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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas for the Fifth Judicial Circuit

The Honorable William W. Wheeler, III, Circuit Court Judge

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Appellate Case No.: 2026-001127  
Trial Court Case No.: 2020-CP-40-03915

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ATC Site Construction, LLC,

Respondent,

v.

NKD, Inc.,

Appellant.

---

**RECORD ON APPEAL VOLUME I**

---

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## **VOLUME I**

### **Orders and Judgments**

|                                                                                                                                                                                  |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Consent Order to Stay Pending Completion of Arbitration entered July 10, 2024 .....                                                                                              | 001 |
| Consent Order for Interim Relief Pending Final Judgment entered July 11, 2025.....                                                                                               | 006 |
| Form 4 Judgment in a Civil Case entered April 8, 2026, by the Honorable William W. Wheeler,<br>III .....                                                                         | 011 |
| Order Granting Motion to Confirm Award, and Denying Motion to Vacate, Modify In Part and<br>Confirm In Part entered April 22, 2026 by the Honorable William W. Wheeler, III..... | 014 |

### **Pleadings**

|                                                                                                                                                                                         |     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Summons and Complaint for Foreclosure of Mechanic's Lien filed August 18, 2020.....                                                                                                     | 032 |
| Exhibit A: Notice of Mechanics Lien .....                                                                                                                                               | 039 |
| NKD's Fourth Amended Answer, Counterclaims, and Cross Claims filed July 3, 2023.....                                                                                                    | 045 |
| NKD's Motion to Release Mechanics Lien Bond filed May 2, 2025 .....                                                                                                                     | 067 |
| Exhibit A: Cash Bond to Release Mechanic's Lien .....                                                                                                                                   | 072 |
| NKD's Motion to Vacate in Part, Modify in Part, and Confirm in Part the Arbitration Award filed<br>May 13, 2025 .....                                                                   | 083 |
| Exhibit A: Final Award dated April 9, 2025.....                                                                                                                                         | 096 |
| Exhibit C: Interim Award dated January 21, 2025.....                                                                                                                                    | 104 |
| ATC's Motion to Confirm the Final Award of the Arbitration Panel filed June 16, 2025 .....                                                                                              | 116 |
| ATC's Motion to Award Attorney Fees and Costs filed July 9, 2025 .....                                                                                                                  | 125 |
| ATC's Memorandum in Support of Motion to Confirm Award, and Opposing Motion to Vacate in<br>Part, Modify in Part, and Confirm in Part the Arbitration Award, filed March 12, 2026 ..... | 127 |
| Exhibit 3: NKD's Motion to Correct Interim Award submitted to the Arbitration Panel .....                                                                                               | 143 |

|                                                                                                                          |     |
|--------------------------------------------------------------------------------------------------------------------------|-----|
| Exhibit 6: ATC’s Fee Petition submitted to the Arbitration Panel .....                                                   | 154 |
| Exhibit 10: Affidavit of Robert. L. Buchanan.....                                                                        | 157 |
| Exhibit 11: Affidavit of Russell Jeter.....                                                                              | 160 |
| NKD’s Omnibus Memorandum Relating to Pending Motions filed March 18, 2026 .....                                          | 167 |
| Exhibit C: One-Page List of Invoices Submitted with ATC’s Fee Petition .....                                             | 192 |
| Notice of Filing on March 18, 2026, of NKD’s Petition for Attorney’s Fees submitted to the<br>Arbitration Panel .....    | 193 |
| Exhibit 1: NKD’s Petition for Attorney’s Fees and Costs submitted to the Arbitration Panel on<br>February 28, 2025 ..... | 194 |

## **VOLUME II**

|                                                                                                         |     |
|---------------------------------------------------------------------------------------------------------|-----|
| Exhibit A: Itemization of Fees and Expenses Incurred in Successfully Defending Mechanic’s<br>Lien ..... | 213 |
| Exhibit B: Combined Lesemann & Associates LLC Invoices from February 2020 – January 2025<br>.....       | 379 |

## **VOLUME III**

|                                                                                                                                                                               |     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Continuation of Exhibit B: Combined Lesemann & Associates LLC Invoices from February<br>2020 – January 2025 .....                                                             | 449 |
| Exhibit C: Affidavit of Ellis R. Lesemann, Esq.....                                                                                                                           | 557 |
| Exhibit D: Affidavit of Bonum Sams Wilson, III, Esq. ....                                                                                                                     | 569 |
| Exhibit E: Order Awarding Attorneys’ Fees and Costs to Party Defending Mechanic’s Lien in<br><i>Balfour Beatty Construction, LLC v. Library Associates, LLC, et al.</i> ..... | 577 |
| NKD’s Reply Regarding Pending Motions filed March 27, 2026.....                                                                                                               | 584 |
| Exhibit C: Release of Cash Bond.....                                                                                                                                          | 596 |
| Exhibit D: Notice of Cancellation of Lis Pendens.....                                                                                                                         | 600 |
| Exhibit H: NKD’s Opposition to ATC’s Fee Petition submitted to the Arbitration Panel on March<br>7, 2025.....                                                                 | 603 |

## **Transcripts**

|                                                                                                                       |     |
|-----------------------------------------------------------------------------------------------------------------------|-----|
| Transcript of Hearing on Pending Motions held on March 19, 2026 before the Honorable<br>William W. Wheeler, III ..... | 615 |
|-----------------------------------------------------------------------------------------------------------------------|-----|

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

ATC Site Construction, LLC,

Plaintiff,

v.

NKD, Inc., and Ameris Bank,

Defendants,

---

ATC Site Construction, LLC,

Plaintiff,

v.

Geo-Systems Design & Testing, Inc.,

Third-Party Defendant,

---

NKD, Inc.,

Counter/Cross/Third-Party Plaintiff,

v.

ATC Site Construction, LLC, Geo-Systems  
Design & Testing, Inc., and Gearig  
Civilworks, LLC,

Counter/Cross/Third-Party Defendants.

---

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2020-CP-40-03915

**CONSENT ORDER TO STAY PENDING  
ARBITRATION**

The Parties have agreed to binding arbitration to resolve all claims involved in this matter and to a stay of this case pending completion of the arbitration. This Order shall be hereinafter referred to as the "Arbitration Order".

**IT IS HEREBY ORDERED:**

1. This action is referred to binding arbitration pursuant to the Construction Industry Arbitration Rules issued by the American Arbitration Association as modified by agreement among the parties, and stayed pending the completion of arbitration between the parties of any and all claims alleged in Plaintiffs' Complaint, Defendants' responsive pleadings, Third-Party Complaints, all counterclaims, crossclaims, along with any or all claims that have been made by the above-captioned Parties to this case, or claims which may be made by any of the Parties to this case.

2. Prior to the arbitration hearing, the Parties may conduct both fact discovery and expert discovery as agreed to by the other Parties and/or directed by the arbitrator. The Parties agree to that the discovery gathered in this case, including, but not limited to depositions, interrogatories responses, responses to requests to admit, responses requests for production, documents produced, testimony, information, or any other materials produced, may be used by the Parties in any manner consistent with the:

- a. South Carolina Rules of Civil Procedure,
- b. South Carolina Rules of Evidence,
- c. Applicable South Carolina case law or statutes, and
- d. Federal Authority pre-empting South Carolina law.

3. The arbitration panel shall make determinations regarding the admissibility of evidence at the arbitration hearing pursuant to the provisions of Paragraph 2 of the Arbitration Order.

4. The Parties agree to refrain from any repetitive discovery from the entry of the Arbitration Order until the time of the arbitration hearing. Nothing in the Arbitration Order shall

prevent the Parties from conducting discovery that was not completed prior to the entry of Arbitration Order, nor shall the Arbitration Order prevent any Party from enforcing a discovery obligation on another Party, such as unanswered discovery requests, depositions noticed before the entry of Arbitration Order, or any other pending discovery.

5. The Court retains jurisdiction over this matter for the purpose of enforcing the provisions of the Arbitration Order and any ultimate arbitration award, if any.

6. The Parties shall notify the Court of any settlement of this matter or the results of the arbitration so that the Court can take further action, to include judicial confirmation of an award and/or dismissal of this action.

7. The Parties have agreed to appoint three arbitrators by consent of all parties. The Parties shall provide the names of the arbitrators to the Court via a filing evidencing the consent of the Parties within thirty (30) days after the entry of the Arbitration Order. The Parties will conduct a binding arbitration hearing at a mutually acceptable location in South Carolina or by video conference.

8. The arbitration panel shall be empowered to hear and rule on all motions as though this matter were being heard in the South Carolina Court of Common Pleas. The arbitration panel shall be empowered to hear all pending motions before the South Court of Common Pleas prior to the entry of the Arbitration Order.

9. The Parties may, but are not obligated, to mediate this case prior to the arbitration hearing.

---

Chief Administrative Judge Fifth Judicial Circuit

July \_\_, 2024  
Columbia, South Carolina

**WE SO CONSENT:**

s/Russell Jeter

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Richland Common Pleas

**Case Caption:** Atc Site Construction Llc vs Nkd Inc , defendant, et al  
**Case Number:** 2020CP4003915  
**Type:** Order/Consent Order

IT IS SO ORDERED.

Jocelyn Newman, Chief Judge for Administrative  
Purposes, Court of Common Pleas, 5th Judicial  
Circuit

|                         |   |                                |
|-------------------------|---|--------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS   |
|                         | ) | FOR THE FIFTH JUDICIAL CIRCUIT |
| COUNTY OF RICHLAND      | ) |                                |

|                             |   |                           |
|-----------------------------|---|---------------------------|
| ATC SITE CONSTRUCTION, LLC, | ) | Case No.: 2020-CP-40-3915 |
|-----------------------------|---|---------------------------|

|            |   |
|------------|---|
| Plaintiff, | ) |
|------------|---|

|     |   |
|-----|---|
| vs. | ) |
|-----|---|

|                             |   |
|-----------------------------|---|
| NKD, INC., and AMERIS BANK, | ) |
|-----------------------------|---|

|             |   |
|-------------|---|
| Defendants, | ) |
|-------------|---|

**CONSENT ORDER FOR INTERIM  
RELIEF PENDING FINAL  
JUDGMENT**

---

|                             |   |
|-----------------------------|---|
| ATC SITE CONSTRUCTION, LLC, | ) |
|-----------------------------|---|

|            |   |
|------------|---|
| Plaintiff, | ) |
|------------|---|

|     |   |
|-----|---|
| vs. | ) |
|-----|---|

|                                     |   |
|-------------------------------------|---|
| GEO-SYSTEMS DESIGN & TESTING, INC., | ) |
|-------------------------------------|---|

|                        |   |
|------------------------|---|
| Third-Party Defendant, | ) |
|------------------------|---|

---

|            |   |
|------------|---|
| NKD, INC., | ) |
|------------|---|

|                                         |   |
|-----------------------------------------|---|
| Counter/Cross/Third-Party<br>Plaintiff, | ) |
|-----------------------------------------|---|

|     |   |
|-----|---|
| vs. | ) |
|-----|---|

|                             |   |
|-----------------------------|---|
| ATC SITE CONSTRUCTION, LLC, | ) |
|-----------------------------|---|

|                                          |   |
|------------------------------------------|---|
| Counter/Cross/Third-Party<br>Defendants. | ) |
|------------------------------------------|---|

This matter comes before the Court by consent of the remaining parties, Plaintiff/Counterdefendant ATC Site Construction, LLC ("ATC") and Defendant/Counterplaintiff NKD, Inc. ("NKD"), to provide certain interim relief pending the resolution of outstanding

motions and the entry of a final judgment in this case. Therefore, for good cause shown and upon consent of the remaining parties, the Court orders as follows:

1. Reduction of Protected Account with First Citizens Bank: As an amendment to this Court's Consent Order and Agreement Regarding Preservation and Protection of Funds dated March 23, 2023, the Minimum Balance in the Protected Account with First Citizens Bank may now be reduced to \$550,000.00 (the "Amended Minimum Balance"), which is equal to the amount of attorney's fees and expenses that NKD requested in the arbitration proceeding and that are the subject of NKD's pending motion(s).

2. Disbursement of Funds Held by Counsel for NKD: Counsel for NKD shall disburse the \$785,717.93 currently in its possession relating to this case as follows: (i) \$579,362.62 (\$568,437.71 final arbitration award and \$10,924.91 interest since May 9, 2025) shall be disbursed in accordance with instructions from NKD, which shall constitute full payment of the Final Arbitration Award dated April 9, 2025 by ATC along with interest that has accrued in accordance with the terms of the Final Arbitration Award up through July 9, 2025, subject to the final resolution of the issues presented in NKD's Motion to Vacate, in Part, Modify, in Part, and Confirm, in Part, the Final Arbitration Award as well as ATC's Motion to Confirm the Arbitration Award; and (ii) \$206,355.31 shall be disbursed to Russell Jeter, as Attorney for ATC Site Construction, LLC. The parties agree that no further interest on the final arbitration award of \$568,437.71 shall accrue.

3. Filing of Notice of Cancellation of Lis Pendens and Release of Mechanics' Lien: Plaintiff ATC Site Construction, LLC shall file a Notice of Cancellation of Lis Pendens and a Release of Mechanics Lien within five (5) days of the date of this Consent Order.

4. Refund of Cash Bond: Upon receipt of notice of the filing of this Consent Order, the Register of Deeds Office shall release the Cash Bond previously filed by NKD on or about March 14, 2022 at Book R 2725, Page 19 in the amount of One Million One Hundred Twenty-Nine Thousand Six Hundred Forty-Eight Dollars and Twenty-Seven Cents (\$1,129,648.27) shall be released and disbursed by check made payable to “Lesemann & Associates, LLC, as Attorneys for NKD, Inc.,” which funds shall be further disbursed in accordance with instructions from NKD. The remaining parties agree that this resolves NKD’s pending Motion to Release Mechanic’s Lien Bond and all matters relating to ATC’s mechanic’s lien claim (except for pending issues raised in NKD’s Motion to Vacate, in Part, Modify, in Part, and Confirm, in Part, the Final Arbitration Award, ATC’s Motion to Confirm the Arbitration Award, or ATC’s Motion for Attorney’s Fees).

5. Reservation of Rights: Except as provided in this Consent Order, the Court confirms that the remaining parties retain and have not waived their rights as to any relief sought in NKD’s Motion to Vacate, in Part, Modify, in Part, and Confirm, in Part, the Final Arbitration Award, ATC’s Motion to Confirm the Arbitration Award, or ATC’s Motion for Attorney’s Fees.

**THEREFORE**, upon the consent of the parties and for good cause shown,

**IT IS SO ORDERED.**

---

The Honorable Daniel Coble  
Chief Administrative Judge for Common Pleas  
Fifth Judicial Circuit

July \_\_, 2025  
Columbia, South Carolina

**WE CONSENT:**

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***Attorneys for Defendant/Counterclaim Plaintiff NKD, Inc.***



Richland Common Pleas

**Case Caption:** Atc Site Construction Llc , plaintiff, et al vs Nkd Inc , defendant, et al  
**Case Number:** 2020CP4003915  
**Type:** Order/Consent Order

So Ordered

s/ Daniel Coble, 2774

Electronically signed on 2025-07-11 13:51:43 page 5 of 5

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4003915

Atc Site Construction Llc et al  
PLAINTIFF(S)

Nkd Inc 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:

An in-person hearing was held on March 19, 2026 for Defendant's Motion to Vacate in part, Modify in part, and Confirm in part the Arbitration Award; Plaintiff's Motion to Confirm the Final Award of the Arbitration Panel; and Plaintiff's Motion for Attorney's Fees. Russ Jeter and George James appeared on behalf of the Plaintiffs. Ellis Lesemann and Robert Bonds appeared on behalf of the Defendants. After hearing all arguments presented by counsel, the court allowed the respective parties to file additional memoranda and took the matter under advisement.

\*see page 2\*

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 04/08/2026 .

Geo Systems Design & Testing Inc  
Atc Site Construction LLC  
Ameris Bank  
Nkd Inc

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), SCRCF.

---

After consideration of the parties respective arguments and additional memoranda, the court finds:

Plaintiff's motion to Confirm the Final Award of the Arbitration Panel is GRANTED.

----

Defendant's motion to Vacate in Part, Modify in Part is DENIED.

Motion for Release/Relief of Mechanic's Lien is MOOT.

The prevailing party shall submit a more formal order within 10 days in accordance with Rule 5(b)(3).



Richland Common Pleas

**Case Caption:** Atc Site Construction Llc , plaintiff, et al vs Nkd Inc , defendant, et al  
**Case Number:** 2020CP4003915  
**Type:** Order/Electronic Form 4

So Ordered

William W. Wheeler, III

|                            |   |                                    |
|----------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA    | ) | IN THE COURT OF COMMON PLEAS       |
|                            | ) |                                    |
| COUNTY OF RICHLAND         | ) | Civil Action No. 2020-CP-40-03915  |
|                            | ) |                                    |
| ATC SITE CONSTRUCTION, LLC | ) |                                    |
|                            | ) |                                    |
| Plaintiff,                 | ) | <b>ORDER GRANTING MOTION TO</b>    |
| Vs.                        | ) | <b>CONFIRM AWARD, AND DENYING</b>  |
|                            | ) | <b>MOTION TO VACATE, MODIFY IN</b> |
| NKD, INC.,                 | ) | <b>PART AND CONFIRM IN PART</b>    |
|                            | ) |                                    |
| Counter Claimant,          | ) |                                    |
| Cross Claimant, and        | ) |                                    |
| Third Party Plaintiff.     | ) |                                    |
|                            | ) |                                    |

---

This matter is before the Court on the motions of NKD, Inc. (“NKD”) to vacate in part, modify in part, and confirm in part, the Final Award issued by an arbitration panel (“NKD’s Motion”), and the motion of ATC Site Construction, LLC (“ATC”) to confirm the Final Award (“ATC’s Motion”).

This mechanics lien case with counterclaims was filed in this Court and had appeared on the trial roster in Richland County when the parties decided to arbitrate this case. The parties jointly filed a proposed Consent Order to Stay Pending Arbitration (“Consent Order”), and Chief Administrative Judge Jocelyn Newman issued the Consent Order on July 10, 2024.

The Consent Order provided: “The arbitration panel shall be empowered to hear and rule on all motions as though this matter were being heard in the South Carolina Court of Common Pleas. The arbitration panel shall be empowered to hear all pending motions before the South Court of Common Pleas prior to the entry of the Arbitration Order.”

NKD’s Motion sought a reversal of the arbitrators’ decision to award ATC attorneys’ fees under the mechanics lien statute. NKD claimed that the arbitrators used the wrong test in deciding

the “prevailing party”; the arbitrators had no jurisdiction to render a decision on the award of attorneys’ fees; the Panel exceeded its power in determining the amount of fees awarded to ATC; and the award should be corrected to calculate additional pre-judgment interest. ATC has moved to confirm the award. Based on the following, the Court finds the Panel’s Award should not be disturbed; therefore, ATC’s Motion to Confirm the Panel’s Award is Granted; NKD’s Motion to Vacate or Modify the Award is Denied, and the Motion for Release/Relief of Mechanic’s Lien is Moot.

### **STANDARD OF REVIEW**

“When a dispute is submitted to arbitration, the arbitrators determine questions of both law and fact. Generally, an arbitration award is conclusive, and courts will refuse to review the merits of an award. An award will only be vacated under narrow, limited circumstances.” Pittman Mortg. Co. v. Edwards, 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997).

S.C. Code Ann. § 15-48-130(a) (Supp.1996) provides the grounds for vacating an arbitration award. It states in relevant part:

- (a) Upon application of a party, the court shall vacate an award where:
  - (1) The award was procured by corruption, fraud or other undue means;
  - (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
  - (3) The arbitrators exceeded their powers;
  - (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 15-48-50, as to prejudice substantially the rights of a party; or

- (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 15-48-20 and the party did not participate in the arbitration hearing without raising the objection.

These statutory provisions make it clear that when parties choose arbitration, the primary role of the courts is not one of reviewing the record for factual or legal errors. Rather, the primary role is to provide relief where the arbitrators have acted in an unexpected and harmful manner such as to exhibit corruption, evident partiality, or acting beyond their powers.

In these cases, it is appropriate for a court to remedy the situation to protect the parties, who cannot protect themselves. However, where the parties have chosen arbitrators, rather than the courts, to resolve their disputes, the General Assembly has not empowered the courts to correct mere errors of law or fact arising from private resolution efforts. As Pittman, supra, states, such arbitration awards are conclusive.

### **FACTUAL BACKGROUND**

The parties were involved with a real estate development in the White Rock area of Richland County. NKD is the owner of the development known as River Shoals, and ATC was the site contractor hired by NKD to construct roads and utilities for that development. Problems arose between the parties which resulted in a mechanics lien and lis pendens being filed by ATC, which prompted counterclaims by NKD for road and utility defects and for liquidated damages for delay, and interest. Geo-Systems Design & Testing was the designer of the roads which were installed and was brought in as a third-party defendant by ATC, while NKD brought in Gearig Civil Works, LLC, a sub-contractor who laid soil cement on the roadbeds, as a third-party defendant. As noted above, the parties consented to arbitration.

After the parties agreed to arbitration, the parties selected three experienced and capable construction lawyers who have outstanding reputations in this State, as arbitrators. The arbitration hearing was held in Columbia and lasted four days in November 2024.

During the arbitration proceeding, Gearig settled its claims with ATC and NKD and was dismissed as a party. It was agreed Gearig's settlement payment to NKD would serve as a credit or setoff in ATC's benefit. At the conclusion of the arbitration, Geo-Systems was found not liable by the Panel. Thus, the Award and challenges to the same is between the contractor, ATC and the owner, NKD.

On January 21, 2025, the Panel issued its Interim Award. The Interim Award found that NKD had suffered net repair damages of \$1,111,787.83 plus liquidated damages of \$365,000, and pre-judgment interest of \$147,616.05. ATC was awarded \$838,685.95 on its mechanics lien claim. The Panel then reduced NKD's award to the extent of the amounts awarded to ATC. After the set-off of the mechanics lien claim, the total amount due NKD by ATC was \$785,717.93. The only issue not resolved by the Interim Award was the issue of the award of Attorney's Fees and costs on the mechanics lien claim. The Panel asked the parties to brief the Panel on the issue of entitlement to attorneys' fees before issuing its final award.

In response, NKD filed a Motion to Correct Interim Award which raised issues concerning: 1) the mistaken or inconsistent calculation of liquidated damages; 2) a miscalculation of interest on the Gearig settlement resulting in a shortfall of \$34,701.40; and 3) a clerical error concerning the damages claimed by NKD against ATC. With respect to the award of attorneys' fees, both parties submitted a Petition for attorneys' fees and both sides filed responses to the other side's Petition.

On April 9, 2025, the Panel issued its Final Award. The Panel rejected NKD's Motion to Correct Interim Award, determining that the liquidated damages had been properly computed, and denying NKD's request for pre-judgment interest on the settlement amount with Gearig. With respect to the award of attorneys' fees, the Panel determined that ATC was the prevailing party for attorneys' fees under S.C.Code Ann. §29-5-10(b). It based this determination on the fact that neither party had made an offer, therefore the issue would be decided under §29-5-10(b) by determining which party's pre-trial offer was closer to the final award in the case. ATC's offer was deemed to be the amount prayed for in its Complaint of \$847,236.20. Because NKD also made no offer, §29-5-10(b) directed that its offer was the amount of its counterclaim, which the Panel found to be \$3,373,570.29. Considering that the Panel's final net award was \$638,101.88 before interest, and \$785,717.93 with interest, under either calculation, ATC's pre-trial demand of \$847,236.20 was "clearly 'Closer to the verdict reached' in this matter."

ATC sought attorneys' fees in the amount of \$267,930.00. After review of all parties' submissions on the issue, the Panel exercised its judgment by reducing ATC's requested fees of \$267,930 by \$39,330 resulting in a total of \$228,600. The Panel reduced NKD's net award by that amount. ATC's Motion to Confirm and NKD's Motion, which are now before this Court, followed.

#### **I. THE PANEL DID NOT LACK SUBJECT MATTER JURISDICTION**

NKD raised the issue the Arbitration Panel did not have subject matter jurisdiction to hear the motions for attorney's fees. NKD cites Palmetto Wildlife Extractors, LLC v. Ludy, 435 S.C. 690, 869 S.E.2d 859 (Ct. App.2022), but this case does not discuss the issue of subject matter jurisdiction. The statutes it cites in its decision do not refer to arbitration, concern procedural issues for obtaining certain types of specialized relief, and the case does not discuss the grant of jurisdiction.

The causes of action that the Court of Appeals refused to send to arbitration involved non-parties whose interests might be affected by a decision to which they were not a party. Pursuing a receivership, dissolution or accounting can involve the interests of non-parties, especially creditors, which an arbitration would not have the power to protect

Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994) anticipated this problem of confusion between venue and subject matter jurisdiction. Quoting from the case:

“The distinction between subject matter jurisdiction and venue is an important one in the law.” “Subject matter jurisdiction is ‘the power to hear and determine cases of the general class to which the proceedings belong.’” “On the other hand, venue is the place or geographical location of trial.” “A court sitting where venue is improper may nevertheless render judgment provided the party who possesses the venue right consents, either expressly or impliedly.” “A court lacking subject matter jurisdiction, however, has no authority to act regardless of the geographical location or consent of the litigants.” “There is but one Circuit Court in South Carolina, with uniform subject matter jurisdiction ‘throughout the State.’ The circuit court is made up of the court of common pleas, which hears civil actions, and the court of general sessions, which hears criminal cases. The phrase ‘court of common pleas’ contained in the statute, refers to the South Carolina Court of Common Pleas, and not a particular circuit or county. The statute grants the court of common pleas throughout the State subject matter jurisdiction to hear appeals from the orders of the full commission.” Having held the Court of Common Pleas sitting in Richland County has subject matter jurisdiction, we review the statute to determine the correct venue for the appeal. S.C.Code Ann. § 42-17-60 designates “the county in which the alleged accident happened, or in which the employer resides or has his principal office” as proper venue for the appeal. As the accident occurred in Lexington County, venue is clearly proper in Lexington County. Proper venue in one county, however, does not exclude proper venue in another county where equally authorized under the statute.” (Citations omitted)  
Id. at 600.

Subject matter jurisdiction is a concept that applies to courts. If the Court does not have subject matter jurisdiction, it must dismiss the case. It also cannot stay the case, nor can it transfer the matter to arbitration since it has no power over the case.

If a court has subject matter jurisdiction, and venue exists or has been waived, it can hear the case. The court also has the power, since it has jurisdiction, to stay the case and refer the matter to arbitration if there is a valid arbitration agreement. S.C. Code Ann. §15-48-20.

Subject matter jurisdiction is not a concept that mandates the matter remain with a Court and prevents it from being sent to a master, a special referee, or an arbitration panel, as NKD seems to contend. Rather, subject matter jurisdiction must exist before a court can take any of those actions.

