS: There was no
25 retainage on this job, but I could -- if there

1 was an issue, they might have -- but I've not
2 seen anything that says that they held anything
3 back.

4 MR. RANNIK: And, Judge, if I
5 might, just in case it's helpful to the Court,
6 that last pay application is the last pages of
7 tab 7B.

8 THE COURT: 7B?

9 MR. RANNIK: Yes, sir.

10 THE COURT: Those are those checks?

11 MR. RANNIK: 7A are the checks.

12 THE COURT: Oh, I'm sorry, yeah. I
13 went back a little too far. Okay. That is the
14 pay app.

15 MR. RANNIK: It's dated September
16 30, 2015. That's the last pay application that
17 was produced.

18 THE WITNESS: Yep. And that would
19 be the \$85,000 that the VA told me they still
20 had.

21 THE COURT: Okay. Total earned
22 less retainage -- total earned was 8.1.

23 THE WITNESS: Uh-huh.

24 THE COURT: Okay. Gotcha. I had a
25 note in here somewhere. Hold on. All right.

1 And then back to your lost profits, those lost
2 profits were not lost profits from -- the
3 \$250,000 figure you gave was not from this job
4 but from other jobs that they were not able to
5 bid because they lost their bonding capacity; is
6 that correct?

7 THE WITNESS: From the end of 2015
8 until --

9 THE COURT: Okay. All right. As a
10 result of this demise?

11 THE WITNESS: As a result, yes.

12 THE COURT: And then, also on the
13 attorney's fees, the 29,000 --

14 THE WITNESS: Yes, other jobs.

15 THE COURT: -- attorney's fees?

16 THE WITNESS: Yes. So, when we
17 couldn't bond anything anymore, you still have
18 overhead to finish the jobs you have on your
19 schedule.

20 THE COURT: Okay.

21 THE WITNESS: So there wasn't
22 enough revenue to cover the expenses. So
23 eventually, when the money is gone, the money is
24 gone, and you end up with issues, lawsuits.

25 THE COURT: Litigation, you're

1 saying?

2 THE WITNESS: Litigation.

3 THE COURT: Right. Okay. And that
4 was coming in pretty regularly there in that time
5 frame?

6 THE WITNESS: I think towards the
7 end.

8 THE COURT: 2015, '16?

9 THE WITNESS: Yes.

10 THE COURT: When did you actually
11 leave work there?

12 THE WITNESS: I left in February of
13 2016.

14 THE COURT: February of '16?

15 THE WITNESS: My husband got orders
16 to Japan.

17 THE COURT: Okay.

18 THE WITNESS: And I started my own
19 business.

20 THE COURT: And is that what you're
21 doing today?

22 THE WITNESS: That is what I'm
23 doing today.

24 THE COURT: Are you still in that
25 business?

1 THE WITNESS: Yes.

2 THE COURT: Okay. Well, you're
3 pretty quick with the numbers there.

4 THE WITNESS: Thank you.

5 THE COURT: Okay. Any questions
6 from what I've asked? I think I've asked what I
7 needed to ask of Ms. Peterson.

8 MR. RANNIK: Nothing from me,
9 Judge.

10 THE COURT: Thank you, sir. All
11 right.

12 Thank you, Ms. Peterson, you may step
13 down.

14 THE WITNESS: Thank you.

15 THE COURT: Appreciate you being
16 here.

17 THE WITNESS: Thank you.

18 THE COURT: All right. Mr. Rannik?

19 MR. RANNIK: Nothing further in
20 terms of testimony, Judge.

21 THE COURT: All right. Very good.
22 All right. Go ahead and give me the basis for
23 your damages claim.

24 MR. RANNIK: Thank you, Judge. It
25 comes in several forms.

1 THE COURT: Right.

2 MR. RANNIK: The first is that, as
3 part of our complaint -- and I'm going pointing
4 specifically to paragraph 14, which is in the
5 breach of agreement section.