In this case, the court of common pleas had subject matter jurisdiction pursuant to S.C. Code Ann. §29-5-140.<sup>1</sup> Richland County was the correct venue for the mechanics lien case arising from a subdivision located in Richland County. See, Dove v. Gold Kist and S.C. Code Ann. §29-5-140.

Richland County was also the correct venue for awarding attorney's fees to the prevailing party in the mechanics lien action according to S.C. Code Ann. §29-5-10(a). Although NKD refers to S.C. Code Ann. §29-5-10(a) as a subject matter jurisdiction statute, NKD is in error because §29-5-10(a) contains no grant of jurisdiction to any specific court. That section simply grants venue in the court in which the lien action is filed, although there is no limitation to it being a circuit court. It is §29-5-140 that bestows subject matter jurisdiction to the circuit court for enforcing a mechanics lien.

NKD argues the use of the imperative "must" in Section 29-5-10(b) indicates a jurisdictional requirement that the case be heard where the lien was filed. In fact, that term is used in venue statutes such as S.C. Code Ann. §15-7-10 and §15-7-20. See also §§15-7-30 and 15-7-80. The use of the term "must" is an indicator of venue, not of jurisdiction.

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<sup>1</sup> S.C. Code Ann. §29-5-140 states in pertinent part: "The lien may be enforced by petition to the court of common pleas for the county in which the building or structure is situated."

Since the Court of Common Pleas for Richland County had subject matter jurisdiction over the case and was the correct venue for the case, this Court also had the power to stay the case and refer the entire matter, including attorneys' fees, to an arbitration panel per S.C. Code Ann. §15-48-20, once the parties agreed to arbitration in the consent order. NKD voluntarily moved and consented to the arbitrators deciding the issue of the entitlement to, and amount of attorney's fees. Accordingly, based upon the record presented to this Court, NKD waived its right to have the Richland County Court of Common Pleas determine those issues.

## **II. THE AWARD CORRECTLY AWARDED ATTORNEYS' FEES TO ATC**

NKD's Motion seeks to vacate the Panel's decision to award ATC attorneys' fees under the mechanics lien statute. The Motion claims that the award of mechanics lien attorney's fees "exceeded their powers" as arbitrators and was "in manifest disregard of the law."

To establish that the arbitrators exceeded their powers under sub-section (a)(3) of S.C. Code Ann. §15-48-130, NKD must show that the issue resolved by the arbitrators was not within the scope of the agreement to arbitrate. Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct.App.1998).

The record reflects that both ATC and NKD made motions for the award of attorneys' fees. This Court's Consent Order to Stay provided "The arbitration panel shall be empowered to hear and rule on all motions as though this matter were being heard in the South Carolina Court of Common Pleas." Thus, the arbitrators did not exceed their powers under section (a)(3) in ruling on this issue which both parties brought before the Panel.

NKD's motion also alleges the non-statutory ground that the decision was in manifest disregard of the law. When a dispute is submitted to arbitration, the arbitrators' decision is generally conclusive, and courts will refuse to review the merits of an award. Pittman Mortgage

Co. v. Edwards, 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997). While it is true the courts have not hesitated in appropriate cases to vacate an arbitration award where there is a manifest disregard or perverse misconstruction of the law, “those cases have been exceedingly rare, requiring circumstances far more egregious than mere errors in interpreting or applying the law.” Lauro v. Visnapuu, 351 S.C. 507, 519, 570 S.E.2d 551 (S.C. App. 2002). Factual and legal errors by arbitrators do not constitute an abuse of power, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers. Pittman, supra, at 337. If there is even an arguable ground for an award, the arbitrators have not manifestly disregarded the law. Batten v. Howell, 300 S.C. 545, 548, 389 S.E.2d 170, 172 (Ct.App. 1990).

NKD argues in its omnibus memorandum there is a standard of review which is “perverse misconstruction” of the law. There is no definition of that standard of review in any of the cases this Court has reviewed. The cases speak in terms of arbitration awards that have been very rarely overturned based on a “manifest disregard or perverse misconstruction of the law.” Batten v. Howell, 300 S.C. 545, 548, 389 S.E.2d 170, 172 (Ct.App. 1990). In the absence of any further definition, “perverse misconstruction” should be construed as an equivalent standard to “manifest disregard”, with all the limitations on its use.

NKD claims that because its recovery on its construction defect and delay counterclaims exceeded ATC’s recovery on its mechanics lien, that ATC has failed to prove “some entitlement” to recover on its lien. NKD has failed to cite to a case saying the party with the smaller award cannot be the prevailing party under the statute for purposes of awarding attorneys’ fees, despite the statute having been in effect for 35 years.

The three cases which NKD does cite were cases that decided, based upon procedural grounds and as a matter of law only, that the lien claimant was not entitled to relief. NKD cites to

EFCO Corp. v. Renaissance on Charleston Harbor, LLC, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006); Utilities Const. Co. v. Wilson, 321 S.C. 244, 250, 468 S.E.2d 1, 4 (Ct. App. 1996); and Seckinger v. Vessel Excalibur, 326 S.C. 382, 388, 326 S.C. 382, 388, 483 S.E.2d 775, 777-78 (Ct. App. 1997).

In EFCO, the Court of Appeals found that the Contractor failed to establish some entitlement to a mechanics lien because the contractor failed to file its lien within the statute of limitations, thus it had no rights at all under the statute. In Utilities, the trial court directed a verdict in favor of Wilson on the mechanic's lien cause of action because Utilities failed to timely serve notice of the mechanic's lien. Once again, the decision was based upon the plaintiff not meeting the statutory prerequisites for making a claim.

Finally, Seckinger ruled that because neither party had made a pre-trial settlement offer, the statutory test did not apply, and instead the common law test of the larger award determined entitlement to attorney's fees.

The holdings in Utilities, EFCO and Seckinger that the contractor had failed to prove entitlement to a lien award were not based upon the merits of the entitlement to lien damages but upon a failure to meet statutory prerequisites that have no relevance to this case. These cases do not apply to the facts in this case.

The Court finds any confusion on how to handle this situation is governed by the holdings in two later Supreme Court decisions, Brasington Tile Co., Inc. v. Worley, 327 S.C. 280, 289, 491 S.E.2d 244, 248 (1997) *superseded by statute* and JRS Builders, Inc. v. Neunsinger, 364 S.C. 596, 614 S.E.2d 629 (2005), that held the statutory prevailing party test applies regardless of whether the parties make a pre-trial offer of settlement.

NKD submitted these same arguments to the Panel. The Panel considered NKD's position but instead applied the statutory formula for determining the "prevailing party" entitled to fees:

Neither party made an offer of settlement as allowed in Section 29-5-10(b) of the South Carolina Code. Therefore, the Panel must look to the amount prayed for in ATC's Complaint as the "final offer of settlement" from ATC. That amount is \$847,236.20. Since NKD also did not make an offer of settlement pursuant to the statute, the Panel must consider "the value of his counterclaim" to be the "negative offer of settlement." Since the statute utilizes "offers of settlement" that are made prior to the start of a trial to determine the "prevailing party," the Panel gives more weight to the counterclaims asserted in NKD's Pre-Hearing Brief than the exhibit introduced at trial, or the subsequent amount asserted in NKD's Post-Hearing Brief. We conclude that the proper amount to be used as NKD's "negative offer of settlement" is \$3,373,570.29.

(Final Award, p.2.)

"Both ATC and NKD thoroughly briefed the issues and provided affidavits in support of their requests for attorneys' fees and costs. The Panel carefully reviewed those submissions and determined that ATC is the "prevailing party" pursuant to the South Carolina Mechanic's Lien statute and related cases. ATC was entitled to nearly all of its mechanics lien amount, but after consideration of the compulsory counterclaims we found that the net award, or one verdict, resulted in an Interim Award in favor of NKD of \$638,101.88 before interest or \$785,717.93 with interest through January 24, 2025. Using either number, and considering the offers of settlement discussed above, ATC is clearly "closer to the verdict reached" in this matter."

(Final Award, p.3)

NKD also claims the Panel engaged in a perverse misconstruction or manifest disregard of the statute by rejecting NKD's arguments. The Court finds The Panel did not disregard the governing statute, but expressly made their decision based upon that statute.

ATC proved entitlement to a mechanics lien of \$838,685.95, or 98.99% of the amount sought. That amount was the final amount awarded under the mechanics lien statute by the Panel. NKD argues that ATC lien award did not result in a cash payment from NKD to ATC, therefore

ATC did not recover on its lien. NKD's setoffs were the result of claims that were not filed under the mechanics lien statute. The fact that the offsetting common law claims exceeded the lien recovery, meant that ATC's 98.99% mechanics lien recovery took the form of an offset rather than cash under the "one verdict" procedure. ATC proved "some entitlement" to a mechanics lien and the arbitrators correctly determined that ATC was the prevailing party under §29-5-10(b) and therefore awarded ATC its attorney's fees. The set-off resulted in a benefit to ATC of \$838,685.95.

The attorneys' fees statute (Section 29-5-10(b)) was enacted in 1991 and amended in 1999. In the 35 years since its enactment, the "one verdict" procedure has been a part of the test that determines which party gets attorney's fees. Replacing the common law rule that the party with the largest net recovery was the prevailing party for attorney's fees, the General Assembly enacted an approach that was designed to promote settlements by rewarding the most reasonable pre-trial offer. Seckinger v. Vessel Excalibur, 326 S.C. 382, 389, 483 S.E.2d 775,780 (Ct.App. 1997). By netting the value of all the claims to reach a single verdict, the single verdict is a benchmark to which the Panel or any court compares the pre-trial offers of the parties. The party whose pre-trial offer is closer to the "one verdict" amount is the prevailing party.

The Panel correctly concluded that after considering the common law counterclaims in which the recovery exceeded the lien recovery, that ATC's 98.99% mechanics lien recovery had to take the form of an offset rather than cash under the "one verdict" procedure. The Panel correctly applied Section 29-5-10(b) to the facts of this case. On review of the record before it, this Court finds the Panel did not engage in either a perverse misconstruction nor a manifest disregard of the statute.

NKD also claims that ATC cannot prevail on its mechanics lien claim because the lien was bonded off and ATC failed to bring a new claim on the bond. Citing Keeney's Metal Roofing, Inc. v. Palmieri, 345 S.C. 550, 555, 548 S.E.2d 900, 902 (Ct.App. 2001), holding that once the property has been bonded off, there is no claim against the property, and a new action must be filed against the bondholder.

However, in this litigation, the bond stated that "Upon the filing of this cash bond, the Mechanics Lien shall be discharged, and the Cash Bond shall take the place of the property upon which the lien existed and shall be subject to the lien." (Cash Bond ECF filing dated April 19, 2022, p.2 of 3.) Thus, no new filing was necessary under the terms of the bond.

There is also no need to refer to the cash bond because ATC's mechanics lien recovery was satisfied by being set off against the amount of NKD's defect claims award. In Cohen's Drywall Co., Inc. v. Sea Spray Homes, LLC, 374 S.C. 195, 648 S.E.2d 598 (2007), the Supreme Court ruled that upon the posting of a cash bond to remove the mechanics lien, the Plaintiff is not required to file a second enforcement action against the cash bond. See also, United Tank Services, Inc. v. United Industries Group, 453 F.Supp.3d, 826 (D.S.C. 2020).

### **III. NKD FAILS TO ESTABLISH GROUNDS TO REVERSE OR AMEND THE PANEL'S AWARD OF ATTORNEYS' FEES**

NKD's motion contends that the Panel "Exceeded Its Power" in determining the amount of fees awarded to ATC. The motion alleges the Panel exceeded their powers and "manifestly disregarded South Carolina law."

The Panel awarded ATC \$228,600 for its attorney's fees. In comparison, NKD's attorney filed a request for \$224,560 for attorney and paralegal time, very close to what ATC received. NKD also spent \$93,000 on expenses for the mechanics lien case, while ATC spent \$0.

Factual and legal errors by arbitrators do not constitute abuse of their powers, and the court is not required to review the merits of their decision so long as the arbitrators do not exceed their powers. Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct.App. 1998). As previously noted, arbitrators “exceed their power” under South Carolina law, only if the issue resolved by them is not within the scope of the agreement to arbitrate. The decisions made regarding attorney’s fees were the result of motions for attorneys’ fees filed by both parties, and the arbitrators were specifically granted the power to decide motions. Upon review of the record before this Court, the arbitrators did not “exceed their power” in awarding attorney’s fees.

NKD summarily includes a statement in Paragraph 32 of its Motion, that the Panel “manifestly disregarded South Carolina law.” This argument is unpersuasive on its merits, and in addition, it would not amount to such an “exceedingly rare” violation as to amount to a “manifest disregard of the law.” The Panel’s reduction of \$39,330, indicates the Panel considered the points NKD argued before the Panel and continues to argue before this Court.

The Panel considered the six factors in Jackson v. Speed, 326 S.C. 492, 494, 486 S.E.2d 750, 760 (1997) and made specific findings of fact regarding those factors. Thus, the Panel was not ignoring existing law on the award of attorneys’ fees. NKD may disagree with the result of the Panel’s deliberation, but the Panel certainly considered the factors they should have under existing law.

Based upon the record before this Court, this Court finds that the arbitrators did not exceed their powers and did not manifestly disregard the law. NKD’s motion for relief is denied.

#### **IV. THE PANEL CORRECTLY CALCULATED PRE-JUDGMENT INTEREST**

NKD challenges the Panel’s calculation of pre-judgment interest concerning Gearig’s settlement payment during the arbitration hearing. As noted in the Panel’s Interim Award filed with

this Court, "Gearig reached a settlement with NKD in return for payment of \$150,000 to NKD and the dismissal of all claims by NKD against Gearig and dismissal of the crossclaims asserted by ATC. All parties agreed that this payment would act as a credit against the claims being asserted by NKD."

NKD contends the Gearig settlement should be incorporated after calculating pre-judgment interest versus before creating an alleged shortfall of \$34,701.40. This proposed calculation is inconsistent with South Carolina law concerning setoffs.

"A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles." Welch v. Epstein, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000) (citing Powers v. Temple, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967) ("[T]he rule is almost universally followed that one [tortfeasor] is entitled to credit for the amount paid by another [tortfeasor] for a covenant not to sue.")). "The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him." Truesdale v. S.C. Highway Dep't, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), overruled on other grounds by McCall ex rel. Andrews, 285 S.C. 243, 329 S.E.2d 741 (1985), superseded by statute. "In other words, there can be only one satisfaction for an injury or wrong." Welch, 342 S.C. at 312, 536 S.E.2d at 425.

When the settlement is for the same injury as a matter of law, "the right to setoff arises as an operation of law, and the circuit court must award a setoff." Smith v. Widener, 397 S.C. 468, 474, 724 S.E.2d 188, 191 (Ct. App. 2012). Once there is a verdict against a defendant, it becomes the trial court's function to determine whether the defendant is entitled to a setoff and the amount of the setoff, if any. See Smith, 397 S.C. at 471-72, 724 S.E.2d at 190 ("[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds

previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury."); *id.* at 472, 724 S.E.2d at 190.

An application dealing almost directly with the issue at hand can be found in Butler Contr., Inc. v. Court St., LLC, 369 S.C. 121, 631 S.E.2d 252 (2006). In Butler, Subcontractor contended the trial court erred in denying its request for prejudgment interest because the amount owed was certain or capable of being reduced to certainty upon demand for payment when a Contractor counterclaimed seeking an offset for damages allegedly caused by delays attributable to Subcontractor and work which Subcontractor failed to timely or properly perform. The South Carolina Supreme Court agreed.

“The amount Contractor owed Subcontractor was a certain sum or capable of being reduced to a certainty based on contractual provisions regarding the amount of the original contract, the amount of change orders approved by Contractor, and payments made by Contractor. **In this case, the trial court should have awarded prejudgment interest to Subcontractor after determining the amount Contractor owed Subcontractor.** Furthermore, Contractor's assertion of a counterclaim seeking an offset does not prevent an award of prejudgment interest because it is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable.”

Butler at 134-135. (Emphasis Added)

Gearig's settlement was paid to dismiss both NKD's and ATC's claims against it, extinguish any liability it may have to either party with no admission to liability, and to buy Gearig's peace. For purposes of the \$150,000.00 Gearig settlement, NKD is entitled to the payment, and the Panel properly handled this issue.

Here, ATC should receive the benefit of the credit/setoff from Gearig's payment, and prejudgment interest should only be calculated after determining the amount ATC owes NKD.

This was the purpose of the settlement. “All parties agreed that [Gearig’s payment] would act as a credit against the claims being asserted by NKD.” The Panel correctly awarded pre-judgment interest after determining the amount ATC owed NKD.

### **CONCLUSION**

Because NKD’s motion does not state grounds sufficient to vacate or modify the Panel’s award, the Motion of ATC, Inc. to confirm the arbitrators award should be granted and NKD’s motion to vacate, modify and partially confirm, must be denied.

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Richland Common Pleas

**Case Caption:** Atc Site Construction Llc , plaintiff, et al vs Nkd Inc , defendant, et al  
**Case Number:** 2020CP4003915  
**Type:** Order/Confirm

So Ordered

William W. Wheeler, III

|                         |   |                              |
|-------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
|                         | ) | FIFTH JUDICIAL CIRCUIT       |
| COUNTY OF RICHLAND      | ) |                              |

|                             |   |                              |
|-----------------------------|---|------------------------------|
| ATC SITE CONSTRUCTION, LLC, | ) | Civil Action No. 2020-CP-40- |
|                             | ) |                              |

PLAINTIFF,

**SUMMONS**

VS.

NKD, INC., AND AMERIS BANK,

DEFENDANTS.

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YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is attached herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscribers at their office at Post Office Box 7425, Columbia, South Carolina, 29202, within thirty (30) day after such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in this Complaint.

/s/ Russell Jeter

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Columbia, South Carolina

August 17, 2020.

|                             |   |                              |
|-----------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA     | ) | IN THE COURT OF COMMON PLEAS |
|                             | ) | FIFTH JUDICIAL CIRCUIT       |
| COUNTY OF RICHLAND          | ) |                              |
|                             |   |                              |
| ATC SITE CONSTRUCTION, LLC, | ) | Civil Action No. 2020-CP-40- |
|                             | ) |                              |
| PLAINTIFF,                  | ) |                              |
|                             | ) | <b>COMPLAINT</b>             |
| VS.                         | ) |                              |
|                             | ) | <b>JURY TRIAL DEMANDED</b>   |
| NKD, INC., AND AMERIS BANK, | ) |                              |
|                             | ) |                              |
| DEFENDANTS.                 | ) |                              |

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THE PLAINTIFF, ATC Site Construction, LLC, complaining of the Defendants, NKD, Inc. and Ameris Bank, would allege and show as follows:

#### **GENERAL ALLEGATIONS**

1. The Plaintiff ATC Site Construction, LLC ("ATC") is a South Carolina limited liability company, the principal office of which is located in Aiken County, South Carolina.
2. NKD, Inc. ("NKD") is a corporation organized under the laws of South Carolina, the principal office of which is located in Lexington County, SC, and is the owner in possession and developer of the real property located in Richland County, SC hereinafter more fully described ("the Property").
3. AMERIS BANK, having the address of 605 W Highway 80, Pooler, GA 31322, is the owner and holder of a real estate mortgage covering the Property dated April 25, 2018, and recorded April 26, 2018 as instrument #2018027531 in Record Book 2298 at Page 2145, Office of the Register of Deeds of Richland County, SC .

**FOR A FIRST CAUSE OF ACTION**

**(Foreclosure of Mechanic's Lien)**

4. All allegations hereinabove made are incorporated herein where relevant.
5. The Plaintiff is due the sum of Eight hundred eighty four thousand four hundred seventy three dollars and eighty four cents (\$884,473.84), all just credits having been applied, as set forth on the Statement of Just and True Account, which is subscribed and sworn to by an authorized officer of ATC based on information known to him, and which is attached hereto and incorporated herein by reference, plus interest, attorney's fees and costs.
6. The aforesaid debt is due the Plaintiff for labor performed or furnished and/or for materials furnished and actually used in the erection, alteration or repair of real estate, buildings or structures situated on the Property by virtue of an agreement with, or with the consent of, NKD, who at relevant times acted through its agents, acting within the course and scope of their authority.
7. ATC first furnished labor or material on June 5, 2017 and last labored and/or supplied labor or materials to the Property on February 24, 2020 within ninety (90) days prior to the filing and service of this Notice of Mechanic's Lien and Statement of Just and True Account.
8. By virtue of the foregoing, and by the filing and service of the Notice of Mechanic's Lien and Statement of Just and True Account (Exhibit "A"), and pursuant to S.C. Code Ann. §29-5-10 (1976), as amended, *et seq.*, the Plaintiff has and claims a lien to secure payment of the debt so due, plus the attorneys fees and the costs of enforcing said lien upon the buildings or structures situate upon the property more particularly described as follows, to wit:

All that certain piece, parcel or tract of land with improvements thereon, situate, lying and being near Crane Creek near the City of Columbia, County of Richland, State of South Carolina on the southerly side of Clemson Road [S.C. Highway S-40-52], shown as **CONTAINING 94.804 ACRES, MORE**

**OR LESS**, being more fully shown on that certain plat prepared for NKD, Inc. by Belter & Associates, Inc. dated November 11, 2004, last revised November 29, 2004, and recorded in the Office of the Register of Deeds for Richland County, in **PLAT BOOK \_\_\_\_\_ AT PAGE \_\_\_\_\_**, and having such metes, bounds and measurements as shown on said plat. All measurements being more or less.

Being the same property conveyed to NKD, Inc., c/o 100 Hagen Court, Lexington, SC 29072, by deed of Louise O'Sheal Younginer, Steven F. O'Sheal, Richard S. O'Sheal, and John M. O'Sheal, by and through their Attorney in Fact, Donald E. Lovett (under a Limited Durable Power of Attorney recorded November 4, 2003, in Record Book 871, at page 2861), collectively the "GRANTORS", dated December 29, 2004, and recorded December 31, 2004 as Instrument Number 2004106317 in Record Book 1011 at Page 1976, Office of the Register of Deeds for Richland County, SC.

**TMS #04300-04-10 [Major Portion]**

**RO4300-04-10**

**Address: 94.8 acres, O'Sheal Road, Irmo, SC 29063**

8. The Plaintiff brings this action to foreclose its Notice of Mechanic's Lien and Statement of Just and True Account filed pursuant to S.C. Code Ann. § 29-5-10 et. seq.
9. The Plaintiff is entitled to judgment in the amount of the Mechanic's Lien, together with reasonable attorney's fees and legal costs associated with this action and prejudgment interest.
10. The Plaintiff is entitled to foreclose its lien as provided by law, with the subject property being sold and the proceeds used to pay and satisfy ATC's lien.

**FOR A SECOND CAUSE OF ACTION**  
**(Breach of Contract)**

11. All allegations hereinabove made are incorporated herein where relevant.
12. NKD, by and through its duly authorized agent, entered into an agreement with the Plaintiff, pursuant to which the Plaintiff performed site construction in which it erected, altered, repaired and/or improved the land, structures and/or buildings situate on the Property in

consideration for payment of fees, costs and services to the Plaintiff for erecting, altering, repairing and/or improving said structures and buildings.

13. NKD has breached the agreement by failing and refusing to pay the Plaintiff as agreed, and by unreasonably delaying Plaintiff's performance on the project.

14. As a direct result of said breach, the Plaintiff has sustained actual damages and Defendant continues to breach the contract by failing and continuing to fail to pay the Plaintiff the monies owed under the contract of \$884,473.84, plus interest, and Plaintiff has been damaged from the delay caused by Defendant which has caused additional work and costs to complete the work, extended home office overhead, extended field office overhead, and other costs.

15. The Plaintiff is entitled to judgment against NKD for said damages.

**FOR A THIRD CAUSE OF ACTION**  
**(Quantum Meruit)**

16. All allegations hereinabove made are incorporated herein where relevant.

17. Valuable services were rendered and materials and labor were furnished by the Plaintiff to NKD.

18. The services, labor and materials were accepted by NKD and it has used and enjoyed and benefited by such materials, labor and services.

19. The Plaintiff, in performing such services, expected to be paid by NKD the reasonable and fair value thereof.

20. Under the doctrine of Quantum Meruit, the Plaintiff is informed and believes it is entitled to a judgment in the amount of \$884,473.84.

WHEREFORE, the Plaintiff prays for the following relief:

(1) That it be granted a judgment against NKD in the amount \$884,473.84, plus interest, attorney's fees and costs and delay damages;

(2) That the real estate, with all improvements, be sold according to law and the proceeds used to pay and satisfy its judgment, with any surplus distributed according to law; and

(3) For such other and further relief as the court deems proper.

/s/ Russell Jeter

The Jeter Law Firm, LLC  
Attorneys for the Plaintiff  
S.C. Bar # 2997  
Post Office Box 7425  
Columbia, South Carolina 29202  
1531 Blanding Street  
Columbia, South Carolina 29201  
Telephone: 803-765-0600  
[rj@jeterlawsc.com](mailto:rj@jeterlawsc.com)

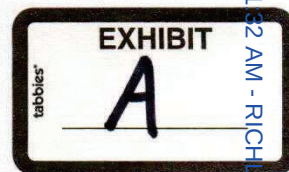
/s/Robert L. Buchanan, Jr.

Hull Barrett, PC  
Attorneys for the Plaintiff  
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[rlbuchananjr@hullbarrett.com](mailto:rlbuchananjr@hullbarrett.com)

Columbia, South Carolina

August 17, 2020.

|                             |   |                                  |
|-----------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA     | ) | IN THE COURT OF COMMON PLEAS     |
| COUNTY OF RICHLAND          | ) | FIFTH JUDICIAL CIRCUIT           |
| ATC SITE CONSTRUCTION, LLC, | ) |                                  |
| PLAINTIFF,                  | ) |                                  |
| VS.                         | ) | <b>NOTICE OF MECHANIC'S LIEN</b> |
| NKD, INC., AND AMERIS BANK, | ) | <b>AND STATEMENT OF JUST AND</b> |
| DEFENDANTS.                 | ) | <b>TRUE ACCOUNT</b>              |



1. ATC Site Construction, LLC. ("ATC"), a South Carolina contractor which operates under SC license number G118212 issued to ATC's authorized agent and officer, John Henderson, Jr, is a South Carolina limited liability company in good standing, the principal office of which is in the City of North Augusta, County of Aiken, State of South Carolina.
2. NKD, Inc. ("NKD"), a South Carolina corporation in good standing, the principal office of which is located in Lexington County, SC, is the owner in possession and developer of the real property located in Richland County, SC hereinafter more fully described ("the Property").
3. AMERIS BANK, having the address of 605 W Highway 80, Pooler, GA 31322, is the owner and holder of a real estate mortgage covering the Property dated April 25, 2018, and recorded April 26, 2018 as instrument #2018027531 in Record Book 2298 at Page 2145, Office of the Register of Deeds of Richland County, SC.
4. ATC hereby gives notice of its lien on the Property to the owner in possession of the Property and a known lien holder on the Property.
5. ATC is due the sum of Eight hundred eighty four thousand four hundred seventy three dollars and eighty four cents (\$884,473.84), all just credits having been applied, as set forth

01360801-1

1

|                                                      |                                       |                   |
|------------------------------------------------------|---------------------------------------|-------------------|
| Book 2496-2754                                       |                                       |                   |
| 2020026823                                           | 6/11/2020 02:37:46:547 Mechanics Lien |                   |
| Fee: \$25.00                                         | County Tax: \$0.00                    | State Tax: \$0.00 |
| 2020026823 John T. Hopkins II Richland County R.O.D. |                                       |                   |

on the Statement of Just and True Account, which is subscribed and sworn to by an authorized officer of ATC having personal knowledge thereof, and which is attached hereto and incorporated herein by reference, plus interest, attorneys' fees and costs as provided by law.

6. The aforesaid debt is due ATC for labor performed or furnished and/or materials furnished and actually used in the erection, alteration or repair of structures situated on the Property by virtue of an agreement with, and with the consent of, NKD, who at relevant times acted through its agents, acting within the course and scope of their agencies.

7. ATC first furnished labor or material on June 5, 2017 and last labored and/or supplied labor or materials to the Property on February 24, 2020 within ninety (90) days prior to the filing and service of this Notice of Mechanic's Lien and Statement of Just and True Account.

8. By virtue of the foregoing, and by the filing and service of this Notice of Mechanic's Lien and Statement of Just and True Account, and pursuant to S.C. Code Ann. §29-5-10, *et seq.*, ATC has and claims a lien to secure payment of the debt so due, plus the attorneys' fees and the costs of enforcing said lien upon the structures situate upon the Property.

9. The Property is more particularly described as follows, to wit:

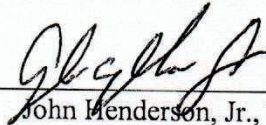
All that certain piece, parcel or tract of land with improvements thereon, situate, lying and being near Crane Creek near the City of Columbia, County of Richland, State of South Carolina on the southerly side of Clemson Road [S.C. Highway S-40-52], shown as **CONTAINING 94.804 ACRES, MORE OR LESS**, being more fully shown on that certain plat prepared for NKD, Inc. by Belter & Associates, Inc. dated November 11, 2004, last revised November 29, 2004, and recorded in the Office of the Register of Deeds for Richland County, in **PLAT BOOK \_\_\_\_\_ AT PAGE \_\_\_\_\_**, and having such Metes, bounds and measurements as shown on said plat. All measurements being more or less.

Being the same property conveyed to NKD, Inc., c/o 100 Hagen Court, Lexington, SC 29072, by deed of Louise O'Sheal Younginer, Steven F. O'Sheal, Richard S. O'Sheal, and John M. O'Sheal, by and through their Attorney in Fact, Donald E. Lovett (under a Limited Durable Power of Attorney recorded November 4, 2003, in Record Book 871, at page

2861), collectively the "GRANTORS", dated December 29, 2004, and recorded December 31, 2004 as Instrument Number 2004106317 in Record Book 1011 at Page 1976, Office of the Register of Deeds for Richland County, SC.

**TMS #04300-04-10 [Major Portion]  
RO4300-04-10**

**Address: 94.8 acres, O'Sheal Road, Irmo, SC 29063**

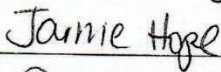
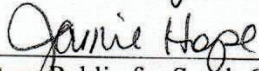


John Henderson, Jr., Vice-President  
ATC SITE CONSTRUCTION, LLC  
Project Manager, River Shoals

May 21 2020

SWORN to before me this

21 day of May 2020



Notary Public for South Carolina  
Commission Expires: 12-3-2029



JAMIE HOPE  
Notary Public for South Carolina  
Comm. Expires December 3, 2029

ATTORNEYS FOR ATC SITE CONSTRUCTION, LLC:

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Robert L. Buchanan, Jr.  
Hull Barrett, PC  
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Aiken, South Carolina 29802-0463  
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Facsimile: 803-648-2601  
rlbuchananjr@hullbarrett.com

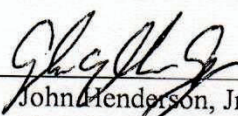
May 21<sup>st</sup>, 2020.

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
ATC SITE CONSTRUCTION, LLC,) )  
LIENOR, )  
VS )  
NKD, INC., AND AMERIS BANK, )  
LIENEES. )

**STATEMENT OF JUST  
AND TRUE ACCOUNT**

ATC Site Construction, LLC, is owed the sum of Eight Hundred Eighty-Four Thousand, Four Hundred Seventy-Three and 84/100 Dollars (\$884,473.84), with all just credits having been applied, as more particularly shown on the STATEMENT OF ACCOUNT dated May 18, 2020, which is attached hereto as Exhibit "A" and incorporated herein completely.

ATC Site Construction, LLC

By:   
John Henderson, Jr.  
Its: Vice President, Member and  
Project Manager of River Shoals  
Construction

SWORN to before me this

21 Day of May 2020

Jamie Hope

Jamie Hope

Notary Public of South Carolina

My Commission Expires: 12-3-2029



JAMIE HOPE  
Notary Public for South Carolina  
Comm. Expires December 3, 2029



May 18, 2020 STATEMENT OF ACCOUNT

ATC Site Construction, LLC, SC Contractor's license #G118212, qualifying party John Henderson Jr. Vice-President, Secretary and Member. John Henderson Jr. was the project manager over the River Shoals project.

The Contract between NKD, Inc. and ATC Site Construction, LLC is dated May 16, 2017. Work start date was June 5, 2017 and the last day worked was February 24, 2020.

Breakdown of money owed with change orders submitted and work that has been completed:

4.29.2019 Pay application \$127,862.87

9.06.2019 Pa application \$201,606.05

Remaining to bill Contract \$67,429.28

Retainage to date \$252,289.75

Change order #11 \$226,735.89

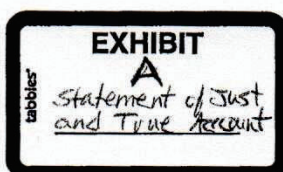
**SUB TOTAL \$875,923.84**

There are a few more changes that were asked to be done but have not had a change order request to date. The items are as follows:

1. Adding Pipe stands & a gauge w/flap for valve vault \$3,850.00
2. Repairing road at waterline broken by others \$3,850.0
3. Raise fire hydrant in rear cul-de sac \$850.00

**SUB TOTAL \$8,550.00**

**TOTAL \$884,473.84**



*[Signature]*

|                               |   |                                     |
|-------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA       | ) | IN THE COURT OF COMMON PLEAS        |
|                               | ) |                                     |
| COUNTY OF RICHLAND            | ) | FOR THE FIFTH JUDICIAL CIRCUIT      |
|                               | ) |                                     |
| ATC SITE CONSTRUCTION, LLC,   | ) | Case No.: 2020-CP-40-03915          |
|                               | ) |                                     |
| Plaintiff,                    | ) |                                     |
|                               | ) |                                     |
| vs.                           | ) | <b>NKD, INC.'S FOURTH AMENDED</b>   |
|                               | ) | <b>ANSWER, COUNTERCLAIMS, AND</b>   |
| NKD, INC., and AMERIS BANK,   | ) | <b>CROSS CLAIMS</b>                 |
|                               | ) |                                     |
| Defendants.                   | ) | <b><u>(Jury Trial Demanded)</u></b> |
|                               | ) |                                     |
| <hr/>                         |   |                                     |
| ATC SITE CONSTRUCTION, LLC,   | ) |                                     |
|                               | ) |                                     |
| Third-Party Plaintiff,        | ) |                                     |
|                               | ) |                                     |
| vs.                           | ) |                                     |
|                               | ) |                                     |
| GEO-SYSTEMS DESIGN & TESTING, | ) |                                     |
| INC., GEARIG CIVILWORKS, LLC, | ) |                                     |
|                               | ) |                                     |
| Third-Party Defendants.       | ) |                                     |
|                               | ) |                                     |
| <hr/>                         |   |                                     |

NKD, Inc. ("NKD"), by and through its undersigned counsel, responds to the Complaint filed by ATC Site Construction, LLC ("ATC") and asserts the following Counterclaims against ATC and Cross Claims against Geo-Systems Design & Testing, Inc. ("Geo-Systems") and Gearig Civilworks, LLC ("Gearig"), as follows:

### **FOR A FIRST DEFENSE**

Each and every allegation of the Complaint filed by ATC not hereinafter specifically admitted is hereby denied and strict proof is demanded thereof.

### **FOR A SECOND DEFENSE**

1. Upon information and belief, NKD admits the allegations contained in Paragraph

1 of the Complaint.

2. NKD admits the allegations contained in Paragraph 2 of the Complaint.

3. NKD admits the allegations contained in Paragraph 3 of the Complaint.

**AS TO THE FIRST CAUSE OF ACTION**  
***(Foreclosure of Mechanic's Lien)***

4. In response to the allegations contained in Paragraph 4 of the Complaint, NKD restates and re-alleges each of its prior responses as if fully set forth herein.

5. NKD denies the allegations contained in Paragraph 5 of the Complaint.

6. NKD denies the allegations contained in Paragraph 6 of the Complaint.

7. NKD denies the allegations contained in Paragraph 7 of the Complaint.

8. NKD denies the allegations contained in Paragraph 8 of the Complaint and states that ATC is not entitled to the relief requested in Paragraph 8 or otherwise.

9. NKD denies the allegations contained in the second Paragraph 8 of the Complaint.

10. NKD denies the allegations contained in Paragraph 9 of the Complaint and states that ATC is not entitled to the relief requested in Paragraph 9 or otherwise.

11. NKD denies the allegations contained in Paragraph 10 of the Complaint and states that ATC is not entitled to the relief requested in Paragraph 10 or otherwise.

**AS TO THE SECOND CAUSE OF ACTION**  
***(Breach of Contract)***

12. In response to the allegations contained in Paragraph 11 of the Complaint, NKD restates and re-alleges each of its prior responses as if fully set forth herein.

13. In response to the allegations contained in Paragraph 12 of the Complaint, NKD craves reference to the contract referenced and states that the contract will speak for itself. NKD denies that ATC performed its obligations under the contract.

14. NKD denies the allegations contained in Paragraph 13 of the Complaint.

15. NKD denies the allegations contained in Paragraph 14 of the Complaint and states that ATC is not entitled to the relief requested in Paragraph 14 or otherwise.

16. NKD denies that ATC is entitled to the relief requested in Paragraph 15.

**AS TO THE THIRD CAUSE OF ACTION**  
***(Quantum Meruit)***

17. In response to the allegations contained in Paragraph 16 of the Complaint, NKD restates and re-alleges each of its prior responses as if fully set forth herein

18. NKD denies the allegations contained in Paragraph 17 of the Complaint.

19. NKD denies the allegations contained in Paragraph 18 of the Complaint.

20. Paragraph 19 of ATC's Complaint seeks confirmation as to what ATC did or did not expect. NKD is unable to provide any response as to what expectation(s) ATC had. To the extent a response is required, NKD denies the allegations in paragraph 19.

21. NKD denies the allegations contained in Paragraph 20 of the Complaint and states that ATC is not entitled to the relief requested in Paragraph 20 or otherwise.

22. NKD denies the allegations contained in the "WHEREFORE" clause of the Complaint, including subparagraphs "1" through "3", and states that ATC is not entitled to the relief requested in the "WHEREFORE" clause or otherwise.

**FOR A THIRD DEFENSE**  
***(Failure to State a Claim)***

23. ATC's Complaint fails to state a claim for which relief can be granted and should therefore be dismissed under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

**FOR A FOURTH DEFENSE**  
***(Fraud)***

24. ATC's claims are barred due to fraud.

**FOR A FIFTH DEFENSE**  
***(Illegality)***

25. ATC's claims are barred due to illegality.

**FOR A SIXTH DEFENSE**  
***(Unclean Hands)***

26. ATC's claims are barred by the doctrine of unclean hands.

**FOR A SEVENTH DEFENSE**  
***(Failure to Comply with Mechanic's Lien Statute)***

27. ATC failed to comply with South Carolina's Mechanic Lien's Statute, including but not limited to South Carolina Code Sections 29-5-10, 29-5-20, 29-5-40, and 29-5-90. As a result, ATC failed to properly perfect its lien and its lien should be dissolved.

**FOR AN EIGHTH DEFENSE**  
***(Reservation of Additional Defenses)***

28. NKD hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

**ADDITIONAL FACTUAL ALLEGATIONS**  
**IN SUPPORT OF NKD'S COUNTERCLAIMS AGAINST ATC**  
**AND CROSS CLAIMS AGAINST GEO-SYSTEMS & GEARIG**

29. NKD, by and through its undersigned counsel, hereby asserts its counterclaims against ATC and cross claims against Geo-Systems, based upon the following factual allegations.

30. Upon information and belief, ATC is a South Carolina limited liability company with a principal office located in Aiken County, South Carolina.

31. Upon information and belief, Geo-Systems is a South Carolina corporation with a principal office located in Lexington County, South Carolina.

32. Upon information and belief, Gearig is a Georgia limited liability company with a

principal office located in Columbia County, Georgia.

33. This action relates to “River Shoals,” a residential development project that will include approximately 149 single-family homes, a system of roads, common areas, and a number of amenities.

34. The River Shoals Project has been significantly damaged and jeopardized due to improper work, delay, and wrongful conduct by: (i) ATC, who performed site work for River Shoals; (ii) Geo-Systems, who performed geotechnical and engineering services relating to the site work; and (iii) Gearig, who performed site work-related services, including but not limited to subgrade spreading and mixing of the soil cement application.

35. On May 16, 2017, after a negotiation process, NKD and ATC entered into the AIA Document A101 Standard Form of Agreement Between Owner and Contractor (the “Agreement”), which incorporated the standard AIA Document A201 General Conditions for the Contract of Construction (the “General Conditions”), as well as the Plans prepared by Civil Engineering of Columbia dated January 15, 2007 and last revised October 23, 2013, and other items, all of which are collectively referred to as the “Contract Documents.”

36. A copy of the Agreement is attached to this Answer and Counterclaims as Exhibit A, and a copy of the General Conditions are attached as Exhibit B.

37. Within the Contract Documents, NKD is referred to as the “Owner,” and ATC is referred to as the “Contractor.” The Agreement also appoints Civil Engineering of Columbia as the “Engineer,” who is also referred to as the “Architect” within the Agreement and the General Conditions.

38. The Agreement provides the scope of work, referred to as the “Work,” and states plainly that “[t]he Contractor shall fully execute the Work described in the Contract Documents,

except as specifically indicated in the Contract Documents to be the responsibility of others.” See *Agreement*, at Art. 2. However, as set forth below, in numerous respects, ATC has failed to fully execute the Work. Furthermore, with regard to the Work that has been conducted, much of it has been done incorrectly, negligently, and haphazardly.

39. As described more fully below, due to unreasonable delays and continuing failures on the part of ATC, NKD was prevented from completing the development of the Property in a timely manner and has incurred substantial damages as a result of the delays and failures of ATC. Only recently has NKD been able to sell the first set of lots.

40. By entering into the Contract with NKD, ATC agreed to provide sitework which would meet both the industry standards as well as the standards and requirements contained in the Contract Documents. ATC failed to do so.

41. As described in the Contract Documents, the sitework services to be provided by ATC for the Property include but are not limited to demolition, the installation of water sewer and stormwater infrastructure, site grading, soil erosion and sediment control, clearing and grubbing, top soil work, fill and compacting, fine grading, site paving, installing curbs gutters and sidewalks, installing a sanitary sewer system, installing a domestic water system, and the installation of a lift station. This work was done slowly, improperly and negligently.

42. Article 3 § 3.1 of the Contract stated that the date of commencement was June 5, 2017. Also, Article 3 § 3.3 of the Contract states that ATC shall achieve Substantial Completion of the entire Work not later than (365) days from the date of commencement, or as follows: 270 days – Substantial Completion, 365 days – Final Completion. As set forth in the Agreement, the failure to achieve Substantial Completion by the stipulated date results in Liquidated Damages payable to Owner in the amount of \$1,000.00 per day.

43. The Contract Documents contain eight (8) signed change requests. One of the change requests, Change Request 08, provided a stipulated adjustment to the Substantial Completion date to August 1, 2018.

44. Substantial Completion is defined in the A201–2007 General Conditions of the Contract for Construction § 9.8 as the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

45. The A201–2007 General Conditions of the Contract for Construction § 8.1.3 states that the date of Substantial Completion is the date certified by the Architect in accordance with § 9.8. As of the date of filing of this Answer and Counterclaims, ATC's work has not yet been certified by the Architect as substantially complete, because it is not substantially complete and will require significant additional time, expense and delay before it could be certified as substantially complete. In addition to the damages incurred for the work that had to be redone and other forms of damage, the liquidated damages owed by ATC amount to approximately ONE MILLION FOUR HUNDRED THOUSAND AND TWO DOLLARS (\$1,402,000.00), exclusive of interest.

46. As noted above, separate from liquidated damages, NKD has sustained significant additional damages due to faulty work, including the construction of the roadways and numerous other aspects of the Project.

47. The Contract Documents specify both the amount and type of materials and methods to be utilized by ATC when constructing and paving the roadways on the Property. ATC has deviated from the specific requirements provided in the Contract Documents and utilized substandard construction methods and or materials constructing and paving the roadways on the

Property required under the Contract Documents.

48. Upon information and belief, ATC, Geo-Systems, and Gearig were aware that construction methods and/or materials that it utilized when constructing and paving the roadways on the Property failed to meet the requirements specified in the Contract Documents and otherwise did not meet industry standards, best practices, and the standard of care.

49. Shortly after ATC stopped working, NKD identified at least ten distinct portions of the roadways on the Property that were failing and exhibited cracking that was visible on the surface of the roadway, either in the form of severe cracks or hairline cracks, both longitudinal and transverse, many of which extended for significant distances. The roadways as constructed were already in noticeable severe distress and the structural integrity and surface operational condition of the roadways were compromised.

50. The ten distinct areas of the roadway where both severe and hairline cracking was already visible was a clear indication that ATC, Geo-Systems, and Gearig utilized substandard construction methods and or materials constructing and paving the roadways on the Property.

51. The Contract Documents require ATC to construct and pave the roadways on the Property in a condition that will be accepted by Richland County. This was not done, and NKD was unable to turn the roads over to Richland County after they were constructed.

52. NKD alerted ATC of the many failures present in the roadways on the Property, and as of the date of this filing, ATC has refused to correct or repair its work that clearly fails to meet the minimum requirements as contained in the Contract Documents.

53. Numerous deficiencies in the work performed by ATC, Geo-Systems, and Gearig that required corrective action to be taken include, but are not limited to, the following:

- The catch basin was built too high, causing storm water to flow around the box, and not into the catch basin. As a result, the catch basin had to be lowered;
- Certain lift rings require removal;
- A total of at least eighty-nine (89) locations of cracked curb and gutter throughout the subdivision that required repair;
- The detention pond was not draining properly, and was backing up into the storm drain system;
- Numerous instances of longitudinal and transverse cracking, patching, potholes, microcracking, and other failures in the roadways constructed were identified that required significant repair, as well as numerous examples of non-compliance with applicable standards;
- The junction box at lots 61 and 62 must be brought up to grade;
- Multiple catch basins must be brought up to grade; and,
- The area adjacent to the amenities area must be stabilized.

54. Additionally, as a result of ATC, Geo-Systems, and Gearig improperly compacting, bedding, and otherwise installing the gravel and related components of the roads at the site, the sewer lines also experienced myriad issues including numerous major bellies and blockages that interfered and impeded with the flow of wastewater.

55. As a direct and proximate result of the improperly constructed roadways and improperly compacting, bedding, and otherwise installing the gravel and related components of the roads at the site, NKD has already incurred significant damages due to the delays in completing the development of the Property.

56. In addition, NKD has and will be required to expend substantial sums which include, but are not limited to, the cost of the investigation(s), the design of the repair, the repair itself, and other actual, incidental, consequential, special, direct and indirect damages all to NKD

in an amount to be determined by the jury. As a result of such conduct and damage proximately caused by ATC, Geo-Systems, and Gearig, NKD is also entitled to treble damages and punitive damages in an amount to be determined by the jury.

57. Separate from the roads, and the liquidated damages owed for the failure to achieve Substantial Completion, ATC has caused additional damages due to the failure to complete several other aspects of the Work and, in instances when the Work was attempted, requires additional work and correction.

**FOR A FIRST COUNTERCLAIM AGAINST ATC**  
***(Breach of Contract)***

58. NKD hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

59. ATC has breached the Agreement with NKD by failing to achieve Substantial Completion of the entire Work not later than August 1, 2018, as required by Change Request 08, and by abandoning the Work.

60. ATC has breached the Agreement with NKD by failing to follow the required specifications for the Work, resulting in Work that is faulty, negligent, and in violation of applicable standards. ATC has also breached the covenant of good faith and fair dealing that existed as part of the Contract, and that ATC owed to NKD.

61. ATC also breached its Contract with NKD by failing to use the minimum standards contained in the Contract Documents for the construction methods and materials that it used when constructing and paving the roadways on the Property.

62. Due to the failure of ATC to complete Substantial Completion of its Work as defined by the Contract Documents, NKD is entitled to at least \$1,402,000.00 in liquidated damages as of the date of this filing.

63. NKD is entitled to a judgment against ATC for both liquidated damages and actual damages as a result of ATC's breaches of the Contract in an amount to be determined by the jury or the Court, as applicable.

**FOR A SECOND COUNTERCLAIM AGAINST ATC**  
***(Breach of Express Warranty – S.C. Code § 36-2-313)***

64. The design, construction, and paving of the roadways on the Property came with an express warranty that the design and construction specifications of the Contract Documents would be followed.

65. However, ATC breached this express warranty, by using substandard construction methods and or materials relating to the construction and paving of roadways.

66. The roadway has failed to satisfy the reasonable expectations of NKD, the consumer, causing proximate damage to NKD.

67. As a direct and proximate result of ATC's breach of express warranty, NKD has suffered significantly due to ATC's improperly constructed roadways. NKD has already incurred significant damages due to the delays in completing the development of the Property. In addition, NKD will be required to expend substantial sums which include, but are not limited to, the cost of the investigation(s), the design of the repair, the repair itself, and other actual, incidental, consequential, special, direct and indirect damages all to NKD in an amount to be determined by the jury.

**FOR A THIRD COUNTERCLAIM AGAINST ATC**  
***(Violation of South Carolina Unfair Trade Practices Act)***

68. NKD hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

69. Section 39-5-20(a) of the South Carolina Unfair Trade Practices Act provides that

unfair methods of competition and unfair and deceptive acts or practices in the conduct of any trade or commerce are unlawful. The terms “trade” and “commerce” include the advertising, offering for sale, sale or distribution of any services and any property, commodity, or thing of value, and any trade or commerce directly or indirectly affecting the people of South Carolina.

70. The conduct of ATC is capable of repetition as it has already been repeated.

71. Prior to entering into the contract with NKD to provide sitework services for the 149 lot River Shoals Subdivision that was being developed by NKD, ATC had already been involved in a similar dispute regarding the quality of its work and/or the use of substandard construction methods and or materials relating to the construction and paving of roadways for a separate NKD project named the Estates of Persimmon Hill, which involved multiple deficiencies with ATC’s installation of soil cement including not abutting the curbing, not being installed to a depth of eight (8) inches (possibly as low as two (2) inches in some locations), and poor grading that is less than two (2) inches below the curbing.

72. All of the deficiencies involving ATC’s work at the Estates of Persimmon Hill required corrective action and the similarity in ATC’s misfeasance and malfeasance shows a pattern of behavior that is capable of repetition and, in fact, has been repeated.

73. ATC has engaged in unfair trade practices and deceptive acts in the conduct of their business in South Carolina by advertising, marketing and warranting that their sitework services will meet both the industry standards and the minimum requirements specified in the Contract Documents and these acts are of a continuing and repetitive nature.

74. That the use or employment of these unfair and deceptive methods, acts, and practices were willful and in violation of South Carolina Code § 39-5-20, thereby directly or indirectly affected the public interest.

75. As a direct, foreseeable and proximate result of the unfair trade practices by ATC, NKD has suffered significant damages, which include, but are not limited to, the cost of the investigation(s), the design of the repair, the repair itself, and other actual, incidental, consequential, special, direct and indirect damages all to NKD in an amount to be determined by the jury.

76. If the Court finds that ATC's use or employment of the unfair or deceptive acts were a willful or knowing violation of South Carolina Code § 39-5-20, the Court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon a finding by the Court of a violation of this article, the Court shall award to the person bringing such action under this section reasonable attorney's fee and costs.

**FOR A FOURTH COUNTERCLAIM AGAINST ATC**  
***(Negligence/Gross Negligence)***

77. NKD hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

78. At all times relevant hereto, ATC undertook and had a duty to NKD to exercise and use due care when constructing and paving the roadways for the Property, to conduct themselves in a good workmanlike manner, to supply and use suitable materials with adequate warnings and instructions and that would perform in accordance with the Contract Documents, the applicable building codes, state law, good design, and prevailing industry standards.

79. As a result of the failure of ATC to uphold these duties, the structural integrity of the roadways is insufficient and substandard, and the roadways are failing in multiple locations resulting in extensive cracking, patching, potholes, and surface markings.

80. Additionally, the sewer lines at the site are experiencing myriad issues including numerous major bellies and blockages that are interfering and impeding with the flow of

wastewater as a result of ATC improperly compacting, bedding, and otherwise installing the gravel on the roadways. These issues related to the sewer lines caused by ATC have required extensive repair.

81. ATC breached its duties to NKD in a manner that was negligent, careless, reckless, willful, and/or wanton, as failures in the design, sourcing of materials, processing, construction and/or paving of the roadways for the Project have rendered the roadways defective and causes ATC to have violated their duty of care. A preliminary identification of negligent acts and omissions on the part of ATC is set forth in the Affidavit of L. Steven Moore, P.E., which is attached as Exhibit C.

82. As a direct and proximate result of ATC's negligence and/or gross negligence in constructing and/or paving the roadways, NKD has suffered significantly. NKD has already incurred significant damages due to the delays in completing the development of the Property. In addition, NKD has and will be required to expend substantial sums which include, but are not limited to, the cost of the investigation(s), the design of the repair, the repair itself, and other actual, incidental, consequential, special, direct and indirect damages all to NKD in an amount to be determined by the jury.

**FOR A FIFTH COUNTERCLAIM AGAINST ATC**  
***(Negligent Misrepresentation)***

83. NKD hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

84. ATC represented to NKD that it could and would construct and pave the roadways on the Property in a manner that would be in accordance with the Contract Documents, the applicable building codes, state law, good design, and prevailing industry standards, and that the problems and defects associated with ATC's work that were present during the Estates of

Persimmon Hill project would not repeat themselves during ATC's work on the Project.

85. This was a false representation of material fact as ATC utilized the same or similar deficient construction methods and/or substandard materials when constructing and paving the roadways for the Project.

86. ATC had a pecuniary interest in making this false representation of material fact to induce NKD to enter into the Contract.