6 THE COURT: Okay.

7 MR. RANNIK: The allegation is
8 that, as a sequence of Restoration's default
9 under its agreements with Palmetto and other
10 subcontractors, Palmetto has been damaged in a
11 sum to be determined. It's broad.

12 THE COURT: Yeah.

13 MR. RANNIK: And consequential
14 damages are contemplated by this and it's
15 admitted. All of these damages are either
16 direct -- so a subcontract amount that was not
17 paid; the profit split that was not paid. Those
18 are direct costs.

19 Everything else, I believe, is a
20 consequence of the default. So you've got the
21 default on the bond payments and the complaints
22 coming in that way. The lost profits because
23 this put us out of business, and the attorney's
24 fees from there.

25 Now, interest, again, the subcontract

1 amount has been certain and solid for a very long
2 time. So rather than go all the way back to the
3 date of that pay application, we said, okay,
4 well, how about from the date of the last damages
5 hearing? And we've got from there and requested
6 damages.

7 THE COURT: Okay.

8 MR. RANNIK: As to the surety
9 bond now -- and again, the basis for that as
10 damages, of course, is the fourth cause of
11 action, which says, you know, we're contractually
12 bound to pay these funds. There have been
13 claims, and we're requesting equitable relief.

14 THE COURT: That's the 1.3 million?

15 MR. RANNIK: Yes, Judge.

16 THE COURT: All right.

17 MR. RANNIK: And we're seeking
18 interest on the portion that had been paid as of
19 the last damages hearing, which is 1.18 million
20 and at the current rate of legal interest.

21 THE COURT: Okay. And that was the
22 620 figure?

23 MR. RANNIK: That was. Yes, Judge.

24 THE COURT: Okay. Tell me about
25 your position on the lost profits of 250 and the

1 attorney's fees, which she's just testified to.
2 Tell me about that. How are those not
3 speculative because that's where I'm going to be
4 talking in just a second?

5 MR. RANNIK: Sure. Well, Judge,
6 there's always a degree of uncertainty in lost
7 profits because you're trying to project
8 something that never came to pass. The reason
9 that these are not speculative is because they
10 are so, so conservative.

11 We've got -- the last two years before
12 Palmetto went under, we've shown what their
13 profits were, and they were small. The company
14 was coming out of -- still, sort of the
15 difficulties from around the 2012 era, which I'm
16 sure Your Honor remembers. It was difficult in
17 the construction business, and construction has
18 exploded in Charleston since then.

19 The idea that Palmetto would make 50,000
20 a year in profit for the last five years, I would
21 bet my mortgage on it. It's uncertain because it
22 didn't happen. But I don't believe it is close
23 to speculative. It is a very, very conservative
24 number. As to -- I've forgotten what Your
25 Honor's other question was. Oh, as to the

1 attorney's fees.

2 THE COURT: The most important
3 part.

4 MR. RANNIK: Well, Your Honor, this
5 is not an instance of, we're seeking attorney's
6 fees for bringing this case that's not provided
7 for in the contract. But they are a
8 consequential damage to Palmetto because they
9 went out of business.

10 They couldn't finish certain projects,
11 had claims made under -- to other sureties that
12 they had to pay and satisfy, and they had to hire
13 lawyers to guide them through that. It was a
14 consequence of being put out of business by this
15 job, and we believe it's recoverable.

16 THE COURT: All right. Very good.

17 Ms. Ariail, your turn.

18 MS. ARIAIL: Your Honor, first of
19 all, I just want to confirm that my objections
20 went through the whole --

21 THE COURT: They're on the record.

22 MS. ARIAIL: Thank you so much.

23 THE COURT: I'm not going to say
24 your objection was to the entire line of the
25 testimony, but certainly, it was expansive. I

1 will grant you that.