87. ATC owed a duty of care to NKD to see that it communicated truthful information.

88. There is no evidence that ATC undertook any measures to see that the same or similar deficient construction methods and/or substandard materials that were present at the Estates of Persimmon Hill would not be repeated when constructing and paving the roadways for the Project.

89. ATC breached its duty of care owed to NKD by failing to exercise due care when it made the false representations described above.

90. NKD reasonably and justifiably relied on the representations of ATC when entering into the Contract with ATC to provide sitework for the Project, including construction and paving of roadways, which would meet both the industry standards as well as the standards and requirements contained in the Contract Documents.

91. As a direct, foreseeable and proximate result of the negligent misrepresentations made by ATC as to the construction methods and/or materials to be utilized in the construction and paving of the roadways for the Project, NKD has suffered significantly due to ATC's improperly constructed roadways. NKD has already incurred significant damages due to the delays in completing the development of the Property. In addition, NKD has and will be required to expend substantial sums which include, but are not limited to, the cost of the investigation(s),

the design of the repair, the repair itself, and other actual, incidental, consequential, special, direct and indirect damages all to NKD in an amount to be determined by the jury.

**FOR A FIRST CROSS CLAIM AGAINST GEO-SYSTEMS**  
***(Negligence/Gross Negligence)***

92. NKD hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

93. Geo-Systems was engaged by NKD to perform a redesign of the roadway system at River Shoals, including but not limited to the design and application of a cement-treated base option and providing of related quality assurance services.

94. Geo-Systems scope of work included but was not limited to observing, mixing, testing, and confirming the cement being spread was designed, mixed, and thereafter applied according to the plans, industry and county standards and requirements, best practices, and the standard of care.

95. However, the cement that was ultimately spread and applied at the Property revealed significant defects, including inconsistencies with moisture content and density.

96. An after-the-fact investigation revealed that an overwhelming majority of the roadway system was below the required 2.0 inches of asphalt and below the required 8.0 inches of soil-cement thickness and failed to meet the plans, industry and county standards and requirements, best practices, and the standard of care.

97. These failures were a result of substandard and negligent quality assurance and workmanship of Geo-Systems.

98. These failures were also a result of Geo-Systems failing to properly train and supervise its field technicians and personnel to ensure that all work operations, including those being performed by ATC, were properly performed, including obtaining in-place test cores of the

soil-cement mixture and asphalt pavement to confirm depth and compaction requirements of the roadway design system were met.

99. As a result of these failures caused by Geo-Systems, the cement-treated base and the asphalt pavement section were substandard and failed to meet the required thickness in order for the roads to comply with the plans, county standards and requirements, best practices, and the standard of care and to be further accepted by Richland County.

100. Geo-Systems, as a licensed professional engineering, geotechnical, soils design, and testing firm, should have known the soil-cement and asphalt mix was substandard, and Geo-Systems should have never allowed the same to be applied to the roadway system. Instead, Geo-Systems knowingly allowed a substandard soil-cement and asphalt mix to be applied, and the roadway system, as result, was defective and failed.

101. A preliminary identification of the actions and omissions by Geo-Systems that breach the applicable standard of care is set forth in the Affidavit of L. Steven Moore, P.E., which is attached hereto as Exhibit C.

102. As a result of these failures caused by Geo-Systems, NKD has suffered significantly due to the improperly constructed roadways, which delayed the completion of the development of the Property. In addition, NKD has and will be required to expend substantial sums, which include, but are not limited to, the cost of the investigation(s), the design of the repair, the repair itself, and other actual, incidental, consequential, special, direct and indirect damages all to NKD in an amount to be determined by the jury.

**FOR A SECOND CROSS CLAIM AGAINST GEO-SYSTEMS**  
***(Breach of Contract)***

103. NKD hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

104. Geo-Systems and NKD entered into a contract, whereby Geo-Systems was engaged by NKD to perform certain geotechnical and quality assurance services related to the redesign of the roadway system at River Shoals, including the design and application of cement-treated base option.

105. Geo-Systems scope of work under the contract included but was not limited to observing, mixing, testing, and confirming the cement being spread was designed and mixed and thereafter applied according to the plans, industry and county standards and requirements, best practices, and the standard of care.

106. Geo-Systems breached the contract by failing to ensure that the cement being mixed and thereafter applied was done properly and in accordance with the plans, industry and county standards and requirements, best practices, and the standard of care, including obtaining in-place test cores of the soil-cement mixture and asphalt pavement to confirm depth and compaction requirements of the roadway design system were met.

107. As a result of these breaches by Geo-Systems, the cement-treated base and the asphalt pavement section of the roadway system were substandard and failed to meet the required thickness in order to comply with the plans, county standards and requirements, best practices, and the standard of care and to be further accepted by Richland County.

108. As a result of these breaches by Geo-Systems, NKD has suffered significantly due to the improperly constructed roadways, which delayed the completion of the development of the Property. In addition, NKD has and will be required to expend substantial sums, which include, but are not limited to, the cost of the investigation(s), the design of the repair, the repair itself, and other actual, incidental, consequential, special, direct and indirect damages all to NKD in an amount to be determined by the jury.

**FOR A FIRST CROSS CLAIM AGAINST GEARIG**  
***(Negligence/Gross Negligence)***

109. NKD hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

110. Gearig was engaged by ATC as a subcontractor to perform certain sitework services at River Shoals, including but not limited to the sub-grade spreading and mixing of the soil cement application.

111. Gearig's scope of work included but was not limited to observing, mixing, and confirming the cement that would be spread was designed, mixed, and spread according to the plans, project requirements, industry and county standards and requirements, best practices, and the standard of care.

112. However, the cement that was ultimately spread and applied at the Property revealed significant defects, including defects with the mix and inconsistencies with moisture content and density.

113. Furthermore, an after-the-fact investigation revealed that an overwhelming amount of the roadway system was below the required 2.0 inches of asphalt and below the required 8.0 inches of soil-cement thickness and failed to meet the plans, industry and county standards and requirements, best practices, and the standard of care. Gearig was aware of these material issues and defects while it performed its scope of work, but nevertheless decided to continue performing its scope of work negligently despite these known material issues and defects.

114. These failures were a result of substandard and negligent workmanship of Gearig.

115. As a result of these failures caused by Gearig, the cement-treated base and the asphalt pavement section were substandard and failed to meet the required thickness in order for

the roads to comply with the plans, county standards and requirements, best practices, and the standard of care and to be further accepted by Richland County.

116. As a result of these failures caused by Gearig, NKD has suffered significantly due to the improperly constructed roadways, which delayed the completion of the development of the Property. In addition, NKD has and will be required to expend substantial sums, which include, but are not limited to, the cost of the investigation(s), the design of the repair, the repair itself, and other actual, incidental, consequential, special, direct and indirect damages all to NKD in an amount to be determined by the jury.

**FOR A SECOND CROSS CLAIM AGAINST GEARIG**  
***(Violation of South Carolina Unfair Trade Practices Act)***

117. NKD hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

118. Section 39-5-20(a) of the South Carolina Unfair Trade Practices Act provides that unfair methods of competition and unfair and deceptive acts or practices in the conduct of any trade or commerce are unlawful. The terms “trade” and “commerce” include the advertising, offering for sale, sale or distribution of any services and any property, commodity, or thing of value, and any trade or commerce directly or indirectly affecting the people of South Carolina.

119. At all times relevant herein, Gearig was engaged in the conduct of its trade as defined by the South Carolina Unfair Trade Practices Act and advertises, markets, and warrants that its sitework-related services will meet both industry standards and project requirements, and these acts are of a continuing and repetitive nature.

120. Gearig’s misconduct referenced above and described below constitutes unfair and deceptive methods, acts, practices in the conduct of its trade, by failing to disclose or otherwise

concealing material issues and defects related to the roadway system at River Shoals, including the integrity and thickness of the soil cement mix.

121. Specifically, while performing its scope of work, Gearig was aware that the roadway system did not have the required 8.0 inches of soil-cement thickness and failed to meet the plans, industry and county standards and requirements, best practices, and the standard of care. However, Gearig concealed or otherwise failed to disclose this material issue and defect to NKD.

122. Gearig's misconduct referenced above is capable of repetition and adversely affects the public interest.

123. The use or employment of these unfair and deceptive methods, acts, and practices by Gearig were willful and in violation of *S.C. Code Ann.* § 39-5-20, thereby directly or indirectly affecting the interests of the people of South Carolina. Gearig knew or should have known that its conduct referenced above was in violation of *S.C. Code Ann.* § 39-5-20.

124. As a direct, foreseeable and proximate result of the unfair and deceptive methods, acts, and practices by Gearig, NKD has suffered significant damages, which include, but are not limited to, the cost of the investigation(s), the design of the repair, the repair itself, and other actual, incidental, consequential, special, direct and indirect damages all to NKD in an amount to be determined by the jury.

125. If the Court finds that Gearig's use or employment of the unfair and deceptive methods, acts, and practices were a willful or knowing violation of *S.C. Code Ann.* § 39-5-20 as alleged, the Court shall award three times (3x) the actual damages sustained by NKD and may provide such other relief as it deems necessary or proper. Upon a finding by the Court of a violation of this article, the Court shall further award to the person bringing such action under this section reasonable attorney's fee and costs.

**WHEREFORE**, NKD respectfully prays that the Court dismiss all of ATC's claims asserted in the Complaint, enter a judgment in favor of NKD and against ATC on its counterclaims, enter judgment in favor of NKD and against Geo-Systems and Gearig on its cross claims, and award NKD its actual, incidental, exemplary, consequential, special, and treble damages, plus prejudgment interest, costs, and attorney's fees as shall be incurred in connection with this action, along with such other and further relief as the Court deems just and proper.

By: s/ Benjamin H. Joyce

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(843) 724-5155

**Attorneys for Defendant and  
Counter/Cross Claim Plaintiff NKD, Inc.**

July 3, 2023  
Charleston, South Carolina

|                                     |   |                                      |
|-------------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA             | ) | IN THE COURT OF COMMON PLEAS         |
|                                     | ) |                                      |
| COUNTY OF RICHLAND                  | ) | FOR THE FIFTH JUDICIAL CIRCUIT       |
|                                     | ) |                                      |
| NKD, INC.,                          | ) | Case No.: 2020-CP-40-03915           |
|                                     | ) |                                      |
| Plaintiff,                          | ) | <b>NKD, INC.’S MOTION TO RELEASE</b> |
|                                     | ) | <b>MECHANIC’S LIEN BOND</b>          |
| vs.                                 | ) |                                      |
|                                     | ) |                                      |
| ATC SITE CONSTRUCTION, LLC, and     | ) |                                      |
| GEO-SYSTEMS DESIGN & TESTING, INC., | ) |                                      |
|                                     | ) |                                      |
| Defendants.                         | ) |                                      |
|                                     | ) |                                      |

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COMES NOW Plaintiff NKD, Inc. (“NKD”) by and through its undersigned counsel, hereby moves the Court for an order releasing the cash bond relating to the mechanic’s lien filed by Defendant ATC Site Construction, LLC (“ATC”)

The grounds for this Motion are as follows:

1. NKD and ATC are parties to a site work construction contract (AIA 101-2007) and general conditions of contract (A201 – 2007) on May 16, 2017 (the “Contract”) for a residential development project in Richland County known as “River Shoals.”
2. NKD was the owner and developer of River Shoals.
3. ATC was hired to grade the property and to install water and sewer lines, roads, and sidewalks at River Shoals.
4. ATC was behind schedule from the beginning of the project and did not progress the work in a diligent manner.
5. Under the Contract, ATC was required to achieve Substantial Completion of the project by August 1, 2018.
6. On February 24, 2020, over eighteen (18) months after the date of Substantial

Completion, ATC abandoned the project having failed to achieve Substantial Completion.

7. Despite receiving payment of approximately \$4,562,176.83 for work that was almost entirely defective and substandard work, and having failed to reach Substantial Completion, ATC filed a Notice of Mechanic's Lien in which it claimed \$884,473.84 was due and owing to ATC.

8. The mechanic's lien was reduced in amount to \$847,236.20 by Consent Order Reducing Mechanic's Lien of ATC entered by the Honorable Michael S. Holt on February 3, 2022.

9. The filing of the Mechanic's Lien caused NKD's original lender to freeze the loan, which required NKD to secure a replacement lender.

10. In addition, in order to allow for finished lots in River Shoals to be sold, NKD filed a Cash Bond to Release Mechanic's Lien with the Richland County Clerk of Court pursuant to S.C. Code § 29-5-110, and delivered a certified check payable to the Register of Deeds for Richland County in the amount of One Million One Hundred Twenty-Nine Thousand Six Hundred Forty-Eight and 27/100 Dollars (\$1,129,648.27). A copy of the Cash Bond to Release Mechanic's Lien is attached as Exhibit A.

11. Upon information and belief, the Mechanic's Lien Bond was filed on or about March 14, 2020, in Book 2725-19 in the Richland County R.O.D.

12. Section 29-5-110 provides certain instances in which the real property may be released from the mechanic's lien:

At any time after service and filing of the statement required under § 29-5-90 the owner or any other person having an interest in or lien upon the property involved may secure the discharge of such property from such lien by filing in the office of clerk of court or register of deeds where such lien is filed his written undertaking, in an amount equal to one and one-third times the amount claimed in such statement, secured by the pledge of United States or State of South Carolina securities, by cash or by a surety bond executed by a surety company licensed to do business in this State, and upon the filing of such undertaking so secured the lien

shall be discharged and the cash, securities or surety bond deposited shall take the place of the property upon which the lien existed and shall be subject to the lien. In the event of judgment for the person filing such statement in a suit brought pursuant to the provisions of this chapter, such judgment shall be paid out of the cash deposited or, in event of pledge of securities, it shall be paid from the proceeds of a sale of so much of the pledged securities as shall be necessary to satisfy such judgment or, in event of the filing of a surety bond, the surety company issuing such bond shall pay such amount found due, not to exceed the amount of the bond. Unless suit for enforcement of the lien is commenced as required by § 29-5-120, the undertaking herein required shall be null and void and the principal therein shall have the right to have it canceled and such cash or securities deposited or pledged or surety bond filed shall be released from the lien herein provided.

See S.C. Code § 29-5-110.

13. By filing the cash bond, NKD agreed to become bound to ATC for payment of any sum, not to exceed the amount of the cash bond, as may be recovered or found due and owing to ATC by virtue of any action to foreclose the mechanic's lien.

14. In 2024, the parties agreed to submit the matter to arbitration before the Panel of three (3) arbitrators (the "Arbitration Panel"). The arbitration hearing took place in Columbia, South Carolina over four (4) days beginning Tuesday, November 19, 2024 and concluding Friday, November 22, 2024. At the time of the arbitration hearing, ATC asserted a mechanic's lien in the amount of \$847,236.20.

15. The Arbitration Panel issued an Interim Award dated January 21, 2025, finding that "the total Interim Award against ATC and in favor of NKD is \$785,717.93." A copy of the Interim Award is attached as Exhibit B.

16. On April 9, 2025, the Arbitration Panel issued the Final Award, which reduced the amount awarded to NKD in the Interim Award by \$228,600.00. A copy of the Final Award is attached as Exhibit C. In other words, ATC has failed to prove that it was entitled to a lien, as ATC is not entitled to a judgment. However, the fact remains that ATC is awarded nothing and, in fact, owes hundreds of thousands of dollars to NKD.

17. NKD is also filing a Motion to Vacate or Modify, in Part, and to Confirm, in Part, the Final Award.

18. Although NKD seeks an order vacating or modifying the Final Award, in part, with respect to the amounts awarded to NKD, the outcome of the arbitration proceeding confirms that ATC breached the Contract, received no award of damages by the Arbitration Panel, and owes a debt to NKD.

19. The outcome of the arbitration proceeding confirms that NKD is not liable to ATC for any sum, no amount of the mechanic's lien was recovered by ATC, and therefore, no judgment shall be paid out of the bond, as ATC has no entitlement to the mechanic's lien. *See* S.C. Code § 29-5-10 ("One verdict assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims.").

20. ATC is not entitled to bring a lien enforcement action against the cash bond because no judgment was entered in favor of ATC. *See* S.C. Code § 29-5-110; *see also Moorhead Const., Inc. v. Enter. Bank of S.C.*, 410 S.C. 386, 391, 765 S.E.2d 1, 3 (Ct. App. 2014) ("If there is no right to foreclosure because the right to a lien is not established, there is no right to recover against the surety on the bond") (*citing* Am.Jur.2d *Mechanics' Liens* § 308 (2007)).

21. Accordingly, NKD is entitled to an order dismissing ATC's mechanic's lien and ordering the immediate release of the cash bond posted by NKD in the amount of 1,129,648.27.

Therefore, Plaintiff NKD, Inc., seeks an order from this Court directing the Richland County Clerk of Court to immediately release the cash bond posted by NKD in the amount of 1,129,648.27, on the basis that ATC has no entitlement to a lien, and award NKD such other and further relief as the Court deems just and proper.

Respectfully submitted,

By: s/ Ellis R. Lesemann  
Ellis R. Lesemann (S.C. Bar No. 15315)  
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(843) 724-5155

***Attorneys for Plaintiff NKD, Inc.***

May 2, 2025  
Charleston, South Carolina

**Exhibit A**

***Cash Bond to Release Mechanic's Lien***

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
  
ATC SITE CONSTRUCTION, LLC, )  
  
Plaintiff, )  
  
vs. )  
  
NKD, INC. and AMERIS BANK, )  
  
Defendants. )

IN THE REGISTER OF DEEDS

**CASH BOND TO RELEASE  
MECHANIC'S LIEN**

WHEREAS, Plaintiff ATC Site Construction, LLC, has filed a Mechanics' Lien against certain property on account of labor and/or special materials alleged to have been furnished for the erection, alteration, or repair of infrastructure on said real estate. The Legal Description for the certain property is attached hereto as Exhibit A and made a part hereof by this reference; and

WHEREAS, that such Mechanics' Lien was filed on or about June 11, 2020, in Book 2496, Page 2754, in the Register of Deeds for Richland County; and being in the amount of Eight Hundred Eighty-Four Thousand Four Hundred Seventy-Three and 84/100 Dollars (\$884,473.84); and

WHEREAS, that such Mechanic's Lien was reduced in amount by Consent Order Reducing Mechanic's Lien of ATC Site Construction, Inc. to \$847,236.20 by Order of The Honorable Michael S. Holt entered on February 3, 2022, attached hereto as Exhibit B. This Order reduced the Mechanic's Lien to Eight Hundred Forty-Seven Thousand Two Hundred Thirty-six and 20/100 Dollars (\$847,236.20); and

Book 2725-19  
2022014536 03/14/2022 14:10:51:570 Mechanics Lien Bond  
Fee: \$10.00 County Tax: \$0.00 State Tax: \$0.00  
  
2022014536 John T. Hopkins II Richland County R.O.D.

WHEREAS, NKD, Inc. without waiving any right or defenses they or any other party may have against Plaintiff, is desirous of having the property as described in the Legal Description released in accordance with the provisions of S.C. Code §29-5-110.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that for and in consideration of the release of the within property from the lien, the undersigned NKD, Inc., by delivering a certified check payable to the Register of Deeds for Richland County in the amount of amount of One Million One Hundred Twenty-nine Thousand Six Hundred Forty-eight and 27/100 Dollars (\$1,129,648.27), as surety, do hereby undertake to become bound to Plaintiff for payment to the Plaintiff of any sum, not to exceed the amount of the Cash Bond, as may be recovered or found due and owing to Plaintiff by virtue of any action to foreclose the said Mechanics' Lien. This Cash Bond is made and filed pursuant to S.C. Code §29-5-110.

Upon the filing of this Cash Bond, the Mechanics' Lien shall be discharged, and the Cash Bond shall take the place of the property upon which the lien existed and shall be subject to the lien.

Otherwise, this obligation is null and void.

Executed this 17<sup>th</sup> day of February, 2022

*[Signatures only on following page]*

WITNESS:

1 M Z  
Alam

By: Becky  
Ellis R. Lesemann (S.C. Bar No. 15315)  
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*Attorneys for Defendant NKD, Inc.*

February 17, 2022  
Charleston, South Carolina

STATE OF SOUTH CAROLINA     )  
                                                           )  
COUNTY OF CHARLESTON     )

PERSONALLY appeared before me, the undersigned witness, and made oath that she saw the named Benjamin H. Joyce sign, seal and as his act and deed deliver the within written instrument, that I am not a party or beneficiary of the transaction, that I am signing as a subscribing witness, and that I witnessed Benjamin H. Joyce sign this document.

Sworn to before me this  
17 day of February, 2022

Alam  
Notary Public for South Carolina

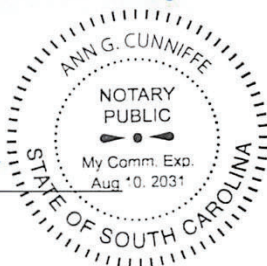


**EXHIBIT A**  
***Legal Description***

**EXHIBIT A**

All that certain piece, parcel or tract of land with improvements thereon, situate, lying and being near Crane Creek near the City of Columbia, County of Richland, State of South Carolina on the southerly side of Clemson Road [S.C. Highway S-40-52], shown as CONTAINING 94.804 ACRES, MORE OR LESS, being more fully shown on that certain plat prepared for NKD, Inc. by Belter & Associates, Inc. dated November 11, 2004, last revised November 29, 2004, and recorded in the Office of the Register of Deeds for Richland County, in PLAT BOOK 1011 AT PAGE 2011, and having such Metes, bounds and measurements as shown on said plat. All measurements being more or less.

Being the same property conveyed to NKD, Inc., c/o 100 Hagen Court, Lexington, SC 29072, by deed of Louise O'Shea] Younginer, Steven F. O'Sheal, Richard S. O'Sheal, and John M. O'Sheal, by and through their Attorney in Fact, Donald E. Lovett (under a Limited Durable Power of Attorney recorded November 4, 2003, in Record Book 871, at page 2861) collectively the "GRANTORS", dated December 29, 2004, and recorded December 31, 2004 as Instrument Number 2004106317 in Record Book 1011 at Page 1976, Office of the Register of Deeds for Richland County, SC.

**TMS #04300-04-10 [Major Portion]**

**RO4300-04-10**

**Address: 94.8 acres, O'Sheal Road, Irmo, SC 29063**

**EXHIBIT B**

*Consent Order Reducing Mechanic's Lien*

|                             |   |                                          |
|-----------------------------|---|------------------------------------------|
| STATE OF SOUTH CAROLINA     | ) | IN THE COURT OF COMMON PLEAS             |
| COUNTY OF RICHLAND          | ) | FOR THE FIFTH JUDICIAL CIRCUIT           |
|                             | ) | Case No.: 2020-CP-40-3915                |
| ATC SITE CONSTRUCTION, LLC, | ) |                                          |
| Plaintiff,                  | ) |                                          |
| vs.                         | ) | <b>CONSENT ORDER</b>                     |
| NKD, INC. and AMERIS BANK,  | ) | <b>REDUCING MECHANIC'S LIEN</b>          |
| Defendants.                 | ) | <b>OF ATC SITE CONSTRUCTION, INC. TO</b> |
|                             | ) | <b>\$847,236.20</b>                      |

IT APPEARS to the Court that the Plaintiff, ATC Site Construction, Inc. ("ATC"), has agreed to reduce the total sum claimed in the Notice of Mechanic's Lien and Statement of Just and True Account filed with this Court on August 18, 2020;

IT APPEARS to the Court that ATC wishes to reduce the total sum claimed from Eight Hundred Eighty-Four Thousand, Four Hundred Seventy-Three and 84/100 (\$884,473.84) to Eight Hundred Forty-Seven Thousand, Two Hundred Thirty-Six and 20/100 (\$847,236.20) as a result of eliminating a cost outlined in Change Order #11 associated with acquiring and installing an emergency generator and changing the cost to a restocking fee, as explained in the Affidavit of John Henderson of ATC filed with this Court on January 13, 2022;

IT APPEARS to the Court that Defendant NKD, Inc. ("NKD") consents to the reduction of the total sum claimed in ATC's Notice of Mechanic's Lien and Statement of Just and True Account as reflected in the paragraph above;

THEREFORE, IT IS ORDERED that the total sum claimed in the Notice of Mechanic's Lien and Statement of Just and True Account filed by ATC with the Court on August 18, 2020 shall be reduced from Eight Hundred Eighty-Four Thousand, Four Hundred Seventy-Three and

84/100 (\$884,473.84) to **Eight Hundred Forty-Seven Thousand, Two Hundred Thirty-Six and 20/100 (\$847,236.20)**. All other costs and sums included the Notice of Mechanic's Lien and Statement of Just and True Account filed on August 18, 2020 are otherwise unaffected by the Order.

**IT IS SO ORDERED.**

\_\_\_\_\_  
Presiding Judge  
Fifth Judicial Circuit

\_\_\_\_\_, 2022  
Columbia, South Carolina

**WE CONSENT:**

s/ Benjamin H. Joyce  
Ellis R. Lesemann, Esq.  
[erl@lalawsc.com](mailto:erl@lalawsc.com)  
Benjamin H. Joyce, Esq.  
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418 King Street, Suite 301  
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(843) 724-5155

*Attorneys for Defendant NKD, Inc.*

**WE CONSENT:**

s/ R. Trippett Boineau, III  
R. Trippett Boineau, III, Esq.  
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Columbia, South Carolina 29201  
(803) 779-2300

s/ E. Russell Jeter  
E. Russell Jeter, Esq.  
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(803) 765-0600

s/ Robert L. Buchanan, Jr.  
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Aiken, South Carolina 29801  
(803) 648-4213

*Attorneys for Plaintiff ATC Site Construction, Inc.*



Richland Common Pleas

**Case Caption:** Atc Site Construction Llc vs Nkd Inc , defendant, et al  
**Case Number:** 2020CP4003915  
**Type:** Order/Consent Order

So Ordered

s/ Michael S. Holt, 2772

Electronically signed on 2022-02-03 12:40:13 page 4 of 4

|                                     |   |                                      |
|-------------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA             | ) | IN THE COURT OF COMMON PLEAS         |
|                                     | ) |                                      |
| COUNTY OF RICHLAND                  | ) | FOR THE FIFTH JUDICIAL CIRCUIT       |
|                                     | ) |                                      |
| NKD, INC.,                          | ) | Case No.: 2020-CP-40-03915           |
|                                     | ) |                                      |
| Plaintiff,                          | ) | <b>NKD, INC.’S MOTION TO VACATE,</b> |
|                                     | ) | <b>IN PART, MODIFY, IN PART, AND</b> |
| vs.                                 | ) | <b>CONFIRM, IN PART, THE</b>         |
|                                     | ) | <b>ARBITRATION AWARD</b>             |
| ATC SITE CONSTRUCTION, LLC, and     | ) |                                      |
| GEO-SYSTEMS DESIGN & TESTING, INC., | ) |                                      |
|                                     | ) |                                      |
| Defendants.                         | ) |                                      |
|                                     | ) |                                      |

An arbitration award has been issued in this case that, in relevant part: (i) is based upon a manifest disregard of applicable law; (ii) rules on issues over which the arbitrators lacked subject matter jurisdiction; and (iii) involves an evident material miscalculation of figures. Separately, there are a few rulings within the arbitration award that should be confirmed, as they are not subject to being vacated or modified. For these reasons, Plaintiff NKD, Inc. (“NKD”) hereby moves the Court to vacate, in part, modify, in part, and confirm, in part, the Final Award dated April 9, 2025, in accordance with the South Carolina Uniform Arbitration Act, S.C. Code §§ 15-48-10, *et seq.*, and the Federal Arbitration Act, 9 U.S.C. §§ 9 – 11, on the grounds set forth below.<sup>1</sup>

This Motion will be supplemented by a memorandum of law, affidavits, a hearing transcript, and other exhibits in support of this Motion.

1. After recognizing the controlling statute governing a request for attorney fees as the “prevailing party” in a mechanic’s lien action, the Arbitration Panel inexplicably failed to apply

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<sup>1</sup> The Final Award dated April 9, 2025, is attached as Exhibit A.

it. The result of the Panel's refusal to apply controlling law on a critical issue transformed the entire outcome of the case.

2. The language of Section 29-5-10 of South Carolina's Mechanic's Lien Statute is clear:

For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. **One verdict assumes some entitlement to the mechanic's lien** and the consideration of compulsory counterclaims.

See S.C. Code § 29-5-10(b) (emphasis added).<sup>2</sup>

3. As the Panel confirmed in the Final Award, "the net award, or one verdict, resulted in an Interim Award in favor of NKD[.]"<sup>3</sup> See *Final Award*, p. 3. The Panel found Defendant ATC Site Construction, LLC ("ATC" or the "Contractor") liable to NKD for damages, including, but not limited to, repair damages, liquidated damages, prejudgment interest, which "shall be paid by ATC within 30 days." See *Final Award*, p. 6.

4. However, despite finding in favor of NKD, the Panel held that "ATC is the 'prevailing party' pursuant to the South Carolina Mechanic's Lien statute" such that "a reasonable amount of attorneys' fees to be awarded to ATC as the prevailing party is \$228,600.00." See *Final Award*, pp. 3, 5.

5. Where there is no award or judgment in favor of the Contractor, there is no "entitlement to the mechanic's lien." See S.C. Code § 29-5-10(b). Additionally, the Contractor has no "entitlement to the mechanic's lien" because NKD filed a bond that released the mechanic's lien.

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<sup>2</sup> A copy of S.C. Code § 29-5-10 is attached as Exhibit B.

<sup>3</sup> The Interim Award dated January 21, 2025, is incorporated into the Final Award, as amended, and attached hereto as Exhibit C.

6. Thus, while the standard for vacating an arbitration award is high, the Panel's decision to award "prevailing party" attorney's fees to the Contractor who has no "entitlement to the mechanic's lien" rises to the level of a manifest disregard of the law that warrants vacating, in part, the Final Award. *See C-Sculptures, LLC v. Brown*, 403 S.C. 53, 58, 742 S.E.2d 359, 361-62 (2013) (holding that the manifest disregard standard is not insurmountable and vacating arbitration award where arbitrator was apprised of unambiguous, clearly applicable South Carolina statutory law but refused to apply it).

7. Pursuant to the Consent Order to Stay Pending Arbitration entered July 10, 2024 (the "Arbitration Order"), this Court "retains jurisdiction over this matter for the purpose of enforcing the provisions of the Arbitration Order and any ultimate arbitration award, if any." *See* Arbitration Order at ¶ 5.

8. The governing law ignored by the Arbitration Panel is well defined, explicit, and clearly applicable. Consequently, the Final Award should be vacated, in part. *See Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (holding that a court may vacate an arbitration award on the grounds that the arbitrator manifestly disregarded the law if the governing law ignored by the arbitrator is "well defined, explicit, and clearly applicable"); *see also Choice Hotels Int'l, Inc. v. SM Prop. Mgmt., LLC*, 519 F.3d 200, 207 (4th Cir. 2008) (holding that an arbitration award fails to draw its essence from the agreement at issue "when an arbitrator has disregarded or modified unambiguous contract provisions or based an award upon his own personal notions of right and wrong").

9. It is believed that this Final Award is subject to review under the Federal Arbitration Act, as the proceeding included a party that was located out of state and otherwise involved interstate commerce. However, to the extent that the South Carolina Uniform Arbitration Act

applies, the outcome should be the same. *Compare* 9 U.S.C. § 10 (providing that court may make an order vacating the award upon the application of any part to the arbitration “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made”) *with* S.C. Code § 15-48-130 (“Upon application of a party, the court shall vacate an award where [ ...] the arbitrators exceeded their powers.”).

10. The Arbitration Panel consisted of three arbitrators who collectively possess extensive knowledge of construction law and experience with construction defect cases. Even so, the Arbitration Panel is not empowered to change the meaning of a clear and unambiguous statute based on the arbitrators’ own personal notions of right and wrong. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (holding that “it is not the court’s place to change the meaning of a clear and unambiguous statute”).

11. The Panel exceeded its powers by rejecting the plain language of Section 29-5-10 and awarding “prevailing party” fees to the party who did not prevail in the mechanic’s lien action (ATC) while refusing to award fees to the party who successfully defended against the mechanic’s lien (NKD). *See Seckinger v. Vessel Excalibur*, 326 S.C. 382, 388, 483 S.E.2d 775, 777-78 (Ct. App. 1997) (confirming that “in a mechanic’s lien action the defendant is entitled to an award of attorney fees as the prevailing party if it is determined that a mechanic’s lien cannot be enforced against it”).

12. Had the Panel applied the well-defined, explicit, and clearly applicable law to the issues before it, the Final Award would have resulted in an award in favor of NKD in the amount of \$1,149,280.92. However, as a result of the Panel’s decision to disregard controlling law, NKD was awarded \$568,437.71, as illustrated by the chart below:

| <b>Award Amount Subtotal<sup>4</sup></b> | <b>ATC Fee Award</b> | <b>NKD Fee Award</b> | <b>Omitted Prejudgment Interest</b> | <b>Total Award</b>          |
|------------------------------------------|----------------------|----------------------|-------------------------------------|-----------------------------|
| \$797,037.71                             | \$0.00               | \$317,541.81         | \$34,701.40                         | \$1,149,280.92              |
| \$797,037.71                             | (-\$228,600.00)      | \$0.00               | \$0.00                              | As Awarded:<br>\$568,437.71 |
| <b>Total Difference:</b>                 |                      |                      |                                     | <b>(\$580,843.21)</b>       |

13. The manifest errors by the Arbitration Panel impede NKD's ability to be made whole for the damages suffered as "a proximate result of ATC's breach of contract and breach of warranty." See *Interim Award*, pp. 6 – 9.

**The Award Should Be Vacated As it Relates to Attorney's Fees**

14. The Final Award should be vacated as to the award of attorney fees to ATC, as this award lacks a statutory or contractual basis. The arbitrators manifestly disregarded statutory law by refusing to award NKD its attorney's fees and costs incurred in its successful defense of the mechanic's lien action, as was plainly required under the South Carolina Mechanic's Lien statute in an instance where the contractor (ATC) does not have "some entitlement to the mechanic's lien."

15. No award was entered in favor of ATC, which makes the award of attorney's fees to ATC impermissible under the controlling statute. See S.C. Code § 29-5-10 ("For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in

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<sup>4</sup> The "Subtotal" amount of the Final Award contains a typographical error by stating the sum of the Interim Award amount and Additional Interest amount as "\$797,031.71," rather than \$797,037.71. However, the "Total Final Award" is calculated based upon the Subtotal amount of \$797,037.71.

the action. One verdict assumes **some entitlement to the mechanic's lien** and the consideration of compulsory counterclaims.”).

16. It is unmistakable that a mechanic's lien cannot be enforced against NKD, as the lien was bonded off **and** NKD prevailed in the action. A lien can only be enforced against a property owner when there is a net judgment in favor of the contractor.

17. The Panel manifestly disregarded statutory law by refusing to award NKD the fees and costs incurred in its successful defense of the mechanic's lien action, as required under the South Carolina Mechanic's Lien statute.

18. South Carolina law is clear: “[I]n a mechanic's lien action the defendant is entitled to an award of attorney fees as the prevailing party if it is determined that a mechanic's lien cannot be enforced against it.” *See, e.g., EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006).

19. Because the rulings by the Panel are “untethered” from controlling legal principles that were known to the arbitrators, this portion of the Final Award must be vacated. *See Waldo v. Cousins*, 442 S.C. 662, 669, 901 S.E.2d 276, 279 (2024) (“Courts may now vacate an arbitration award, but only when it is untethered from controlling legal principles known to, but shrugged off by, the arbitrator.”).

**The Panel Lacked Subject Matter Jurisdiction to Enter Fee Award**<sup>5</sup>

20. It is unclear, and may be a matter of first impression, whether arbitrators have subject matter jurisdiction to make a determination of attorney's fees under S.C. Code 29-5-10. The statute includes the following relevant language:

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<sup>5</sup> Based on the apparent lack of subject matter jurisdiction on the part of the arbitrators relating to the award of attorney's fees, NKD will file its Petition for an Award of Attorney's Fees with the Court.

The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party. **The fee must be determined by the court in which the action is brought** but the fee and the court costs may not exceed the amount of the lien.

See S.C. Code Ann. § 29-5-10(a) (emphasis added).

21. It is acknowledged that both ATC and NKD requested an award of attorney fees from the Panel. However, upon review of the specific analysis of the applicable statute, the language appears to be mandatory and confers subject matter jurisdiction only upon the “court in which the action is brought.” *Id.* The arbitrators are not a “court.” See *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 704, 869 S.E.2d 859, 866 (Ct. App. 2022) (holding that claim for the appointment of a receiver, an accounting, and judicial dissolution cannot be sent to arbitration because that claim can only be resolved by the “circuit court” under the applicable statutes).

22. In *Palmetto Wildlife*, the court found that a claim for the appointment of a receiver pursuant to S.C. Code § 33-44-803(a),<sup>6</sup> for an accounting, and for judicial dissolution pursuant to S.C. Code § 33-44-801<sup>7</sup> was not subject to arbitration because that claim can only be resolved by “the circuit court” based on the language in the statute and the nature of the relief. *Id.* at 703, 869 S.E.2d at 866.

23. Pursuant to statute, a fee award under Section 29-5-10 “must be determined by the **court** in which the action is brought.” See S.C. Code § 29-5-10(a) (emphasis added). This action

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<sup>6</sup> Section 33-44-803(a) provides that “[a]fter dissolution, a member who has not wrongfully dissociated may participate in winding up a limited liability company’s business, but on application of any member, member’s legal representative, or transferee, **the circuit court**, for good cause shown, may order judicial supervision of the winding up.” See S.C. Code § 33-44-803(a) (emphasis added).

<sup>7</sup> Section 33-44-801(4) of the Act provides for dissolution “on application by a member or a dissociated member, upon entry of a ‘judicial decree’” if certain events occur. See S.C. Code § 33-44-801(4).

was brought in the Richland County Court of Common Pleas. Because the fee “must” be determined by this Court, the Panel exceeded its powers and lacked subject matter jurisdiction when it entered a fee award in favor of ATC. *See Seckinger*, 326 S.C. at 387, 483 S.E.2d at 777 (“The cardinal rule of statutory construction is that words used in a statute should be given their plain and ordinary meaning unless something in the statute requires a different interpretation.”).

24. Lack of subject matter jurisdiction can be raised at any time by the parties or sua sponte by the court. *See S.C. Dep’t of Soc. Servs. v. Tran*, 418 S.C. 308, 314, 792 S.E.2d 254, 257 (Ct. App. 2016). In addition, the lack of subject matter jurisdiction cannot be waived by consent of the parties. *Id.*; *see also Bunkum v. Manor Props.*, 321 S.C. 95, 99–100, 467 S.E.2d 758, 761 (Ct. App. 1996) (stating that “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 our own motion”).

25. Since the Panel had no subject matter jurisdiction to determine the fee award under Section § 29-5-10(a), the Final Award is void as to the Panel’s ruling that “ATC is the ‘prevailing party’ pursuant to the South Carolina Mechanic’s Lien statute” such that “a reasonable amount of attorneys’ fees to be awarded to ATC as the prevailing party is \$228,600.00.” *See Final Award*, pp. 3, 5; *Bunkum*, 321 S.C. at 99, 467 S.E.2d at 761 (finding that, where the master had entered final judgment, and therefore had no subject matter jurisdiction to hear motion for fees, his order entering judgment was void).

26. To the extent the Court determines that the fee may be determined by the arbitrators under S.C. Code § 29-5-10(a), NKD requests that the Court remand the fee award issue to be decided by a new panel of arbitrators.

**The Panel Exceeded Its Power in Determining the Amount of Fees Awarded to ATC**

27. Although Section 29-5-10 precluded the Panel from exercising jurisdiction over the determination of the fee, the Panel issued a ruling that “a reasonable amount of attorneys’ fees to be awarded to ATC as the prevailing party is \$228,600.00.” See *Final Award*, p. 5.

28. Following the issuance of the Interim Award, the Panel instructed the parties to include in their respective fee petitions appropriate support and proof as to the criteria established in Rule 1.5 of the South Carolina Professional Rules of Conduct and relevant caselaw.<sup>8</sup> As indicated in the Final Award, the Panel did not address the factors set forth in Rule 1.5 but recited the factors set forth in *Jackson v. Speed*. *Id.* 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) (determining a reasonable attorney’s fee based on consideration of the following factors: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services).

29. ATC’s fee petition and accompanying documentation provide no basis for the Panel to ensure that the time is reasonable and that the work billed by different attorneys is not duplicative. ATC submitted a one-page document entitled “ATC Site Construction Inc Item Actual Cost Detail” containing a list of invoices identified by date, number, and amount with no description as to the tasks being performed, the timekeeper(s) performing the unidentified tasks,

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<sup>8</sup> Rule 1.5 of the South Carolina Professional Rules of Conduct sets for the following factors to be considered in determining the reasonableness of a fee: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. See Rule 1.5(a), RPC, Rule 407, SCACR.

the billable rate(s), or the total hours. There is no itemization as to the nature of the fees and expenses charged by ATC's counsel from which the Panel could consider the reasonableness factors.

30. Based on the limited information presented in ATC's fee petition, it would not be possible for the Panel to determine whether the fees requested under S.C. Code § 29-5-10 are within the scope of the statute (to the extent ATC had prevailed). All "prevailing party" provisions, including S.C. Code § 29-5-10, are interpreted under South Carolina law such that the prevailing party is "[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered." *Seckinger*, 326 S.C. at 388, 483 S.E.2d at 777-78.

31. Fees and expenses incurred by ATC in seeking to defeat NKD's successful claim for breach of contract cannot be charged to NKD. *See Prevatte v. Asbury Arms*, 302 S.C. 413, 417, 396 S.E.2d 642, 644 (Ct. App. 1990) (finding that the time and labor devoted to issues on which party does not prevail should not be charged against the opposing party who prevailed on those issues). However, ATC's fee petition omits provided no documentation or assurance that ATC's unsuccessful efforts to avoid paying repair damages, liquidated damages, and prejudgment interest to NKD were omitted from the total hours or fees requested.

32. By entering a \$228,600.00 fee award to ATC without statutory authority and evidentiary support, the Panel manifestly disregarded South Carolina law.

33. Therefore, the Court should vacate the Final Award, in part, relating to the improper fee award.

**The Award Should Be Modified in Part to Correct the Calculation of Pre-Judgment Interest**

34. The prejudgment interest awarded to NKD is based on the Panel's miscalculation of prejudgment interest based on the Panel's decision to include an offset of the settlement received from Gearig Civilworks *prior* to calculating prejudgment interest rather than *after* calculating the interest as required under South Carolina law.

35. NKD went out of pocket to correct ATC's defective work during 2020, 2021, and 2022. However, the \$150,000.00 was received from Gearig in late January 2025. As a result, NKD is entitled to interest on the setoff amount going back to June 3, 2022, the date that the Panel has confirmed that the claims were fully liquidated.

36. NKD's claim for an award of prejudgment interest is governed by S.C. Code § 34-31-20, which provides for interest at the rate of 8.75% per annum where the sums are due are capable of being reduced to certainty. *See* S.C. Code § 34-31-20(A). South Carolina law allows prejudgment interest on obligations to pay money from the time when, either by agreement or by operation of law, the payment is demandable even if the parties do not agree on the amount of the obligation. *See Brooklyn Bridge, Inc. v. S.C. Ins. Co.*, 309 S.C. 141, 145, 420 S.E.2d 511, 513 (Ct. App. 1992) (affirming award of prejudgment interest where sum due under contract was capable of being reduced to certainty). It is recognized under South Carolina law that the right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. *See Miller Constr. Co., LLC v. PC Constr. of Greenwood, Inc.*, 418 S.C. 186, 207, 791 S.E.2d 321, 333 (Ct. App. 2016).

37. NKD submitted a Motion to Correct the Interim Award based on the Panel's decision to calculate prejudgment interest in a manner that is contrary to South Carolina law, which the Panel denied.

38. The revised calculation of prejudgment interest is \$182,317.45, which is inclusive of the additional interest in the amount of \$34,701.40 that the Panel failed to include in the prejudgment interest calculation.

39. “Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where [ ...] [t]here was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award.” See S.C. Code § 15-48-140; see also 9 U.S.C. § 11 (providing that court may make an order modifying or correcting the award upon the application of any party to the arbitration “[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award”).

40. Therefore, the Final Award should be modified to correct the miscalculation of prejudgment interest awarded to NKD.

**There are Limited Aspects of the Final Award That Should be Confirmed**

41. The Final Award should be confirmed, in part, pursuant to S.C. Code § 15-48-120 and 9 U.S.C. § 9 as to the Panel’s findings and conclusions that: (i) ATC breached the Contract and breached its warranties to NKD; (ii) ATC is liable to NKD for damages, including, but not limited to, repair damages, liquidated damages, prejudgment interest; (iii) that the net award, or one verdict, resulted in an Interim Award in favor of NKD with interest through January 24, 2025; and (iv) that the final award in favor of NKD “shall be paid by ATC within 30 days and, if not paid by then, shall accrue interest at the South Carolina Judgment Rate.”

42. “Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 15-48-130 and 15-48-140.”

See S.C. Code §15-48-120; *see also* 9 U.S.C. § 9 (“[A]t any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title”).

43. Accordingly, the Final Award should be confirmed, in part, as to ATC’s liability to NKD.

### **CONCLUSION**

For these reasons, Plaintiff NKD, Inc., respectfully requests that the Court grant this Motion to Vacate, in part, Modify, in part, and Confirm, in part, the Final Award, and award NKD the following relief: (i) an order vacating the Final Award, in part, with respect to the Panel’s findings that ATC is the “prevailing party” for purposes of an award of attorney’s fees pursuant to the Mechanic’s Lien statute; (ii) an order modifying the Final Award as to the amount of the prejudgment interest to reflect the total prejudgment interest in the amount of \$182,317.45, inclusive of the interest that accrued on the setoff amount for the period from June 3, 2022 to January 25, 2025; and (iii) an order confirming the Final Award, in part, with respect to ATC’s liability for damages to NKD.

Respectfully submitted,

By: s/ Ellis R. Lesemann  
 Ellis R. Lesemann (S.C. Bar No. 15315)  
erl@lalawsc.com  
 Michelle A. Stewart (S.C. Bar No. 100685)  
mas@lalawsc.com  
 LESEMANN & ASSOCIATES LLC  
 418 King Street, Suite 301  
 Charleston, SC 29403  
 (843) 724-5155

May 13, 2025  
 Charleston, South Carolina

***Attorneys for Plaintiff NKD, Inc.***

**Exhibit A**

*Final Award dated April 9, 2025*

|                                |   |                              |
|--------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA        | ) |                              |
|                                | ) |                              |
| COUNTY OF RICHLAND             | ) |                              |
|                                | ) | BEFORE THE ARBITRATION PANEL |
| ATC SITE CONSTRUCTION, LLC,    | ) |                              |
| Claimant,                      | ) | FINAL AWARD                  |
| vs.                            | ) |                              |
| NKD, INC.,                     | ) |                              |
|                                | ) |                              |
| Respondent,                    | ) |                              |
| Counterclaimant, and           | ) |                              |
| Third-Party Claimant,          | ) |                              |
|                                | ) |                              |
| ATC SITE CONSTRUCTION, LLC,    | ) |                              |
| Third-Party Claimant,          | ) |                              |
| vs.                            | ) |                              |
| GEO-SYSTEMS DESIGN & TESTING,  | ) |                              |
| INC., GEARIG CIVIL WORKS, LLC, | ) |                              |
| Third-Party Respondents.       | ) |                              |

This Final Award follows the arbitration panel’s Interim Award dated January 21, 2025, incorporates that Award as amended herein, and addresses the award of attorneys’ fees.

Subsequent to the issuance of the Interim Award, NKD timely filed a Motion to Correct Interim Award (“Motion”). That motion raised five separate issues each of which is addressed below. ATC timely filed a response to that Motion addressing the issues requested by the Panel.

NKD asserts that there was a clerical error in the Interim Award where that award stated that NKD’s Claimed Damages were \$4,400,579.07 inclusive of pre-judgment interest and excluding attorneys’ fees (Motion Section V). That number was derived from NKD’s Pre-Hearing Brief at page 2. NKD points to an inconsistent chart on page 23 of that brief which

states “Damages Due From ATC” of \$3,373,570.29 after excluding attorney’s fees and expenses. However, that chart did not include the claim for prejudgment interest accrued prior to and after a refinancing event. NKD acknowledged in a footnote that it was not entitled to recover that interest in addition to Liquidated Damages. During the hearing, NKD introduced Exhibit 191 which stated the claimed damages as \$3,679,891.03 including prejudgment interest on the repair costs which had not been included in any of the prior calculations. ATC asserts that the amount in Exhibit 191 of \$3,679,891.03 is the proper amount to be considered as NKD’s Claimed Damages.

Neither party made an offer of settlement as allowed in Section 29-5-10(b) of the South Carolina Code. Therefore, the Panel must look to the amount prayed for in ATC’s Complaint as the “final offer of settlement” from ATC. That amount is \$847,236.20. Since NKD also did not make an offer of settlement pursuant to the statute, the Panel must consider “the value of his counterclaim” to be the “negative offer of settlement.” Since the statute utilizes “offers of settlement” that are made prior to the start of a trial to determine the “prevailing party,” the Panel gives more weight to the counterclaims asserted in NKD’s Pre-Hearing Brief than the exhibit introduced at trial, or the subsequent amount asserted in NKD’s Post-Hearing Brief. We conclude that the proper amount to be used as NKD’s “negative offer of settlement” is \$3,373,570.29.

NKD also asserts that prejudgment interest was miscalculated through the application of the Gearig settlement of \$150,000.00 (Motion Section IV). The Panel finds that there was no miscalculation of the amount of NKD’s claim subject to prejudgment interest and that the appropriate rate was applied to the balance due to NKD.

Finally, NKD asserts that the amount of Liquidated Damages is based on mistake or oversight or that there was some Internal Inconsistency or that the period used for calculating Liquidated Damages was a mistake or result of oversight (Motion Sections I, II, and III). The Panel has carefully reviewed the evidence presented and counsel's arguments and remains convinced that the calculation of Liquidated Damages was proper, consistent with the evidence and without error.

In accordance with the Scheduling Order in this matter, both parties submitted memoranda in support of their request for attorneys' fees which are allowed under South Carolina Code §29-5-10. Both ATC and NKD thoroughly briefed the issues and provided affidavits in support of their requests for attorneys' fees and costs. The Panel carefully reviewed those submissions and determined that ATC is the "prevailing party" pursuant to the South Carolina Mechanic's Lien statute and related cases. ATC was entitled to nearly all of its mechanics lien amount, but after consideration of the compulsory counterclaims we found that the net award, or one verdict, resulted in an Interim Award in favor of NKD of \$638,101.88 before interest or \$785,717.93 with interest through January 24, 2025. Using either number, and considering the offers of settlement discussed above, ATC is clearly "closer to the verdict reached" in this matter.

In determining the amount of reasonable attorneys' fees to be awarded to ATC, the Panel considered the six factors set forth in *Jackson v Speed* (486 S.E.2d 750 at 760, S.C. 1997) and make the following specific findings of fact:

The nature, extent and difficulty of the case – There were four attorneys who worked on this case for ATC. However, only Mr. Jeter and Mr. Buchanan did work on the mechanics lien portion of the case and they were the only attorneys for ATC who submitted a request for an

award of attorneys fees. By comparison, NKD had three attorneys and two paralegals who worked on the mechanics lien defense. The Panel is well aware of the complexities of this matter and finds that both parties adequately staffed the mechanics lien dispute.

The time necessarily devoted to the case – As discussed in more detail below, ATC's counsel spent a combined 762 attorney hours in the prosecution of the mechanics lien portion of this case. By comparison, NKD's attorneys spent 565.2 hours and their paralegals spent 390.9 hours. Due to the complexity of the case, the Panel finds that ATC's attorneys necessarily devoted an appropriate amount of time to the case.

The professional standing of counsel – Mr. Buchanan has been a member in good standing of the South Carolina Bar for 48 years and has a Martindale Hubbell AV rating. Mr. Jeter has been a member in good standing of the South Carolina Bar for 45 years and has ample experience with construction law. He has also been recognized by Super Lawyers and Best Lawyers in America. The Panel finds that both counsel have excellent professional standing in South Carolina.

Contingency of compensation – Both counsel for ATC charged an hourly rate of \$300, which was less than their normal hourly rates in recognition of the long-standing relationship that Mr. Buchanan had with the client and the amount of time that would be required to handle the mechanics lien to conclusion.

The beneficial results obtained - ATC asserted a mechanic's lien of \$847,236.20. After considering all the testimony and evidence, the Panel found that ATC was entitled to \$838,685.95 on its mechanic's lien. Although NKD obtained a net award of \$638,101.88 before pre-judgment interest (after claiming in excess of \$3 million), NKD's damages were the result of counterclaims for repairs and Liquidated Damages that were defended by counsel other than Mr.

Buchanan and Mr. Jeter. The Panel finds that ATC achieved a beneficial result on the mechanics lien action.

Customary legal fees for similar services – The fees charged by counsel for ATC are consistent with customary legal fees for similar services. ATC asserts that it has incurred \$267,930.00 in total attorneys' fees from Mr. Jeter and Mr. Buchanan. However, the Affidavit of Russell Jeter sets forth the hours related solely to the mechanic's lien dispute which reduces the total fees incurred by ATC related to the mechanic's lien portion of this case to \$228,600.00. By comparison, NKD asserts that it incurred \$224,456.00 for attorney and paralegal time solely related to the mechanic's lien issues. The Panel finds the attorneys' fees incurred by ATC for the mechanic's lien issue to be customary and reasonable. The Panel finds that a reasonable amount of attorneys' fees to be awarded to ATC as the prevailing party is \$228,600.00.