2 MS. ARIAIL: All right.

3 THE COURT: And I think

4 Ms. Peterson did a tremendous job explaining in a
5 short and very rapid fashion, the basis for their
6 claim for damages. But based on that, tell me
7 where --

8 MS. ARIAIL: All right. So first
9 of all --

10 THE COURT: Tell me where you are.
11 Is there anything in there that you don't
12 disagree with because I would expect you to
13 disagree?

14 MS. ARIAIL: There was absolutely
15 nothing authenticated.

16 THE COURT: Okay.

17 MS. ARIAIL: There was absolutely
18 nothing that -- there were hearsay. You know, we
19 didn't even get past authentications for me even
20 to make a hearsay objection.

21 THE COURT: Okay.

22 MS. ARIAIL: So we've got a
23 notebook full of documents that haven't been
24 authenticated, and in my opinion, are hearsay.

25 THE COURT: Okay. I don't remember

1 that objection. Was that one of the objections?
2 Was that part of your ongoing objection?

3 MS. ARIAIL: Well, I did bring up
4 the authentication, which I believe is the first
5 bar he has to cross. I did bring that up in the
6 objections, Your Honor.

7 THE COURT: Okay.

8 MS. ARIAIL: So that's the first
9 bar he needed to cross before I could even get to
10 a hearsay objection.

11 THE COURT: I think Ms. Peterson
12 testified that she created the --

13 MS. ARIAIL: She created the job
14 costs.

15 THE COURT: -- job cost reports.

16 MS. ARIAIL: I believe, yes, sir.
17 However, she did testify that there are no
18 documents that support that, that have been
19 provided today.

20 First of all, you know, an entry to
21 default is an admission by the defaulting party
22 of a well pled complaint. Let's look at the
23 complaint. The only thing in this complaint that
24 talks about profit sharing bonds is line 9, which
25 says, Restoration Specialists has failed to pay

1 the contract balances due, and furthermore, has
2 failed to account for the profit sharing funds.

3 All he has failed to do is account for
4 profit sharing funds. There is no legal basis in
5 this complaint for profit sharing. There was no
6 attachment. The attachment document that is
7 undated that plaintiffs used to support the
8 profit sharing is not attached to the subcontract
9 as Exhibit A to the complaint.

10 Furthermore, the Exhibit A subcontract
11 actually talks about a spreadsheet at, I believe
12 it's paragraph 9.3, and it says, provides
13 supervision and management of concrete
14 subcontractor, Atlantic Concrete Contractor. See
15 PCG subcontract breakdown spreadsheet dated
16 9/5/14.

17 This document is undated. The math on
18 it is a little suspect. It's not a legal basis
19 for profit sharing pursuant to the terms of this
20 complaint.

21 THE COURT: Clearly there's a
22 reference to some document, though, is there not?

23 MS. ARIAIL: There's no reference
24 to a document. All it says is that he hasn't
25 accounted for them. That's all he's admitted to.

1 It said, he has not accounted for profit sharing.

2 THE COURT: See PCG's subcontract
3 breakdown spreadsheet dated 9/5/14 provided,
4 attached.

5 MS. ARIAIL: Right.

6 THE COURT: That's pretty specific.

7 MS. ARIAIL: That's pretty
8 specific, and this document that they've tried to
9 use as their backup for profit sharing is not
10 dated and was not attached to the complaint.

11 THE COURT: All right.

12 MS. ARIAIL: All right. Let's talk
13 about the indemnification, subparagraph 10 of the
14 complaint. Restoration and Mr. and Mrs. Ward
15 must indemnify the surety and the plaintiffs to
16 the extent they are required to pay. They
17 haven't paid anything. They have not paid.

18 Hanover has not seen them, and any
19 action between Hanover and PCG is barred by the
20 statute of limitations. We'll talk about the
21 causes of action that were pled, but if PCG was
22 going to make some sort of claim against
23 Restoration Specialists, they should have pled
24 equitable subrogation.

25 Equitable subrogation requires -- for

1 there to be a cause of action for equitable
2 subrogation, there has to be full payment made,
3 full, not partial, not zero, which is what we
4 have here. Full payment should have been made;
5 therefore, the claim for the 1.3 for payment of
6 the surety is barred as a matter of failure to
7 plead.

8 When you look at the indemnity
9 agreement, the indemnity agreement says that they
10 waive all rights to subrogation, contribution,
11 indemnity until -- until the surety has been
12 paid. So not only did they plead it, but the
13 indemnity agreement, they even agreed to waive
14 any -- any actions against Restoration
15 Specialists and the other indemnities. That's
16 the problem with the surety claim.

17 You know, again, we've got a letter
18 that's dated like last week that purports to say
19 how much Hanover is due. There's been no
20 authentication of any of these documents from
21 Hanover. There's been no proof of payment by
22 Hanover. There's no vouchers. All there is, is
23 a spreadsheet that basically says, this is what
24 we're owed or a letter that says, this is what
25 we're owed.

1 At this point, if PCG was allowed to
2 recover this money, Ms. Peterson says, oh, we'll
3 pay it. Well, Ms. Peterson is not PCG. Frankly,
4 PCG would be getting a windfall. That's not how
5 this -- equitable subrogation would work.

6 Breach of contract. The subcontract --
7 the teaming agreement was terminated upon
8 execution of the subcontract; so any reliance on
9 terms of the teaming agreement are history. The
10 subcontract took its place, despite Mr. Rannik's
11 representation that it just supplemented teaming
12 agreement. It very specifically was terminated
13 once the subcontract was executed.

14 The subcontract is a stipulated sum.
15 It's not a cost plus award fee. You know, you've
16 got AIA documents that contemplate those types of
17 agreements. That's not what it was. It was a
18 stipulated sum. You will be paid this much
19 money.

20 There are terms in the contract that, if
21 the subcontractor is not getting paid, he can
22 stop work. He can write a letter to the general
23 contractor and tell him, I'm stopping work until
24 you pay me, and then, you know, that's a problem.
25 And then potentially the surety would have gotten

1 involved at that point in time. That didn't
2 happen. That did not happen.

3 So we've got an admission by PCG that
4 they've been paid over the amount of the
5 subcontract by \$14,000. So my position is that
6 the breach of agreements cause of action doesn't
7 survive because they've been overpaid. If you
8 want to see what the damages are, it's a negative
9 damage there.

10 THE COURT: So they owe your client
11 money?

12 MS. ARIAIL: Sir?

13 THE COURT: They would owe your
14 client money if y'all were not in default?

15 MS. ARIAIL: We wouldn't
16 owe them -- well, less money.

17 THE COURT: That's what I'm saying.

18 MS. ARIAIL: Absolutely. Yes, sir.

19 THE COURT: All right. I just
20 wanted to make sure.

21 MS. ARIAIL: \$14,000 based on the
22 contract.

23 THE COURT: Okay.

24 MS. ARIAIL: Negligent
25 misrepresentation. Well, the cause of action

1 here doesn't talk about any of the defendants
2 except for Mr. Ward. It doesn't discuss Ms.
3 Ward. It doesn't discuss Restoration
4 Specialists.

5 All it says is that Mr. Ward represented
6 he would manage the project and pay for material
7 and work supplied or performed. It doesn't talk
8 anything about profit split again. This cause of
9 action has to fail because there are elements
10 that -- of negligent misrepresentation that just
11 flat aren't pled here.

12 There's no indication of a false
13 representation to the plaintiff. There's no
14 indication of a duty of care. There's no
15 pleading of a breach duty. There's no proximate
16 cause of the loss. All it says is, he said he
17 would pay for material and work, and we relied on
18 that.

19 The same thing with the third cause of
20 action. Again, if you look -- base this on the
21 pleadings, again, they failed to plead all of the
22 elements of constructive and actual fraud.
23 There's no false statements here. All this says
24 is that Mr. Ward knew or should have known that
25 the statements were material, and we -- would be

1 relied upon.