The Panel further finds that the fees and expenses of the Arbitrators shall be borne by the parties as follows: ATC, NKD, Geo-Systems Design & Testing, Inc. and Gearig Civil Works, LLC are each responsible for one-fourth of the fees for hearing time and related expenses. ATC, NKD and Geo-Systems are each responsible for one-third of the fees for the Panel's post-hearing time. An accounting will follow this Final Award.

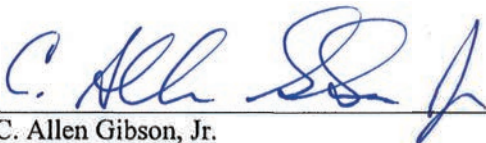
The net Award to NKD was \$638,101.88 with interest accruing at \$152.97 per day. Including pre-judgment interest through January 24, 2025, the total Interim Award was \$785,717.93, however the net Award has continued to accrue interest from January 25, 2025 until April 9, 2025 (the date of this Final Award). Therefore, NKD's Award has continued to accrue interest for 74 days at \$152.97 per day for a total additional amount of \$11,319.78 in prejudgment interest.

The Final Award in favor of NKD is as follows:

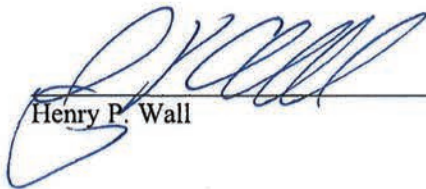
|                     |                     |
|---------------------|---------------------|
| Interim Award       | \$785,717.93        |
| Additional Interest | <u>\$11,319.78</u>  |
| Subtotal            | \$797,031.71        |
| Less Attorney' Fees | <u>\$228,600.00</u> |
| Total Final Award   | \$568,437.71        |

This amount shall be paid by ATC within 30 days and, if not paid by then, shall accrue interest at the South Carolina Judgment Rate.

IT IS SO ORDERED.

  
C. Allen Gibson, Jr.

\_\_\_\_\_  
J. Blanton O'Neal, IV

  
Henry P. Wall

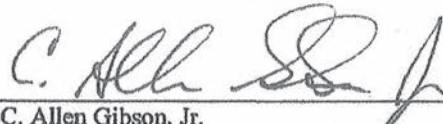
DATE: April 9, 2025

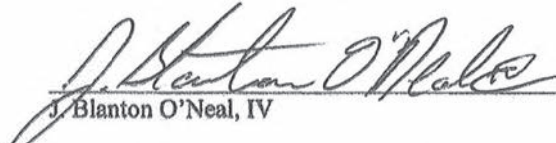
The Final Award in favor of NKD is as follows:

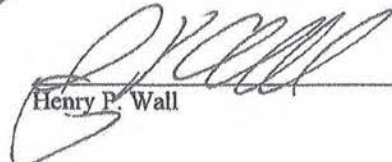
|                     |                     |
|---------------------|---------------------|
| Interim Award       | \$785,717.93        |
| Additional Interest | <u>\$11,319.78</u>  |
| Subtotal            | \$797,031.71        |
| Less Attorney' Fees | <u>\$228,600.00</u> |
| Total Final Award   | \$568,437.71        |

This amount shall be paid by ATC within 30 days and, if not paid by then, shall accrue interest at the South Carolina Judgment Rate.

IT IS SO ORDERED.

  
C. Allen Gibson, Jr.

  
J. Blanton O'Neal, IV

  
Henry P. Wall

DATE: April 9, 2025

**Exhibit C**

*Interim Award dated January 21, 2025*

|                                |   |                              |
|--------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA        | ) |                              |
|                                | ) |                              |
| COUNTY OF RICHLAND             | ) |                              |
|                                | ) | BEFORE THE ARBITRATION PANEL |
| ATC SITE CONSTRUCTION, LLC,    | ) |                              |
|                                | ) |                              |
| Claimant,                      | ) | INTERIM AWARD                |
|                                | ) |                              |
| vs.                            | ) |                              |
|                                | ) |                              |
| NKD, INC.,                     | ) |                              |
|                                | ) |                              |
| Respondent,                    | ) |                              |
| Counterclaimant, and           | ) |                              |
| Third-Party Claimant,          | ) |                              |
|                                | ) |                              |
| ATC SITE CONSTRUCTION, LLC,    | ) |                              |
|                                | ) |                              |
| Third-Party Claimant,          | ) |                              |
| vs.                            | ) |                              |
|                                | ) |                              |
| GEO-SYSTEMS DESIGN & TESTING,  | ) |                              |
| INC., GEARIG CIVIL WORKS, LLC, | ) |                              |
|                                | ) |                              |
| Third-Party Respondents.       | ) |                              |

This private arbitration is before arbitrators C. Allen Gibson, Jr., Henry P. Wall and J. Blanton O’Neal IV pursuant to a Consent Order to stay filed July 10, 2024 and the Consent Administrative Order agreed to by all parties dated October 16, 2024. ATC Site Construction, LLC (“ATC”) initiated litigation against NKD, Inc. (“NKD”) for foreclosure of a mechanic’s lien in the amount of \$847,236.20, breach of contract and Quantum Meruit. ATC requests an award of \$1,186,766 inclusive of pre-judgment interest. NKD answered and crossclaimed against ATC for \$4,400,579.07, inclusive of pre-judgment interest and excluding attorneys’ fees, as more fully set forth in NKD’s Pre-Hearing Brief. NKD alleges breach of contract, breach of warranty, negligence/gross negligence, negligent misrepresentation and unfair trade practices

against ATC. At the conclusion of the hearing, NKD modified its total claim (after the setoff discussed below) to \$3,166,597.21 inclusive of pre-judgment interest and suggested an appropriate allocation of those damages.

NKD also asserted third party claims against Geo-Systems Design & Testing, Inc. (“Geo-Systems”) and Gearig Civil Works, LLC. (“Gearig”). The claims against Geo-Systems were for breach of an oral contract, negligence and delay in the original amount of \$899,170. NKD’s claims against Gearig were for negligence and unfair trade practices also in the original amount of \$899,170. After Geo-Systems and Gearig were joined, ATC asserted claims against Geo-Systems for equitable indemnity and contribution and claims against Gearig for indemnity, contribution, and breach of contract.

An in-person hearing was held November 19-22, 2024 and a video conference was held on November 25, 2024. Appearances at the hearings were as follows: Trippett Boineau, George James, Russ Jeter and Robert Buchanan for ATC; Ellis Lesemann and Nikole Mergo for NKD; Robert Osborne for Geo-Systems; Rett Kendall and Cameron Stephenson for Gearig.

During the course of the hearing, Gearig reached a settlement with NKD in return for payment of \$150,000 to NKD and the dismissal of all claims by NKD against Gearig and dismissal of the crossclaims asserted by ATC. All parties agreed that this payment would act as a credit against the claims being asserted by NKD.

The parties presented live testimony of 15 witnesses and submitted deposition designations for two additional witnesses. At the conclusion of the testimony, the parties agreed to a briefing schedule for post-hearing briefs. Each party timely submitted the required briefs. This Interim Award does not address the award of Attorney’s Fees which are requested by NKD

and ATC. That issue will now be briefed and submitted to the Panel for preparation of a Final Award.

### **FACTUAL BACKGROUND**

This case arises out of a residential development project called River Shoals, a subdivision near White Rock, South Carolina. The subdivision includes 149 single-family homes, a system of roads, common areas, and other amenities. NKD obtained the property and pursued plans for the project as early as 2005 with original engineering work done by Civil Engineering of Columbia. NKD later hired Geo-Systems to provide geotechnical testing, engineering design of the roads, and materials monitoring and testing during construction of the roads.

ATC contracted with NKD to perform the site work for the development pursuant to an AIA Contract dated May 16, 2017. ATC's sitework services included: installation of water, sewer and stormwater infrastructure; site grading; soil erosion and sediment control; clearing and grubbing; topsoil work; fill and compacting; fine grading; site paving; installing curbs, gutters, and sidewalks; installing a sanitary sewer system; installing a domestic water system; and installation of a lift station. Gearig, a subcontractor to ATC, was responsible for mixing the soil cement for most of the project. Afterwards, ATC was responsible for grading, compaction, and installation of the asphalt road surface.

ATC slowly progressed work on the project but was impacted by unanticipated rock formations. ATC and NKD ultimately agreed on Change Order #8 to address that impact. ATC continued working on the project, submitted regular payment applications and change order requests some of which were ignored by NKD. ATC received its last payment for work on the

project in April 2019 but continued to work for the remainder of 2019 despite not being paid. The last day ATC worked on the project was in February 2020.

The roadways were installed during the summer of 2019. Later that year, transverse and longitudinal cracks began appearing and the pavement showed observable forms of distress. ATC reported these issues in January of 2020 and NKD subsequently demanded that ATC correct the defects. Both parties hired expert witness consulting engineers who came to differing conclusions about the extent of the damage, the cause of the damage, and the repairs necessary to correct the defects. ATC did not undertake to make any repairs to the roadway, so NKD performed the repairs that it deemed necessary. In addition, after ATC left the project, NKD discovered some issues with the underground utilities that had been installed by ATC. ATC maintains that the sewer lines passed both the mandrel and pressure tests, were acceptable when it left the project and that any damage was likely caused by others during the repair work. NKD disputes those assertions and made substantial repairs to the sewer lines.

### **ATC CLAIMS**

ATC's claim for damages is based on breach of contract, quantum meruit and a mechanic's lien. As an initial matter, we deny the quantum meruit claim based on the existence of a contract between the parties and a breach of that contract. ATC filed its mechanics lien on May 21, 2020, in the amount of \$884,473.84, which was subsequently revised to \$847,236.20 by consent order. There was no argument that that the lien was not timely filed and perfected. The amounts set forth in the lien consist primarily of amounts due under the signed contract plus agreed change orders. The pay applications in 2019 were for \$127,862.87 (Pay Apps #19) and \$201,606.05 (Pay App #20). In addition, \$67,429.28 which was originally listed in the lien as "remaining to be billed on the contract," was later made into pay application #21. These unpaid

contract amounts, plus retainage of \$252,289.75, bring the total payments claimed by ATC under the pay applications to \$649,187.95.

ATC also performed work required by NKD for which NKD failed to sign a change order or make payment. These items make up unsigned Change Order #11. Nick Leventis acknowledged two items in Change Order #11 that were owed: the “removal of trees” for \$13,500, and “remove and save pipe” for \$29,872. These two items bring the agreed contract amount to \$692,559 according to ATC.

Karl Haslinger generally disputed the costs for a few items in C.O.#11 including the generator; the SCADA system, cutting back shoulders, and the deceleration lane with very little specifics. In contrast, John Henderson testimony clearly explained the reasons for the charges in C.O.#11, including details regarding the generator, the SCADA system, the re-grading of the shoulders, the repair of the damages caused by others, the changes ordered to the design of the storm drains and roads, and the changes involving the deceleration lane. Much of this work was required by NKD’s engineers, such as relocating the air relief valve in the deceleration lane, undercutting the deceleration lane, and regrading the shoulders.

ATC also claimed \$8,550 in small charges in the lien (items 1, 2, and 3) which were never billed to NKD, so we find there is no entitlement to these amounts. The Panel finds that the contract balance, prior to any applicable setoff or award on the counterclaims of NKD, is \$838,685.95 calculated as follows:

Payment Applications 19, 20 and 21 – \$396,898.20

Retainage – \$252,289.75

Admitted items in Change Order #11 – \$43,372

Additional items in Change Order #11 – \$146,126.

### **LIQUIDATED DAMAGES**

The Substantial Completion date established in the Contract was August 1, 2018 including the initial 270 days under the Contract as well as the extension in Change Order #8 which added 152 days. With the extension, ATC had 422 days to achieve Substantial Completion. However, in late February 2020, well after the Substantial Completion date had passed, ATC left the job as a result of having not been paid for contract work and claimed change orders, some of which included requests for additional time associated with changes in scope. During this time, NKD discovered certain defects in the work performed by ATC and proceeded to correct those defects and complete the project without ATC. NKD achieved Substantial Completion on June 3, 2022, when the final Permits to Operate were obtained and finished lots could be sold to Stanley Martin.

The Panel finds that the liquidated damages provision of \$1,000 per day is a reasonable estimation of the damages that would be sustained due to delay. This is confirmed by the significant interest obligations that NKD would and did incur on borrowed funds in the event of delay. As demonstrated during the hearing, the daily rate of liquidated damages was proportionate to the anticipated interest carry, property taxes, and related carrying costs.

It is undisputed that the project substantial completion was delayed considerably. The Panel finds that both parties contributed to those delays. ATC was behind schedule from the beginning of the project and did not progress the work in a diligent manner. However, NKD did not properly address additional requests for time extensions after the extension for the rock issue. After ATC left the project, NKD did not proceed in a reasonable amount of time to complete the work. In addition, some of the delay before ATC left and at the end of the project, including the

generator and the SCADA system, were NKD's responsibility. Therefore, the Panel finds that ATC is responsible for 365 days of delay which would have been a reasonable amount of time to complete the remedial work. The contract amount for Liquidated Damages is \$1,000 per day so we find in favor of NKD for the total amount of \$365,000 in delay damages as an appropriate off-set to the contract balance.

### **UNFAIR TRADE PRACTICES**

NKD asserted a claim against ATC for violation of the South Carolina Unfair Trade Practices Act. The Panel finds that ATC did not engage in an unfair or deceptive act as contemplated by the statute, nor did any of ATC's conduct impact the public interest. Therefore, we find in favor of ATC on the UTPA claim.

### **NKD REPAIR DAMAGES**

As a result of the cracking in the roadways, NKD hired S&ME, an engineering firm, to investigate the cause and recommend a repair protocol. ATC and Geo-Systems also hired experts, all of whom agreed that there was a problem with the roads but disagreed on the cause and the solution. We first find that the design which called for the use of soil cement as a base for the asphalt roadway was appropriate. However, the installation performed by ATC did not meet the contract requirements. We also find that the S&ME recommended repair protocol, approved by the County, was the most cost-effective solution for the deficiencies in the thickness of the soil cement and the asphalt. NKD paid S&ME \$49,193 for its services but this included work as an expert witness in this proceeding which is not a recoverable damage. In reviewing the work product produced by S&ME and the invoices submitted, the Panel finds the appropriate damages incurred for investigation and providing a repair design is \$35,193.

Asphalt Paving and Maintenance (“Asphalt Paving”) performed the repairs on the roads and we find that work was necessary and proximately caused by ATC’s breach of contract and/or warranty for failing to meet the project requirements and failing to correct the issue when it was discovered. Therefore, we find that the total amount of \$445,917.56 paid to Asphalt Paving was reasonable.

There was considerably more dispute regarding the utility defects and repairs claimed by NKD. ATC maintained that the sewer lines passed the mandrel test and the pressure test before it left the project. It also asserted that work by others caused damage to the lines, especially the vertical sections which connected to each lot. ATC did not have any documents to confirm that the appropriate tests were passed but did have photos of damaged vertical pipes. Damage to the vertical pipes would also allow debris to enter the pipes which would have to be removed. NKD hired Carolina Contracting (“Carolina”) and LG Utility Contractors (“LG”) to perform the repairs to the utilities. Because of bellies in the lines that had to be corrected, substantial excavation had to occur at considerable expense. Carolina was paid \$569,654.27 and LG was paid \$230,673. Some of the amounts paid to these contractors was for damage to the sewer lines that was caused by others and is not the responsibility of ATC. We find that a reduction of \$20,000 to the amount paid to Carolina and \$10,000 of the amount paid to LG is appropriate.

NKD also paid Coogler Construction \$10,350 for completion of site work which the Panel finds appropriate as an element of damages due to NKD.

As previously discussed, during the course of the hearing Gearig settled all claims against it in return for payment to NKD of \$150,000.00. This amount is set off against the amounts otherwise due to NKD as shown below:

S&ME – \$35,193

Asphalt Paving – \$445,917.56

Carolina Contracting – \$549,654.27

LG Utility Contractors – \$220,673

Coogler Construction – \$10,350

Less Gearig settlement – (\$150,000)

Total Net Repair Damages due to NKD - \$1,111,787.83

The Panel further finds that the damages awarded to NKD damages are a proximate result of ATC's breach of contract and breach of warranty. We find that ATC is not liable for negligence, gross negligence or negligent misrepresentation as alleged by NKD.

### **GEO SYSTEMS**

As noted above, Geo-Systems designed the roads and performed moisture and density testing of the soil cement as it was applied by Gearig. The Panel finds that the design prepared by Geo-Systems met the standard of care in the industry on the roads of this type. This design is commonly used in the Columbia, South Carolina area and performs well if properly constructed. While there were issues regarding the moisture and density testing performed by Geo-Systems, the Panel also finds that Geo-Systems did not breach its contract and was not negligent in the performance of those services. Further, the Panel finds that the services provided by Geo-Systems were not a proximate cause of the failure of the roads which required replacement as discussed above so we find in favor of Geo-Systems on all claims asserted by NKD and ATC.

Therefore, the Panel finds that Geo-Systems is not responsible for any damages. Similarly, the Panel finds that ATC's indemnity claims against Geo-Systems are denied.

### **SUMMARY**

Total net repair damages due to NKD of \$1,111,787.83

Plus Liquidated Damages of \$365,000

Less Contract balance, retainage and change order work due to ATC of (\$838,685.95)

Total amount due to NKD before interest - \$638,101.88

### **PRE-JUDGMENT INTEREST**

Both ATC and NKD alleged entitlement to pre-judgment interest. Various calculations were submitted by the parties in support of their claims. The Panel finds that both parties had liquidated claims as discussed above. ATC was entitled to the Contract balance, less Liquidated Damages, after the final invoices were due. However, NKD began incurring repair expenses at the same time. NKD's claim was fully and finally liquidated as of June 3, 2022, the date of Substantial Completion. The net amount due to NKD is \$638,101.88. The statutory pre-judgment interest rate is 8.75% which is \$152.97 per day. We calculate the interest from June 3, 2022 until the date of this award, January 24, 2025, which is 965 days. Therefore, we award NKD pre-judgment interest in the amount of \$147,616.05 (965 x 152.97). Therefore, the total Interim Award against ATC and in favor of NKD is \$785,717.93.

This Interim Award addresses all issues submitted in the arbitration except the award of Attorneys' Fees and costs. Any other claims not specifically addressed are hereby denied. A Final Award, inclusive of Attorneys' Fees and costs as provided in Section 29-5-10 of the South Carolina Code, will be provided after the parties brief that issue and submit appropriate support.

IT IS SO ORDERED.



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C. Allen Gibson, Jr.



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For J. Blanton O'Neal, IV



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For Henry P. Wall

DATE: January 21, 2025

|                                |   |                                   |
|--------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA        | ) | IN THE COURT OF COMMON PLEAS      |
|                                | ) |                                   |
| COUNTY OF RICHLAND             | ) | Civil Action No. 2020-CP-40-03915 |
|                                | ) |                                   |
| ATC SITE CONSTRUCTION, LLC     | ) |                                   |
|                                | ) |                                   |
| Plaintiff,                     | ) | ATC SITE CONSTRUCTION, LLC'S      |
| Vs.                            | ) | MOTION TO CONFIRM                 |
|                                | ) | THE FINAL AWARD OF                |
| NKD, INC.,                     | ) | THE ARBITRATION PANEL             |
|                                | ) | DATED APRIL 9, 2025               |
| Counter Claimant,              | ) |                                   |
| Cross Claimant, and            | ) |                                   |
| Third Party Plaintiff.         | ) |                                   |
|                                | ) |                                   |
| <hr/>                          |   |                                   |
| ATC SITE CONSTRUCTION, LLC,    | ) |                                   |
|                                | ) |                                   |
| Third-Party                    | ) |                                   |
| Plaintiff,                     | ) |                                   |
|                                | ) |                                   |
| Vs.                            | ) |                                   |
|                                | ) |                                   |
| GEO-SYSTEMS DESIGN & TESTING,  | ) |                                   |
| INC., GEARIG CIVIL WORKS, LLC, | ) |                                   |
|                                | ) |                                   |
| Third-Party                    | ) |                                   |
| Defendants.                    | ) |                                   |
|                                | ) |                                   |
| <hr/>                          |   |                                   |

ATC Site Construction, LLC respectfully moves the Court for an order confirming the Final Award of the Arbitration Panel dated April 9, 2025, pursuant to the South Carolina Uniform Arbitration Act. A copy of the Final Award is attached hereto as Exhibit A and incorporated herein.

ATC Site Construction, LLC intends to provide a proposed order to the Court in support of the Motion to Confirm.

Respectfully submitted:

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By: s/Trippett Boineau, III  
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803-779-2300

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
ATC SITE CONSTRUCTION, LLC, )  
Claimant, )  
vs. )  
NKD, INC., )  
Respondent, )  
Counterclaimant, and )  
Third-Party Claimant, )  
\_\_\_\_\_  
ATC SITE CONSTRUCTION, LLC, )  
Third-Party Claimant, )  
vs. )  
GEO-SYSTEMS DESIGN & TESTING, )  
INC., GEARIG CIVIL WORKS, LLC, )  
Third-Party Respondents. )

BEFORE THE ARBITRATION PANEL

FINAL AWARD



This Final Award follows the arbitration panel’s Interim Award dated January 21, 2025, incorporates that Award as amended herein, and addresses the award of attorneys’ fees.

Subsequent to the issuance of the Interim Award, NKD timely filed a Motion to Correct Interim Award (“Motion”). That motion raised five separate issues each of which is addressed below. ATC timely filed a response to that Motion addressing the issues requested by the Panel.

NKD asserts that there was a clerical error in the Interim Award where that award stated that NKD’s Claimed Damages were \$4,400,579.07 inclusive of pre-judgment interest and excluding attorneys’ fees (Motion Section V). That number was derived from NKD’s Pre-Hearing Brief at page 2. NKD points to an inconsistent chart on page 23 of that brief which

states “Damages Due From ATC” of \$3,373,570.29 after excluding attorney’s fees and expenses. However, that chart did not include the claim for prejudgment interest accrued prior to and after a refinancing event. NKD acknowledged in a footnote that it was not entitled to recover that interest in addition to Liquidated Damages. During the hearing, NKD introduced Exhibit 191 which stated the claimed damages as \$3,679,891.03 including prejudgment interest on the repair costs which had not been included in any of the prior calculations. ATC asserts that the amount in Exhibit 191 of \$3,679,891.03 is the proper amount to be considered as NKD’s Claimed Damages.

Neither party made an offer of settlement as allowed in Section 29-5-10(b) of the South Carolina Code. Therefore, the Panel must look to the amount prayed for in ATC’s Complaint as the “final offer of settlement” from ATC. That amount is \$847,236.20. Since NKD also did not make an offer of settlement pursuant to the statute, the Panel must consider “the value of his counterclaim” to be the “negative offer of settlement.” Since the statute utilizes “offers of settlement” that are made prior to the start of a trial to determine the “prevailing party,” the Panel gives more weight to the counterclaims asserted in NKD’s Pre-Hearing Brief than the exhibit introduced at trial, or the subsequent amount asserted in NKD’s Post-Hearing Brief. We conclude that the proper amount to be used as NKD’s “negative offer of settlement” is \$3,373,570.29.

NKD also asserts that prejudgment interest was miscalculated through the application of the Gearig settlement of \$150,000.00 (Motion Section IV). The Panel finds that there was no miscalculation of the amount of NKD’s claim subject to prejudgment interest and that the appropriate rate was applied to the balance due to NKD.

Finally, NKD asserts that the amount of Liquidated Damages is based on mistake or oversight or that there was some Internal Inconsistency or that the period used for calculating Liquidated Damages was a mistake or result of oversight (Motion Sections I, II, and III). The Panel has carefully reviewed the evidence presented and counsel's arguments and remains convinced that the calculation of Liquidated Damages was proper, consistent with the evidence and without error.

In accordance with the Scheduling Order in this matter, both parties submitted memoranda in support of their request for attorneys' fees which are allowed under South Carolina Code §29-5-10. Both ATC and NKD thoroughly briefed the issues and provided affidavits in support of their requests for attorneys' fees and costs. The Panel carefully reviewed those submissions and determined that ATC is the "prevailing party" pursuant to the South Carolina Mechanic's Lien statute and related cases. ATC was entitled to nearly all of its mechanics lien amount, but after consideration of the compulsory counterclaims we found that the net award, or one verdict, resulted in an Interim Award in favor of NKD of \$638,101.88 before interest or \$785,717.93 with interest through January 24, 2025. Using either number, and considering the offers of settlement discussed above, ATC is clearly "closer to the verdict reached" in this matter.

In determining the amount of reasonable attorneys' fees to be awarded to ATC, the Panel considered the six factors set forth in *Jackson v Speed* (486 S.E.2d 750 at 760, S.C. 1997) and make the following specific findings of fact:

The nature, extent and difficulty of the case – There were four attorneys who worked on this case for ATC. However, only Mr. Jeter and Mr. Buchanan did work on the mechanics lien portion of the case and they were the only attorneys for ATC who submitted a request for an

award of attorneys fees. By comparison, NKD had three attorneys and two paralegals who worked on the mechanics lien defense. The Panel is well aware of the complexities of this matter and finds that both parties adequately staffed the mechanics lien dispute.

The time necessarily devoted to the case – As discussed in more detail below, ATC's counsel spent a combined 762 attorney hours in the prosecution of the mechanics lien portion of this case. By comparison, NKD's attorneys spent 565.2 hours and their paralegals spent 390.9 hours. Due to the complexity of the case, the Panel finds that ATC's attorneys necessarily devoted an appropriate amount of time to the case.

The professional standing of counsel – Mr. Buchanan has been a member in good standing of the South Carolina Bar for 48 years and has a Martindale Hubbell AV rating. Mr. Jeter has been a member in good standing of the South Carolina Bar for 45 years and has ample experience with construction law. He has also been recognized by Super Lawyers and Best Lawyers in America. The Panel finds that both counsel have excellent professional standing in South Carolina.

Contingency of compensation – Both counsel for ATC charged an hourly rate of \$300, which was less than their normal hourly rates in recognition of the long-standing relationship that Mr. Buchanan had with the client and the amount of time that would be required to handle the mechanics lien to conclusion.

The beneficial results obtained - ATC asserted a mechanic's lien of \$847,236.20. After considering all the testimony and evidence, the Panel found that ATC was entitled to \$838,685.95 on its mechanic's lien. Although NKD obtained a net award of \$638,101.88 before pre-judgment interest (after claiming in excess of \$3 million), NKD's damages were the result of counterclaims for repairs and Liquidated Damages that were defended by counsel other than Mr.

Buchanan and Mr. Jeter. The Panel finds that ATC achieved a beneficial result on the mechanics lien action.

Customary legal fees for similar services – The fees charged by counsel for ATC are consistent with customary legal fees for similar services. ATC asserts that it has incurred \$267,930.00 in total attorneys' fees from Mr. Jeter and Mr. Buchanan. However, the Affidavit of Russell Jeter sets forth the hours related solely to the mechanic's lien dispute which reduces the total fees incurred by ATC related to the mechanic's lien portion of this case to \$228,600.00. By comparison, NKD asserts that it incurred \$224,456.00 for attorney and paralegal time solely related to the mechanic's lien issues. The Panel finds the attorneys' fees incurred by ATC for the mechanic's lien issue to be customary and reasonable. The Panel finds that a reasonable amount of attorneys' fees to be awarded to ATC as the prevailing party is \$228,600.00.

The Panel further finds that the fees and expenses of the Arbitrators shall be borne by the parties as follows: ATC, NKD, Geo-Systems Design & Testing, Inc. and Gearig Civil Works, LLC are each responsible for one-fourth of the fees for hearing time and related expenses. ATC, NKD and Geo-Systems are each responsible for one-third of the fees for the Panel's post-hearing time. An accounting will follow this Final Award.

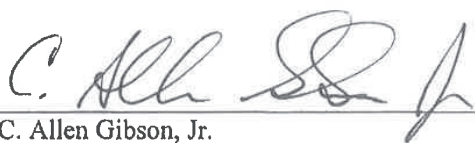
The net Award to NKD was \$638,101.88 with interest accruing at \$152.97 per day. Including pre-judgment interest through January 24, 2025, the total Interim Award was \$785,717.93, however the net Award has continued to accrue interest from January 25, 2025 until April 9, 2025 (the date of this Final Award). Therefore, NKD's Award has continued to accrue interest for 74 days at \$152.97 per day for a total additional amount of \$11,319.78 in prejudgment interest.

The Final Award in favor of NKD is as follows:

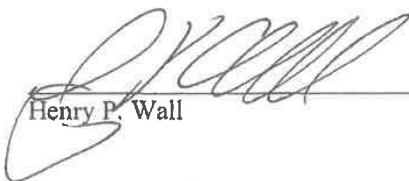
|                     |                     |
|---------------------|---------------------|
| Interim Award       | \$785,717.93        |
| Additional Interest | <u>\$11,319.78</u>  |
| Subtotal            | \$797,031.71        |
| Less Attorney' Fees | <u>\$228,600.00</u> |
| Total Final Award   | \$568,437.71        |

This amount shall be paid by ATC within 30 days and, if not paid by then, shall accrue interest at the South Carolina Judgment Rate.

IT IS SO ORDERED.

  
C. Allen Gibson, Jr.

\_\_\_\_\_  
J. Blanton O'Neal, IV

  
Henry P. Wall

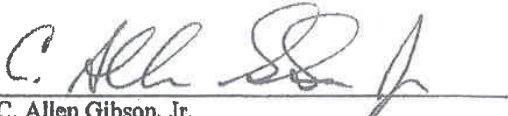
DATE: April 9, 2025

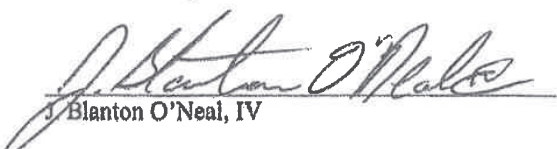
The Final Award in favor of NKD is as follows:

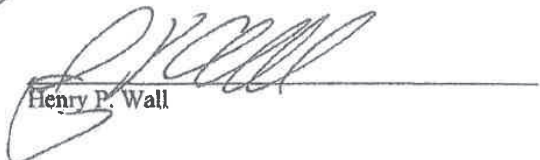
|                     |                     |
|---------------------|---------------------|
| Interim Award       | \$785,717.93        |
| Additional Interest | <u>\$11,319.78</u>  |
| Subtotal            | \$797,031.71        |
| Less Attorney' Fees | <u>\$228,600.00</u> |
| Total Final Award   | \$568,437.71        |

This amount shall be paid by ATC within 30 days and, if not paid by then, shall accrue interest at the South Carolina Judgment Rate.

IT IS SO ORDERED.

  
C. Allen Gibson, Jr.

  
J. Blanton O'Neal, IV

  
Henry P. Wall

DATE: April 9, 2025

|                                |   |                                   |
|--------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA        | ) | IN THE COURT OF COMMON PLEAS      |
|                                | ) |                                   |
| COUNTY OF RICHLAND             | ) | Civil Action No. 2020-CP-40-03915 |
|                                | ) |                                   |
| ATC SITE CONSTRUCTION, LLC     | ) |                                   |
|                                | ) |                                   |
| Plaintiff,                     | ) | ATC SITE CONSTRUCTION, LLC'S      |
| Vs.                            | ) | MOTION TO AWARD IT                |
|                                | ) | ATTORNEY FEES AND COSTS           |
|                                | ) |                                   |
| NKD, INC.,                     | ) |                                   |
|                                | ) |                                   |
| Counter Claimant,              | ) |                                   |
| Cross Claimant, and            | ) |                                   |
| Third Party Plaintiff.         | ) |                                   |
|                                | ) |                                   |
| <hr/>                          |   |                                   |
| ATC SITE CONSTRUCTION, LLC,    | ) |                                   |
|                                | ) |                                   |
| Third-Party                    | ) |                                   |
| Plaintiff,                     | ) |                                   |
|                                | ) |                                   |
| Vs.                            | ) |                                   |
|                                | ) |                                   |
| GEO-SYSTEMS DESIGN & TESTING,  | ) |                                   |
| INC., GEARIG CIVIL WORKS, LLC, | ) |                                   |
|                                | ) |                                   |
| Third-Party                    | ) |                                   |
| Defendants.                    | ) |                                   |
|                                | ) |                                   |
| <hr/>                          |   |                                   |

In light of (a) the broad consent of all parties to refer all issues in the captioned case to the Arbitration Panel, including claims for attorney fees and costs by ATC Site Construction, LLC ("ATC") and NKD, Inc. ("NKD") with respect to ATC's mechanic's lien, and (b) NKD's current position that the Arbitration Panel lacked the authority to award attorney fees and costs, which ATC disputes, ATC respectfully moves the Circuit

Court to award it attorney fees and costs related to its mechanic's lien. ATC incorporates in this Motion by reference the Final Award of the Arbitration Panel dated April 9, 2025 (Exhibit 1), and ATC's Petition for Award of Attorneys' Fees with Affidavits of Counsel (Exhibit 2, 2A and 2B).

Respectfully submitted:

July 8, 2025

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By: s/Trippett Boineau, III  
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|                            |   |                                      |
|----------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA    | ) | IN THE COURT OF COMMON PLEAS         |
|                            | ) |                                      |
| COUNTY OF RICHLAND         | ) | Civil Action No. 2020-CP-40-03915    |
|                            | ) |                                      |
| ATC SITE CONSTRUCTION, LLC | ) |                                      |
|                            | ) |                                      |
| Plaintiff,                 | ) |                                      |
| Vs.                        | ) | <b>MEMORANDUM IN SUPPORT OF</b>      |
|                            | ) | <b>MOTION TO CONFIRM AWARD, AND</b>  |
| NKD, INC.,                 | ) | <b>OPPOSING MOTION TO VACATE,</b>    |
|                            | ) | <b>MODIFY IN PART AND CONFIRM IN</b> |
|                            | ) | <b>PART</b>                          |
| Counter Claimant,          | ) |                                      |
| Cross Claimant, and        | ) |                                      |
| Third Party Plaintiff.     | ) |                                      |
|                            | ) |                                      |

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|                                |   |  |
|--------------------------------|---|--|
| ATC SITE CONSTRUCTION, LLC,    | ) |  |
|                                | ) |  |
| Third-Party                    | ) |  |
| Plaintiff,                     | ) |  |
|                                | ) |  |
| Vs.                            | ) |  |
|                                | ) |  |
| GEO-SYSTEMS DESIGN & TESTING,  | ) |  |
| INC., GEARIG CIVIL WORKS, LLC, | ) |  |
|                                | ) |  |
| Third-Party                    | ) |  |
| Defendants.                    | ) |  |
|                                | ) |  |

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This matter is before the Court on the dueling motions of NKD, Inc. (“NKD”) to vacate in part, modify in part, and confirm in part, the Final Award issued by an arbitration panel (“NKD’s Motion”), and the motion of ATC SITE CONSTRUCTION, LLC (“ATC”) to confirm the Final Award (“ATC’s Motion”).

Originally this case was filed in this Court and had appeared on the trial roster in Richland County when the parties decided to arbitrate this case. The parties jointly filed a proposed Consent Order to Stay Pending Arbitration (“Consent Order”), and Chief Administrative Judge Jocelyn

Newman issued the Consent Order on July 10, 2024. The Consent Order is attached hereto as **Exhibit 1**.

NKD's Motion seeks a reversal of the arbitrators' decision to award ATC attorneys' fees under the mechanics lien statute. NKD claims that the arbitrators used the wrong test in deciding the "prevailing party"; that the arbitrators "may" have no jurisdiction to render a decision on the award of attorneys' fees; that the Panel exceeded its power in determining the amount of fees awarded to ATC; and that the award should be corrected to calculate additional pre-judgment interest. ATC has moved to confirm the award. (**Ex. 9**)

### **STANDARD OF REVIEW**

"When a dispute is submitted to arbitration, the arbitrators determine questions of both law and fact. Generally, an arbitration award is conclusive, and courts will refuse to review the merits of an award. An award will only be vacated under narrow, limited circumstances." *Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997).

S.C. Code Ann. § 15-48-130(a) (Supp.1996) provides the grounds for vacating an arbitration award. It states in relevant part:

- (a) Upon application of a party, the court shall vacate an award where:
- (1) The award was procured by corruption, fraud or other undue means;
  - (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
  - (3) The arbitrators exceeded their powers;
  - (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 15-48-50, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 15-48-20 and the party did not participate in the arbitration hearing without raising the objection.

These statutory provisions make it clear that when parties choose arbitration, the role of the courts is not one of reviewing the record for factual or legal errors. Rather, the primary role is to provide relief where the arbitrators have acted in an unexpected and harmful manner such as to exhibit corruption, evident partiality, or acting beyond their powers. In these cases, it is appropriate for a court to remedy the situation to protect the parties, who cannot protect themselves. However, where the parties have chosen arbitrators, rather than the courts, to resolve their disputes, the General Assembly has not empowered the taxpayer funded courts to correct mere errors of law or fact arising from private resolution efforts. As *Pittman, supra*, states, such arbitration awards are conclusive. Thus, a conclusive arbitration award is a risk the parties to an arbitration must accept.

### **FACTUAL BACKGROUND**

The parties were involved with a real estate development in the White Rock area of Richland County. NKD was the owner of a real estate development known as River Shoals, and ATC was the site contractor hired by NKD to construct roads and utilities for that development. Problems arose between the parties which resulted in a mechanics lien and lis pendens being filed by ATC, which prompted counterclaims by NKD for road and utility defects and for liquidated damages for delay. GEO-SYSTEMS DESIGN & TESTING was the designer of the roads which were installed and was brought in as a third-party defendant by ATC, while NKD brought in GEARIG CIVIL WORKS, LLC, a sub-contractor who laid soil cement on the roadbeds, as a third-party defendant. Gearig settled its claims with NKD and was dismissed as a party, and Geo-Systems was found not liable by the Panel. Thus, the Award deals with the issues between the contractor, ATC and the owner, NKD.

Arbitrators- After the parties agreed to arbitration, the parties selected three experienced and capable construction lawyers who have outstanding reputations in this State, as arbitrators. Even NKD, who is seeking to vacate and modify the Final Award, acknowledges the Panel “collectively possess extensive knowledge of construction law and experience with construction defect cases.” (5/13/2025, NKD Mot to Vacate, Par. 10, p.4.)

The Interim Award- The arbitration hearing lasted four days in November 2024, and the testimony was transcribed. On January 21, 2025, the Panel issued its Interim Award. **(Ex. 2)**. The Interim Award found that NKD had suffered net repair damages of \$1,111,787.83 plus liquidated damages of \$365,000, and pre-judgment interest of \$147,616.05. ATC was awarded \$838,685.95 on its mechanics lien claim. The Panel then reduced NKD’s award to the extent of the amounts due on ATC’s award. After the set-off of the mechanics lien claim, the total amount due NKD by ATC was \$785,717.93. The only issue not resolved by the Interim Award was the issue of the award of Attorney’s Fees and costs on the mechanics lien claim. The Panel asked the parties to brief the Panel on the issue of entitlement to attorneys’ fees.

Meanwhile, NKD filed a Motion to Correct Interim Award **(Ex. 3)**, which raised issues concerning: 1) the mistaken or inconsistent calculation of liquidated damages; 2) a miscalculation of interest on the Gearig settlement resulting in a shortfall of \$34,701.40; and 3) a clerical error concerning the damages claimed by NKD against ATC. The Panel ignored #1 but did ask for comments from ATC as to #2 and #3. **(Ex.4)** ATC responded to the Panel’s request for comments. **(Ex.5)**

Final Award and Attorney’s Fees- With respect to the award of attorneys’ fees, both parties submitted a Petition for attorneys’ fees **(Ex. 6, ATC Petition)** and both sides filed responses to the other side’s Petition. **(Ex.7 ATC Response to NKD fee request.)**

On April 9, 2025, the Panel issued its Final Award. **(Ex.8)** The Panel rejected NKD's Motion to Correct Interim Award, determining that the liquidated damages had been properly computed, and denying NKD's request for pre-judgment interest on the settlement amount with Gearig. With respect to the award of attorneys' fees, the Panel determined that ATC was the prevailing party for attorneys' fees under §29-5-10(b). It based this determination on the fact that neither party had made an offer, therefore the issue would be decided under §29-5-10(b) by determining which party's pre-trial offer was closer to the final award in the case. ATC's offer was deemed to be the amount prayed for in its Complaint of \$847,236.20. Because NKD also made no offer, §29-5-10(b) directed that its offer was the amount of its counterclaim, which the Panel found to be \$3,373,570.29. Considering that the Panel's final net award was \$638,101.88 before interest, and \$785,717.93 with interest, under either calculation, ATC's pre-trial demand of \$847,236.20 was "clearly 'Closer to the verdict reached' in this matter." **(Ex.8, p.3.)**

ATC sought attorneys' fees in the amount of \$267,930.00. After review of all parties' submissions on the issue, the Panel exercised its judgment by trimming ATC's requested fees of \$267,930 by \$39,330. The Panel awarded ATC fees of \$228,600, and reduced NKD's net award by that amount. **(Ex.8, p.5.)**

ATC's Motion and NKD's Motion, which are now before the Court, followed.

#### **I. NKD CLAIMS THE AWARD SHOULD BE VACATED AS IT RELATES TO ATTORNEYS' FEES**

NKD's Motion seeks a reversal of the Panel's decision to award ATC attorneys' fees under the mechanics lien statute. NKD's Motion claims that the award of mechanics lien attorney's fees "exceeded their powers" as arbitrators (par.11) and was "in manifest disregard of the law." (par.6).

Exceeding Power To establish that the arbitrators exceeded their powers under sub-section (a)(3) of Section 15-48-130, NKD must show that the issue resolved by the arbitrators was not

within the scope of the agreement to arbitrate. Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct.App. 1998). The record reflects that both ATC and NKD made motions for the award of attorneys' fees. This Court's Consent Order to Stay provided that the arbitrators could hear and rule on all motions. Thus, the arbitrators did not exceed their powers under section (a)(3).

Manifest Disregard NKD's motion also alleges the non-statutory ground that the decision was in manifest disregard of the law. When a dispute is submitted to arbitration, the arbitrators decide questions of law and fact. Generally, an arbitration award is conclusive, and courts will refuse to review the merits of an award. Pittman Mortgage Co. v. Edwards, 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997). While it is true the courts have not hesitated in appropriate cases to vacate an arbitration award where there is a manifest disregard or perverse misconstruction of the law, "those cases have been exceedingly rare, requiring circumstances far more egregious than mere errors in interpreting or applying the law." Lauro v. Visnapuu, 351 S.C. 507, 519, 570 S.E.2d 551 (S.C. App. 2002). Factual and legal errors by arbitrators do not constitute an abuse of power, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers. Pittman, supra, at 337.

The Panel applied the "prevailing party" test found in Section 29-5-10(b) of the mechanics lien statute. The Panel's Final Award lays out in detail its findings as to each of the statutory factors:

Neither party made an offer of settlement as allowed in Section 29-5-10(b) of the South Carolina Code. Therefore, the Panel must look to the amount prayed for in ATC's Complaint as the "final offer of settlement" from ATC. That amount is \$847,236.20. Since NKD also did not make an offer of settlement pursuant to the statute, the Panel must consider "the value of his counterclaim" to be the "negative offer of settlement." Since the statute utilizes "offers of settlement" that are made prior to the start of a trial to determine the "prevailing party," the Panel gives more weight to the counterclaims asserted in NKD's Pre-Hearing Brief than the exhibit introduced at trial, or the subsequent amount asserted in NKD's Post-Hearing Brief. We conclude that the proper amount to be used as NKD's "negative offer of settlement" is \$3,373,570.29.

(Ex.8, p.2.)

To establish “manifest disregard” of existing law by the Panel, NKD argues that the Section 10(b) statutory test does not apply and that a common law test should apply. When the awards are netted out, NKD argues that its total award is greater than ATC’s, thus NKD is the prevailing party. NKD’s view of the prevailing party test is clearly in conflict with the language of Section 29-5-10(b), which determines the “prevailing party” by deciding whose pre-trial offer was closer to the final verdict. NKD ignores Section 10(b) and instead launches into a common law determination of the “prevailing party” citing *Seckinger v. Vessel Excalibur*, 326 S.C. 382, 483 S.E.2d 775 (Ct.App. 1997). *Seckinger* applied the old common law test because of its conclusion that Section 29-5-10(b)’s “prevailing party” test did not apply if neither party made a pre-trial offer under the statute. Based upon its interpretation of the mechanics lien statute, the Court of Appeals in *Seckinger*, held that Section 10(b) is not applicable until one of the parties makes a written offer under Section 10(b).

There is a significant problem in NKD relying upon *Seckinger*. The South Carolina Supreme Court has effectively overruled the holding in *Seckinger* on two different occasions, by holding that the Section 10(b) test for the prevailing party is applicable regardless of whether either party made a pre-trial offer. Those two Supreme Court of South Carolina decisions are binding precedent on the Court of Appeals under S.C. Const. Art. V, §9. Specifically, in *Brasington Tile Co., Inc. v. Worley*, 327 S.C. 280, 289, 491 S.E.2d 244, 248 (1997), the Supreme Court addressed the 1991 version of Section 10(b), as follows:

**“when neither party makes a written offer of settlement** (emphasis added), the plaintiff’s offer is considered the amount prayed for in its complaint and the defendant’s offer is considered to be zero. Whether fairly or unfairly, the statute

does not make provision for considering counterclaims as negative offers of settlement.”

Obviously, the highlighted part of the Opinion is important because it contradicts, and replaces, the *Seckinger* decision that Section 10(b) is inapplicable if no offer is made.

Then in 1999, the legislature reacted to the *Brasington* decision by enacting an amendment to Section 10(b) that dealt with the unfairness issue that the opinion had raised. The 1999 amendment changed the defendant’s offer, when one had not been made, to be the value of its counterclaim, if it had made a counterclaim.

In 2005, the Supreme Court in *JRS Builders, Inc. v. Neunsinger*, interpreted the 1999 version of Section 10(b), the same statute now before this Court. After *Brasington Tile* the General Assembly amended the statute to provide that if the Defendant makes no written offer of settlement, the value of his counterclaim is the negative offer of settlement. Thus, the holding in *Seckinger* that Section 10(b) does not apply when the parties fail to make an offer, is clearly not the law. The two Supreme Court decisions referenced above govern that issue. The statutory prevailing party test in Section 10(b) is the applicable test, not the old common law test used in *Seckinger*, and the Panel was correct in using the Section 10(b) test.

NKD’s claim that the arbitrators engaged in manifest disregard of the law by awarding ATC its attorneys’ fees, is unreasonable and has no merit. In fact, the arbitrators “got it right” and it is clear from their written decision that they followed the wording of the statute. ATC was the prevailing party under Section 29-5-10(b) and is entitled to prevail on its motion for attorneys’ fees.

## **II. WHETHER THERE IS SUBJECT MATTER JURISDICTION TO ENTER THE FEE AWARD**

NKD argues that the mechanics lien statute makes the award of attorneys' fees an issue of subject matter jurisdiction, and that there was no subject matter jurisdiction to allow the award of fees by the Panel. NKD's argument is based upon the language in Section 29-5-10(a) which states: "The costs which may arise in enforcing or defending against the lien under this chapter may be recovered by the prevailing party. *The fee must be determined by the court in which the action is brought* but the fee and court costs may not exceed the amount of the lien...." (emphasis added).

According to NKD, this language is mandatory and limits subject matter jurisdiction for the award of fees to the court in which the action is brought. However, in *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (S.C. 1994), the Supreme Court's reasoning establishes that this language merely provides the correct venue, and that venue may be waived by consent of the party having the venue rights. Since the parties agreed to submit the case to arbitration, NKD waived its right to have the attorneys' fees determined by this Court.

"The distinction between subject matter jurisdiction and venue is an important one in the law." *Id.* Subject matter jurisdiction concerns the "power to hear and determine cases." and cannot be waived because a court lacking subject matter jurisdiction "has no authority to act regardless of the geographical location or the consent of the parties." *Id.* "On the other hand, venue is the place or geographical location of trial." A court sitting where venue is improper may render judgment if the party which has the venue right consents and waives its venue rights. *Id.*

Since "subject matter jurisdiction" relates to whether the claim is one of a general class of cases that a court has the power to hear and determine, while venue relates to the location of trial, how do these principles apply to the statute at issue in this case? The mechanics lien statute states in Section 29-5-140 that "The lien may be enforced by petition to the court of common pleas for the county in which the building or structure is situated." According to *Dove*, there is only "one

Circuit Court in South Carolina, with uniform subject matter jurisdiction throughout the State.” *Dove*, at 600. The phrase ‘court of common pleas’ in the statute “refers to the South Carolina Court of Common Pleas, and not to a particular circuit or county.” *Id.* Like the statute in *Dove*, the mechanics lien statute grants subject matter jurisdiction to courts of common pleas throughout the state, to enforce mechanics liens.

The correct court in which to seek an award of attorney’s fees in this case was “the court in which the action is brought...” Section 29-5-10. According to *Dove*, while the subject matter jurisdiction is vested in the South Carolina Court of Common Pleas, the clauses all designate a specific county as a matter of venue. Thus, the correct venue for the award of attorneys’ fees is the Court of Common Pleas for Richland County.

Since the language which grants subject matter jurisdiction is found in Section 29-5-140, while the language in Section 29-5-10(a) which NKD relies upon concerns venue, the question is whether NKD, as the party having venue rights, consented to have the arbitrators determine attorneys’ fees. If so, that consent will be honored. *Dove*, at 600.

The Plaintiff filed its mechanics lien case in the Court of Common Pleas for Richland County. While the case was on the trial roster, the parties reached an agreement to arbitrate the case, which agreement was embodied in the Consent Order to Stay Pending Arbitration. As stated in that Order, to which NKD was a movant and signed its consent, “The arbitration panel shall be empowered to hear and rule on all motions as though this matter were being heard in the South Carolina Court of Common Pleas.” Thus, the parties agreed, and this Court so ordered, that the Panel would act in the place of a Richland County circuit court judge in ruling on motions. After the arbitration hearing, both ATC and NKD filed motions before the Panel to award them attorneys’ fees, and the Panel ruled on both motions. NKD’s motion was denied, and ATC’s motion was

granted although the amount of fees awarded were less than the motion sought. On appeal NKD, for the first time, alleges that Section 29-5-10 deprives the arbitration panel of subject matter jurisdiction to award attorneys' fees. NKD never raised this issue with the arbitrators, the parties or this Court. In fact, NKD made its own motion for attorney's fees to the arbitrators.

NKD voluntarily and clearly consented to the arbitrators deciding the issue of the entitlement to, and amount of attorney's fees. Accordingly, NKD waived its right to have the Richland County Court of Common Pleas determine those issues.

NKD has not established that there was a "lack of subject matter jurisdiction." Accordingly, NKD's waiver of the venue provision, and the agreement and Order allowing the arbitration panel to determine the amount of attorney's fees, should be confirmed. NKD has established no grounds to reverse the award of fees to ATC, the prevailing party on the lien claim.

**III. WHETHER THE PANEL EXCEEDED ITS AUTHORITY IN DETERMINING THE AMOUNT OF FEES OWED TO ATC.**

ATC sought attorneys' fees in the amount of \$267,930.00. **Ex.8, p.5.** The Panel awarded ATC fees of \$228,600. Thus, after a review of all parties' submissions on the issue, the Panel exercised its judgment by trimming ATC's request by \$39,330.

The Panel reviewed the attorneys' fees spent by both sides on the mechanics lien issues, which were quite close in amount. NKD had three attorneys and two paralegals working on the mechanics lien case, while ATC had two attorneys work on it. The Panel noted the number of hours the professionals spent on the case and found that ATC's attorneys spent an appropriate amount of time. The Panel found that both of ATC's attorneys had excellent professional standing in South Carolina. They charged reasonable fees. And the Panel found that ATC was entitled to \$847,236.20 on the mechanics lien, which was a beneficial result for their client.

NKD's motion contends that the Panel "Exceeded Its Power" in determining the amount of fees awarded to ATC. Factual and legal errors by arbitrators do not constitute abuse of their powers, and the court is not required to review the merits of their decision so long as the arbitrators do not exceed their powers. *Harris v. Bennett*, 332 S.C. 238, 503 S.E.2d 782 (Ct.App. 1998). Arbitrators "exceed their power" under South Carolina law, only if the issue resolved by them is not within the scope of the agreement to arbitrate. *Id.* As noted earlier, the decisions made regarding attorney's fees were the result of motions filed by both parties, and the arbitrators were specifically granted the power to decide motions. Clearly, the arbitrators did not "exceed their power."

NKD summarily includes a statement in Paragraph 32 of its Motion, that the Panel "manifestly disregarded South Carolina law." This argument is unpersuasive on its merits, and in addition, it would not amount to such an "exceedingly rare" violation as to amount to a "manifest disregard of the law." The Panel's reduction of \$39,330, indicates the Panel considered the points NKD argues. This portion of the motion should be denied.

**IV. THE COURT SHOULD NOT MODIFY THE AWARD TO "CORRECT" THE CALCULATION OF PRE-JUDGMENT INTEREST AS THIS IS IN THE ARBITRATION PANEL'S JURISDICTION AND THERE ARE NO BASES TO CHALLENGE THE PANEL'S AWARD.**

As a threshold matter, ATC asserts this Court can resolve this issue by simply ruling the Arbitration Panel had the exclusive ability to consider, calculate, and order the pre-judgment interest. NKD was presented with the opportunity to contest this ruling in a motion in response to the Interim Award. ATC asserts this was essentially a Rule 59(e) SCRCF motion to reconsider. The Arbitration Panel considered this position and denied the miscalculation. This ends the analysis.