2 Well, the only statement he made was up
3 top, he would pay -- he would use this money from
4 the project to pay for material and work.
5 There's no falsity. There's no false statement
6 alleged here. There's no knowledge of reckless
7 disregard of the false statements.

8 And here, they're requesting punitive
9 damages, to recover punitives and to prove that
10 it was willful, wanton or reckless. There was
11 total disregard of the plaintiff's rights and
12 that it has to be by clear and convincing
13 evidence.

14 This fourth one is a head scratcher. It
15 is for legal -- other legal and equitable relief.
16 I'm not sure what relief they're asking for here.
17 All it says is that they're contractually bound
18 to pay funds if the claims on the -- if there are
19 claims on the surety bond.

20 There are claims. They request legal
21 and equitable relief. I'm not sure what that
22 relief is. If this is some attempt to make
23 claims on the indemnity agreement, then we've got
24 the whole equitable subrogation issue again.

25 THE COURT: Okay.

1 MS. ARIAIL: The injunctive relief,
2 again, it talks about Mr. Ward. It doesn't talk
3 about Restoration Specialists. I'm wrong. It
4 does talk about Restoration Specialists.

5 But it talks about that, funds held are
6 to be received to utilize to pay Palmetto. This
7 would only be appropriate if money damages
8 weren't acceptable. I don't see where injunctive
9 relief makes sense here.

10 The accounting, this is the one that
11 only talks about Mr. Ward. It says that, because
12 Palmetto does not know all funds Mr. Ward has
13 received and what has been distributed, Palmetto
14 asked for an accounting, an accounting of what --
15 Mr. Ward's funds. Nothing there on Restoration
16 Specialists.

17 The special damages, you said it
18 yourself, Your Honor. First of all, it's not
19 pled, these lost profits because of some bonding
20 issue. You know, there were other -- there was
21 an admission here that there were other bonding
22 companies and they had other litigation going on.

23 Some of the cases that I asked about
24 included some of the other bonding companies that
25 were unrelated to this. So special damages, it

1 seemed extremely speculative. And I don't think
2 it survives. So I would like to move to strike
3 all of the causes of action 2 through 5 because
4 of --

5 THE COURT: Well, you might be able
6 to do that, but you're in default; so you can't
7 get that. That's not the relief that I can give
8 you.

9 MS. ARIAIL: And I want to move
10 that no damages be awarded on any of the five
11 causes of action.

12 THE COURT: All right. Very good.
13 Okay.

14 MS. ARIAIL: And I do also want to
15 reserve our rights for appeal on this.

16 THE COURT: Sure.

17 MS. ARIAIL: And anything
18 previously addressed in the suit.

19 THE COURT: Sure.

20 All right. Do you have any response?
21 Anything you want to say?

22 MR. RANNIK: I'll be very brief,
23 Judge. First, Ms. Peterson testified that she
24 was involved in the accounting of every part of
25 this project. She created a number of the

1 documents. The rest of the numbers on the
2 documents she didn't create, came from the
3 documents that were produced to us in this case
4 by Restoration.

5 That's tab 7. That's all their numbers.
6 We didn't have a single number in there that came
7 anywhere except from Restoration. Secondly, the
8 question of this last page of the subcontract, I
9 will agree that, on this last page, it does not
10 have a date.

11 The page right before it notes that, an
12 additional document that forms part of this
13 subcontract -- this is section 16.1.4.21 is PCG
14 subcontract breakdown. That is exactly the title
15 on the top of the next page, PCG subcontract
16 breakdown.

17 It is indisputably part of the contract.
18 If it was omitted from the complaint -- and I
19 have not gone back to check that it was. It was
20 an error. This is absolutely part of the
21 contract.

22 Well, a couple of the specific items in
23 the complaint. Paragraph 9 says that -- sorry,
24 paragraph 10 notes that we would be required --
25 we would be entitled to recover the amount that

1 the -- was paid by the surety to the extent that
2 any of these parties are required to pay. We are
3 required to pay because that's what the bond
4 says.

5 As soon as the claim is made, even if
6 it's not paid, we're required to pay. So that is
7 satisfied. The teaming agreement, I've -- or
8 Ms. Peterson has testified as to why that remains
9 in place.

10 The balance due under the contract.
11 There has been -- Ms. Ariail has said that we
12 haven't said in our complaint that we weren't
13 paid the profit share. Judge, at the time this
14 complaint was filed, we didn't have any records
15 because Restoration hadn't been providing records
16 since the third pay application on this job.

17 So it would have been impossible for us
18 to say, there is a profit, and we are owed it,
19 and it hasn't been paid. What we could say is,
20 there has been no accounting. Now, a party
21 cannot fail to provide information and then point
22 to lack of information as a basis for defeating a
23 claim.

24 Finally, equitable subrogation, that's a
25 liability question, not a damages question. The

1 argument is, we can't be liable for the --
2 Restoration can't be liable for this amount
3 because equitable subrogation was not paid --
4 pled. That's just not a question of damages.
5 Thank you, Judge.

6 THE COURT: What is your position
7 relative to your fraud claim? Where do you come
8 in there?

9 MR. RANNIK: Judge, I really think
10 that our damages, all of them, are covered by
11 paragraph 14 from the breach of agreement. The
12 constructive and actual fraud, again, Judge, this
13 was pled at a time when we really didn't have any
14 information.

15 We, still to this day, don't know where
16 this money went. It was represented to Palmetto
17 that the agreements would be satisfied, that
18 subcontracts would be paid, that there would be a
19 share of the profits. And that didn't happen.
20 We don't have enough information, because they're
21 in default, to say whether or not Mark Ward and
22 Restoration squirreled the money away or did
23 whatever they did with it.

24 So the fraud claim stands. We have,
25 again, tied our damages to other causes of

1 action, but I think it's every bit as viable a
2 cause of action and a cause of damages as the
3 others.

4 THE COURT: Very good. Okay. All
5 right. This has become an interesting case, and
6 I've been getting a lot of those lately. This
7 one has not taken five weeks, like the last
8 construction case I had, I'm happy to report.
9 It's taken more years than the last one has, but
10 that's a different story altogether. And I don't
11 suppose it will end anytime soon.

12 But what is driving -- largely driving
13 the train here is the defendant's default, but
14 commensurate with that default is a lack of
15 discovery that has been done here. And that's
16 one of the difficult things in determining what
17 the damages really are.

18 I'm concerned in part because
19 Ms. Peterson's testimony, which I find to be
20 highly credible and knowledgeable, especially
21 when it comes to numbers. That lady knows her
22 numbers. Okay? I'm convinced of that. She
23 talks real fast, like she's from PA or something.
24 As I said earlier, I'm very familiar with
25 Yardley, PA. It's a beautiful part of the world.

1 But I'm more concerned, of course, as to
2 what's happened to this company. It just doesn't
3 exist anymore. These two gentlemen are out there
4 hanging in the wind. So, and it's -- that's
5 going be part of my ruling. But I do find, as to
6 the claim for damages, that these are actual
7 damages.

8 Some of these are consequential damages,
9 but I'm not going to be able to -- the request
10 was for \$2.6 million. I just don't feel like I
11 can give you all of that. But let me tell you
12 what I do find. I clearly find that Palmetto is
13 due for the subcontract work, the amount of the
14 \$184,858.69.

15 The share of the profits, as
16 Ms. Peterson testified to, is conservatively
17 factored at 225,389.81. I've got no question
18 about that. I find that the amount due to the
19 surety has been established at the tune of
20 1,307,970.71, and then clearly the interest has
21 been calculated.

22 Even that has been calculated
23 conservatively, and a lot of times I find that to
24 be the case. Mathematicians and engineers like
25 to be very specific in their findings; so you can

1 quantify those. I think those are being clearly
2 shown. What the Court has been wrestling with is
3 the claim for lost profits and the attorney's
4 fees because I could find no contractual basis
5 for attorney's fees.

6 And I understand, Mr. Rannik, your claim
7 is that those are consequential damages as a
8 result of whatever flowed from the demise of this
9 particular contractual arrangement; however, we
10 are also aware that the company had just folded
11 and just gone out of business, and I don't know
12 what the specific date on that is.

13 And it's on that basis that I'm going to
14 decline to grant you the \$250,000 and the \$29,000
15 that you've requested. So the figure -- and I
16 hadn't done the math yet, but it's the figure
17 you've requested less the \$279,549.91. Okay? So
18 it's going to be somewhere around 2.3, something
19 or other. Here's my math lady here.

20 \$2,338,958.64 is the figure I come to. That's
21 the actual damages. Okay?

22 There was a request for punitive damages
23 in here. I don't think we've had enough basis to
24 award those under these facts. I think it's a
25 sad story, clearly, because it looked like that

1 these two entities tried to get into something
2 that was going to work, hopefully work for both
3 of them, and it just didn't work for whatever
4 reason. I don't know why that was. But
5 certainly lack of communication doesn't assist
6 anybody in the process.

7 And I'm not sure what all the
8 ramifications are, but clearly Ms. Peterson, as
9 you said, the worst thing that could befall a
10 construction company is to not get the deal done.
11 Then you pay for that for the rest of your life,
12 and so you don't have to go through that process.

13 And I commend you and these gentlemen
14 for completing the project at what great cost,
15 I'm sure. And certainly you've got a former
16 employee who speaks very, very highly of y'all,
17 and that's a nice thing to have. You don't
18 always get to hear that the courtroom, I can tell
19 you that as well.

20 So anyway, I'm hopeful that y'all can
21 get this one resolved. I realize it may take a
22 while, but that's part of the process. We always
23 encourage settlements, and that sometimes will
24 end matters, but sometimes it doesn't. All
25 right. So I'm going to grant that relief under

1 the damages hearing, give you something to appeal
2 to so y'all can both kind of go at it if you'd
3 like.

4 Interesting case, though. Interesting
5 case. And like I said, I'm starting to read
6 these AIA contracts and I keep finding myself at
7 the same sections all the time. Section 4,
8 section 9, section 7. I'm getting a little bit
9 tired of it.

10 But anyway, I want to thank y'all for
11 being civil with one another. It always makes my
12 life a lot easier, and I wish you all well.
13 Thank you for coming today, and thank you for
14 your prompt and prepared presentation.

15 (The hearing was concluded at
16 5:03 P.M.)

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1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF DORCHESTER

4 I, Jennifer M. Huggins, Certified
5 Shorthand Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness whose attached in the
8 foregoing hearing was by me duly sworn to testify
9 to the truth, the whole truth, and nothing but
10 the truth in the within-entitled cause; that said
11 hearing was taken at the time and location
12 therein stated; that the testimony of the witness
13 and all objections made at the time of the
14 examination were recorded stenographically by me
15 and were thereafter transcribed by computer-aided
16 transcription; that the foregoing is a full,
17 complete and true record of the testimony of the
18 witness and of all objections made at the time of
19 the examination; and that the witness was given
20 an opportunity to read and correct said hearing
21 and to subscribe the same.

22 Should the signature of the witness
23 not be affixed to the hearing, the witness shall
24 not have availed himself/herself of the
25 opportunity to sign or the signature has been
waived.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal on March 18th, 2021 at
Charleston, Charleston County, South Carolina

Jennifer M. Huggins
Court Reporter And Notary Public
My commission expires: 02/07/2022