In the event it is determined the Arbitration Panel exceeded the scope of its authority in other areas, which is denied, the Arbitration Panel correctly ruled on the calculation of pre-judgment interest.

**A. NKD incorrectly asserts it should be provided the benefit of the \$150,000.00 settlement entered into during the pendency of the arbitration for purposes of pre-judgment interest.**

As noted in the Panel's Interim Award, "Gearig reached a settlement with NKD in return for payment of \$150,000 to NKD and the dismissal of all claims by NKD against Gearig and dismissal of the crossclaims asserted by ATC. *All parties agreed that this payment would act as a credit against the claims being asserted by NKD.*" (Ex. 2, p. 2, Emphasis Added).

"A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles." *Welch v. Epstein*, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000) (citing *Powers v. Temple*, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967) ("[T]he rule is almost universally followed that one [tortfeasor] is entitled to credit for the amount paid by another [tortfeasor] for a covenant not to sue.")). "The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him." *Truesdale v. S.C. Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), overruled on other grounds by *McCall ex rel. Andrews*, 285 S.C. 243, 329 S.E.2d 741 (1985), superseded by statute. "In other words, there can be only one satisfaction for an injury or wrong." *Welch*, 342 S.C. at 312, 536 S.E.2d at 425.

When the settlement is for the same injury as a matter of law, "the right to setoff arises as an operation of law, and the circuit court must award a setoff." *Smith v. Widener*, 397 S.C. 468, 474, 724 S.E.2d 188, 191 (Ct. App. 2012). Once there is a verdict against a defendant, it becomes the trial court's function to determine whether the defendant is entitled to a setoff and the amount

of the setoff, if any. *See Smith*, 397 S.C. at 471-72, 724 S.E.2d at 190 ("[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury."); *id.* at 472, 724 S.E.2d at 190.

NKD seeks to deprive ATC of the very credit from Gearig's settlement explicitly provided in the Interim Award and required by law, universally. "NKD is *entitled* to interest on the setoff amount going back to June 3, 2022, the date that the Panel has confirmed that the claims were fully liquidated. *Interest on the \$150,000.00 is owed by ATC* for the time period until the setoff funds were received, which should be treated as January 25, 2025." (**Ex.3, p. 9**, Emphasis Added.)

Instead, Gearig's settlement was paid to dismiss both NKD's and ATC's claims against it, extinguish any liability it may have to either party with no admission to liability, and to buy Gearig's peace. For purposes of the \$150,000.00 Gearig settlement, NKD is entitled to nothing other than just that—Gearig's settlement payment, and ATC owes nothing.

**B. NKD incorrectly interprets the law concerning setoff/credits and Liquidated Damages.**

ATC agrees with the general premise presented by NKD that the credit or setoff afforded by Gearig's settlement does not invalidate NKD's ability to recover pre-judgment interest. However, the undersigned could not locate any cases that allow for the credit or setoff to be used for purposes of calculating what is owed in prejudgment interest as proposed by NKD in the Motion. Instead, case law would support the Panel's findings in determining the applicable prejudgment interest *after* determining what ATC owed NKD.

In a review of applicable cases dealing with this issue, it would appear the issue to be decided concerning the presence of credits and/or setoffs was to determine if the presence of a

credit or setoff rendered a claim unliquidated, or incapable of being reduced to a sum certain, for the purpose of an award of pre-judgment interest. *See Butler, infra* fn. 1.

The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. *Smith-Hunter Constr. Co. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005); *Babb v. Rothrock*, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993); The right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable. *Lee v. Thermal Engineering Corp.*, 352 S.C. 81, 88-89, 572 S.E.2d 298, 302 (Ct. App. 2002); *Southern Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985).

Here, ATC should receive the benefit of the credit/setoff from Gearig's payment, and prejudgment interest should only be calculated after determining the amount ATC owes NKD. This was the purpose of the settlement. "All parties agreed that [Gearig's payment] would act as a credit against the claims being asserted by NKD." (**Ex. 2, p.2**). The Panel correctly awarded prejudgment interest after determining the amount ATC owed NKD.

### CONCLUSION

Because NKD's motion does not state grounds sufficient to vacate or modify the Panel's award, the Motion of ATC, Inc. to confirm the arbitrators award should be granted and NKD's motion to vacate, modify and partially confirm, must be denied.

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ATTORNEYS FOR ATC SITE  
CONSTRUCTION, LLC

Columbia, South Carolina

March 12, 2026.

**BEFORE THE ARBITRATION PANEL**

ATC SITE CONSTRUCTION, LLC, )  
 )  
 Claimant, )  
 )  
 vs. )  
 )  
 NKD, INC., )  
 )  
 Respondent, )  
 Counterclaimant, and Third-Party )  
 Claimant, )  
 \_\_\_\_\_ )  
 )  
 ATC SITE CONSTRUCTION, LLC, )  
 )  
 Third-Party Plaintiff, )  
 )  
 v. )  
 )  
 GEO-SYSTEMS DESIGN & TESTING, INC. )  
 )  
 Third-Party Defendant. )  
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**NKD, INC.'S MOTION  
TO CORRECT INTERIM AWARD**

Following thorough review of the Interim Award, Respondent and Counterclaimant NKD, Inc. ("NKD") respectfully files this Motion to Correct the Interim Award in order to address miscalculations, inconsistencies, omissions and mistakes. In support of its Motion, NKD states the following grounds:

**LEGAL STANDARD**

The AIA Contract between NKD and ATC provided that any claim subject to arbitration shall be administered by the American Arbitration Association (AAA) in accordance with its Construction Industry Arbitration Rules. (*Hearing Ex. 13, § 15.4.1.*) Pursuant to the Construction Industry Arbitration Rules, "[w]ithin 20 calendar days after the transmittal of an award, the arbitrator on his or her initiative, or any party, upon notice to the other parties, may request that

the arbitrator, through the AAA, clarify the award or correct any clerical, typographical, technical, or computational errors in the award.” *See Construction Industry Arbitration Rules, R-52 (Modification of Award)*. NKD’s Motion seeks to clarify and correct issues in the Interim Award.

### **ARGUMENT**

#### **I. The Amount of the Liquidated Damages Award Appears to be Based on Mistake or Oversight**

In the Interim Award, the Panel found that ATC breached the AIA Contract and breached its warranties to NKD. Specifically, with regard to project delays that would result in liability for liquidated damages, the Panel also found that:

ATC was behind schedule from the beginning of the project and did not progress the work in a diligent manner.

*See Interim Award*, at p. 6. Regarding the defective work, the Panel awarded NKD approximately 98% of its requested repair costs. Furthermore, to provide for liquidated damages during the remedial period, the Interim Award states that:

[T]he Panel finds that ATC is responsible for 365 days of delay which would have been a **reasonable amount of time to complete the remedial work**.

*See Interim Award* at 7 (emphasis added). Although this provides 365 days to complete the repairs, it omits an award of liquidated damages for the 587 days that ATC exceeded the Substantial Completion Date up through February 24, 2020, when ATC left the project in an incomplete and defective state that would require, in the Panel’s determination, 365 days to correct. The one-year period to complete the remedial work cannot run concurrently with the untimely performance of the defective work. Work has to be done incorrectly or defectively before it can be remediated. NKD believes that the Panel intended to also award an amount of liquidated damages for the delay allocable to ATC that arose between August 1, 2018 and February 24, 2020, which was as a 587-

day period. In all, ATC worked on the project for a period of 994 days and was either paid or credited for 99% of the work. Therefore, the omission of additional liquidated damages for the portion of the prior delay that the Panel attributes to ATC should be noted and corrected. Otherwise, the Interim Award is clearly inconsistent with the terms and intent of the AIA Contract.

On September 24, 2019, thirteen months after the substantial completion date, ATC acknowledged that an amount of liquidated damages would be due. *See Hearing Ex. 80*. This was 419 days after the Substantial Completion Date, but still before it was even known that there were such significant project defects that a 365-day repair period would be needed. Additionally, there is no dispute that Substantial Completion was not reached as of October 13, 2019. *See Hearing Ex. 78 (Email from Engineer of Record Itemizing the Known Outstanding Items and Confirming Substantial Completion Not Reached)*. The was 438 days after the Substantial Completion Date. The parties may have disagreed about what needed to occur to achieve substantial completion, but no one argued that substantial completion had already occurred. And again, this was without knowledge that a substantial portion of ATC's untimely work was going to have to be redone.

Although the Panel did award a compromise repair period of one (1) year, the Panel omitted any award of liquidated damages consistent with its finding that "ATC was behind schedule from the beginning of the project and did not progress the work in a diligent manner." While the Panel could reduce the amount based on delay it believes should be attributed to NKD, to the extent that such actions indeed affected the critical path, it appears to be an omission and a mistake for the Interim Award to lack any liquidated damages for the portion of the 994 days of defective and delayed performance through February 24, 2020. The AIA Contract included a stipulation that ATC would be responsible for "[l]iquidated damages for failure to complete Substantial

Completion at \$1,000 per day after completion date,” but the Interim Award omits a corresponding award of liquidated damages for ATC’s delays that occurred up until the date that ATC left.

NKD does not believe that the Panel intended to allocate all of the delay that occurred during the 994 days (between June 5, 2017 through February 24, 2020) to *NKD*, but that is the result of the Interim Award. ATC has been paid or credited for 994 days of work, which should require a finding that ATC exceeded the contract time while it was performing work in a non-diligent and defective manner, separate from the time period needed to actually correct the defects. The Panel has confirmed that the liquidated provision is reasonable and enforceable, which creates an inconsistency if no damages for delay (separate from the remedial period) are awarded.

ATC ceased work 547 days after the Substantial Completion date had expired. While it is clear that the Panel does not believe that ATC should be responsible for 100% of this delay, it is also clear that ATC is responsible for a significant portion of it. One milestone in the record is the October 16, 2019 email from Bill Flowers at Civil Engineering of Columbia. The email confirms that, based on physical observation of the site, numerous aspects of the project were incomplete and the project had not reached substantial completion. It is undisputed that PTOs were not in hand and could not have been based on various items that were ATC’s responsibility. At this point, ATC had exceeded the Contract Time by 441 days. This is a date through which liquidated damages can and should be awarded, which would result in an additional award of \$441,000.00 in liquidated damages, for a total of \$806,000.00 in liquidated damages when added to the one-year remedial period.

The Panel noted in the Interim Award that NKD ceased making payments to ATC during 2019. As an alternative to the October 16, 2019 date, if the Panel believes that NKD’s refusal to pay ATC’s pay applications as of Payment Application # 19 dated April 29, 2019 constituted a

“break” in causation for liquidated damages, an additional award of liquidated damages to NKD in the amount of \$301,000.00 has been omitted and should be added to the Interim Award. This should be added to the 365 days awarded for the subsequent remedial work, for a total of \$666,000.00 in liquidated damages.<sup>1</sup> Any delay in the order of the generator or the SCADA system clearly did not cause the project to fail to meet substantial completion by this date, as the roads had not even been paved until July 2019. Absent a correction of the amount of liquidated damages, ATC has been unjustly enriched and the terms and intent of the AIA Contract have not been implemented.

**II. If There Was No Omission or Mistake as to Liquidated Damages, the Interim Award is Internally Inconsistent.**

If the omission of any liquidated damages for the 573-day Delay Period was not a mistake, then the Interim Award should be revised to address several inconsistencies. ATC’s liability for liquidated damages cannot be limited to a one-year remediation period only based on the Panel’s other findings. This includes the fact that ATC was found to have failed to diligently pursue the work, but was compensated for the entire 994-day period during which it performed delayed and defective work (the “Defective Performance Period”). Similarly, the Parties stipulated that ATC was working up until February 24, 2020, such that it was undisputed that ATC worked on the project over a period of 994 days before ceasing work. ATC left the site 573 days after the Substantial Completion Date had passed. If ATC is to be credited for work done over 994 days, the absence of a liquidated damages award for all or some portion of the 573 days that ATC overshot the Contract Time renders the Interim Award inconsistent.

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<sup>1</sup> Under the AIA Contract, the due date for payment under a pay application submitted after the 20<sup>th</sup> day of a month is 30 days from the date of the Pay Application. *See* AIA Contract (A101) at Section 5.1.3.

The date when ATC quit working was not disputed. On February 25, 2020, Glenn Gentry wrote an email to Nick Leventis stating that: “[n]o further work will be done on your project, due to a lack of payment by the owner, until resolution of problems is made and all payments are current.” *See Hearing Ex. 119*. As the Panel is aware, NKD did not believe further payment was due to ATC due to the delays that had already occurred, the incomplete status of the job, and the defects that were beginning to manifest. Thereafter, ATC filed its mechanic’s lien in which it confirmed under oath that “ATC first furnished labor or material on June 5, 2017 and last labored and/or supplied labor or materials to the Property on **February 24, 2020** within ninety (90) days prior to the filing and service of this Notice of Mechanic’s Lien and Statement of Just and True Account.” *See Hearing Ex. 133*, ¶ 7. By giving ATC a credit of \$838,685.95 against the repair damages, the Panel caused ATC to be paid for all of the work, whether defective or non-defective, that ATC performed over the 994-day Performance Period. It was not until after the 994 days had passed that the remedial period, which the Panel determined should be one year, could begin.

The Panel appears to have determined that both sides were responsible for a portion of the delays during the Delay Period. It is acknowledged that the Panel found that a portion of the prior delay should be allocated to NKD for items such as the delay in the ordering and delivery of the generator and the SCADA system and for not paying pay applications once the project was significantly overdue. To address the mistake or inconsistency, the Interim Award should be revised to reflect additional liquidated damages arising during the 573 days between the revised Substantial Completion date (August 1, 2018) and the date when the parties stipulated that ATC last performed the AIA contract (February 24, 2020), subject to an adjustment that the Panel believes should be made due to actions by NKD that indeed affected the project’s critical path.

**III. The One-Year Period for Remedial Period Cannot Run Concurrently with the Defective Performance Period.**

Upon review of the Interim Award, the one-year remedial period of liquidated damages that was awarded runs concurrently with the period during which ATC was performing untimely and defective work. This appears to be a mistake or oversight, as remedial work cannot occur until defective work was performed (and the defects manifest themselves). By omitting an award of liquidated damages for the portion of the 994-day period allocable to ATC, the one-year remedial period begins and ends while ATC was still performing defective work. This should be corrected.

As the parties have stipulated, and the evidence confirms, ATC was performing the Contract during the 994-day Performance Period from June 5, 2017 until February 24, 2020. As written, the Interim Award brings the delay period to an end on August 1, 2019. The delay period in the Interim Award expires before ATC abandoned the work in February of 2020. It is undisputed that ATC did not even finish its paving operations until July of 2019. *See Hearing Tr., 205:13 – 209:17*. The cracks in the roadways first became noticeable by December of 2019. *See Hearing Tr., 250:22 – 25; Hearing Ex. 90*. As a result, the one-year remediation period ends six months before ATC ceased performing work and several months before the road defects began to become noticeable. The one-year period to remedy the defects should start from the date that the defects were known, not from a date that is prior to the discovery of the defects.

As noted above, the actual time to correct the defects was two years. The Panel shortened that period to one year, which would encompass the time during which: (i) the defects could be discovered; (ii) the defects to be investigated; (iii) the remedial scope of work to address the defects could be to be determined in consultation with Richland County; (iv) the remedial scope of work

could be performed and completed; and (v) the revised work could be inspected and approved by Richland County.

The remedial work that ATC refused to undertake could not begin until ATC left the job. There should be an award of liquidated damages both before and after February 24, 2020. *See Austin-Griffith v. Goldberg*, 224 S.C. 372, 389, 79 S.E.2d 447, 455 (1953) (holding where the contractor abandons the work after the time fixed for completion, the clause providing for liquidating damages applies from the time fixed for completion until the work is abandoned, and for a further period of time reasonably necessary to complete the job). The evidence in the record and the Panel's finding indicate that ATC was responsible for the defects. It is also undisputed that ATC refused to conduct the necessary repairs.

Correcting the Interim Award to reflect an award of liquidated damages for both the defective Performance Period and the 365-day remedial period is consistent with the Panel's other findings and reconciles the findings in the Interim Award that: (i) the date of Substantial Completion, as revised, was August 1, 2018; (ii) the liquidated damages provision of \$1,000 per day is reasonable and enforceable; (iii) a one-year period was a reasonable amount of time to complete the *remedial work* (but does account for the untimely performance of the defective work); (iv) that ATC was not diligent in completing the work during the 994 day period for which it was paid or credited for work; (v) Substantial Completion was achieved on June 3, 2022, when the final Permits to Operate were obtained and finished lots could be sold to Stanley Martin; and (vi) both ATC and NKD had a share of responsibility for the delays that arose from June 5, 2017 up through February 24, 2020. While it appears from these findings that the Panel intended to include liquidated damages for the Delay Period, the miscalculation in the Interim Award creates a discrepancy that fails to conform to the Contract, the evidence, and applicable law. In addition,

the Panel's finding that liquidated damages occurred during the one-year period from August 1, 2018, until August 1, 2019 requires a correction to the Interim Award to reflect the pre-judgment interest that has accrued on the liquidated damages from the date that the liquidated damages accrued, as opposed to June 3, 2022. The additional interest and carry costs were incurred by NKD in 2018, 2019, 2020, and 2021, and 2022. The calculation methodology in the Interim Award understates the damages.

#### **IV. The Pre-Judgment Interest Award is Based on a Miscalculation Relating to the Gearig Settlement**

In addition to the issues regarding liquidated damages, the net amount due to NKD was incorrectly reduced based on the application of an offset for the Gearig Civilworks settlement prior to calculating prejudgment interest as opposed to after calculating the interest. NKD went out of pocket to correct ATC's defective during 2020, 2021, and 2022. The \$150,000.00 was received from Gearig in late January 2025. As a result, NKD is entitled to interest on the setoff amount going back to June 3, 2022, the date that the Panel has confirmed that the claims were fully liquidated. Interest on the \$150,000.00 is owed by ATC for the time period until the setoff funds were received, which should be treated as January 25, 2025. This changes the per diem interest rate from \$152.97 to \$188.93. The revised calculation of prejudgment interest is \$182,317.45, which is \$34,701.40 in additional interest due that should be added the Interim Award. This results in an amended Interim Award of  $\$785,717.93 + \$34,701.40 = \underline{\$820,419.33}$ , subject to the additional award of liquidated damages to account for the portion of the 587 days of delay allocated to NKD that occurred up through February 24, 2020, plus the corresponding prejudgment interest on the additional liquidated damages.

NKD's claim for an award of prejudgment interest is governed by S.C. Code § 34-31-20, which provides for interest at the rate of 8.75% per annum where the sums are due are capable of being reduced to certainty. *See* S.C. Code § 34-31-20(A). South Carolina law allows prejudgment interest on obligations to pay money from the time when, either by agreement or by operation of law, the payment is demandable even if the parties do not agree on the amount of the obligation. *See Brooklyn Bridge, Inc. v. S.C. Ins. Co.*, 309 S.C. 141, 145, 420 S.E.2d 511, 513 (Ct. App. 1992) (affirming award of prejudgment interest where sum due under contract was capable of being reduced to certainty). It is recognized under South Carolina law that the right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. *See Miller Constr. Co., LLC v. PC Constr. of Greenwood, Inc.*, 418 S.C. 186, 207, 791 S.E.2d 321, 333 (Ct. App. 2016). The Interim Award should be amended to correct the error in the liquidated damages amount and the Panel's decision to calculate prejudgment interest in a manner that is contrary to South Carolina law.

**V. The Interim Award Contains a Clerical Error as to the Amount of NKD's Claimed Damages Against ATC**

The first paragraph of the Interim Award erroneously states that NKD sought damages "against ATC for \$4,400,579.07, inclusive of pre-judgment interest and excluding attorneys' fees, as more fully set forth in NKD's Pre-Hearing Brief." *Interim Award*, p. 1. NKD's Pre-Hearing Brief includes a table setting forth the type of damages/expenses incurred by NKD as a result of ATC's breach of the Contract. *NKD's Pre-Hearing Br.*, p. 23. The amount of "damages due from ATC," excluding attorney's fees and expenses, was alleged in NKD's Pre-Hearing Brief to be \$3,373,570.29, not \$4,400,579.07. *NKD's Pre-Hearing Br.*, p. 23. The Interim Award overstates the damages due from ATC, as alleged in NKD's Pre-Hearing Brief, by \$1,027,008.78. Also, these

amounts included prejudgment interest, which should not be included for purposes of determining the prevailing party as the “value” of the claim or counterclaim. Only the underlying amounts of the costs for repair costs should be considered.

### **CONCLUSION**

For these reasons, the Interim Award should be amended and corrected in the manner set forth above. before the final award is issued to: (i) correct the award of liquidated damages calculation to account for the delay allocated to ATC prior to February 24, 2020; (ii) correct miscalculation of pre-judgment interest; and (iii) correct other mistakes in the Interim Award.

By: s/ Ellis R. Lesemann  
Ellis R. Lesemann (S.C. Bar No. 15315)  
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Charleston, SC 29403  
(843) 724-5155

***Counsel for NKD, Inc.***

February 11, 2025  
Charleston, South Carolina

|                             |   |                                    |
|-----------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA     | ) |                                    |
|                             | ) | BEFORE THE ARBITRATION PANEL       |
| COUNTY OF RICHLAND          | ) |                                    |
|                             | ) |                                    |
| ATC SITE CONSTRUCTION, LLC, | ) |                                    |
|                             | ) |                                    |
| Plaintiff,                  | ) | <b>ATC SITE ONSTRUCTION, LLC'S</b> |
|                             | ) | <b>PETITION FOR AWARD OF</b>       |
| v.                          | ) | <b>ATTORNEYS FEES</b>              |
|                             | ) |                                    |
| NKD, INC. AND AMERIS BANK,  | ) |                                    |
|                             | ) |                                    |
| Defendants.                 | ) |                                    |
|                             | ) |                                    |

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ATC is filing this Petition for the award of attorneys' fees as the "prevailing party" on its mechanics lien claim.

The mechanics lien statute awards attorneys' fees to the "prevailing party." who meets the criteria set forth in §29-5-10. The current version, last amended in 1999, provides:

"If the Plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement.

If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero."

The 1999 amendment changed the value of the defendant's counterclaim, when he does not make a written offer of settlement, from "zero" to "his negative offer of settlement."

The Supreme Court, in *JRS Builders, Inc. v. Neunsinger*, 614 S.E.2d 629 (2005), reviewed the statutory history of §29-5-10:

“In 1997, this Court specifically interpreted the 1991 statute and held the following:

*‘when neither party makes a written offer of settlement, the plaintiff’s offer is considered the amount prayed for in its complaint and the defendant’s offer is considered to be zero. Whether fairly or unfairly, the statute does not make provision for considering counterclaims as negative offers of settlement.*

*Brasington Tile Co., Inc. v. Worley*, 327 S.C. 280, 289, 491 S.E.2d 244, 248 (1997)’

In response to the *Brasington* decision, the legislature amended the statute . . . . The amended version provides, in pertinent part, the following:

If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero.”

Id. at 631. (Emphasis Added)

Thus, the current version of §29-5-10, provides that “when neither party makes a written offer of settlement,” as is the case here, the Plaintiff’s offer is the amount in his complaint and the defendants negative offer is the value of his counterclaim.

The Panel’s Interim Award provided all of the information necessary to determine the “prevailing party.” The Panel even put the Interim Award in the single award format required by §29-5-10. The relevant numbers from the Interim Award are as follows:

According to the Award, ATC’s position was that it was due \$1,186,766. (p.1 of the Interim Award)

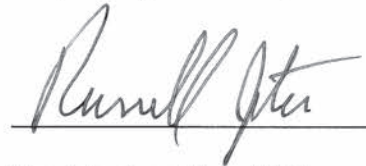
NKD’s position was that pursuant to its counterclaims it was due \$4,400,579 (which ATC acknowledges should be \$3,679,891.03). (p.1 of the Interim Award.)

The Panel, in the single award format, awarded NKD \$785,717.93. (p.10 of the Interim Award)

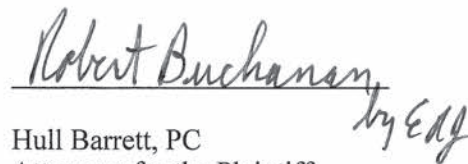
The calculation of whose position was closer to the ultimate award is simple arithmetic. ATC was \$1,972,483 away from the award amount ( $\$1,186,766 + \$785,717$ ), while NKD was \$2,894,174 from the award amount ( $-\$3,679,891 + \$785,717$ ). ATC is clearly the “prevailing party” for purposes of attorneys’ fees under §29-5-10.

ATC asks that it be awarded the attorneys fee amounts set forth in the attached affidavits.

Respectfully submitted,



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[rlbuchananjr@hullbarrett.com](mailto:rlbuchananjr@hullbarrett.com)

February 28, 2025

STATE OF SOUTH CAROLINA    BEFORE THE ARBITRATION PANEL  
COUNTY OF RICHLAND

|                              |   |                         |
|------------------------------|---|-------------------------|
| ATC SITE CONSTRUCTION, LLC,) | ) |                         |
|                              | ) |                         |
| PLAINTIFF, )                 | ) | AFFIDAVIT               |
|                              | ) | OF                      |
|                              | ) | ROBERT L. BUCHANAN, JR. |
|                              | ) |                         |
| Vs. )                        | ) |                         |
|                              | ) |                         |
| NKD, INC. AND AMERIS BANK, ) | ) |                         |
|                              | ) |                         |
| DEFENDANTS. )                | ) |                         |

I, Robert L. Buchanan, Jr., being duly sworn, depose and state:

1. I have regularly represented ATC over a period of years in a variety of matters. I began such representation over six (6) years ago while working as a sole practitioner at Buchanan Law Office, PA, 212 Newberry Street NW, Aiken, SC 29801. Approximately six years ago I closed Buchanan Law Office, PA and began practicing at the Aiken, SC office of Hull Barrett, PC, a law firm based in Augusta, GA with offices in Evans, GA and Aiken, SC. I have continued to represent ATC in some matters since that time.

2. Realizing the matter with NKD involved construction in Richland County, SC, and having known and worked with Attorney Russell Jeter previously in other matters, I recommended Mr. Jeter to ATC. Mr. Jeter was engaged as co-counsel for ATC in this matter. Mr. Jeter and I worked together in all phases of this matter, with the exception of the arbitration hearing after the first day (but we communicated by phone during that time).

3. Out of necessity, a mechanics lien was prepared, filed and served on NKD in Richland County, SC. Mr. Jeter and I participated in a mediation with Attorney/Mediator Frank Smith, which was disappointingly unsuccessful. After the passage of time with no success in trying to resolve the dispute by agreement, a lawsuit to foreclose the lien was required and filed. NKD counterclaimed. Attorneys Trippett Boineau and George James became involved for ATC's carrier. The case was mediated a second time by Attorney/

Mediator John Cutino. This mediation was disappointing and less successful than the first through no fault of Mr. Cutino. After being on more than one Richland County roster, the parties finally agreed to arbitrate the matter.

4. The fees requested include my time and effort working with Mr. Jeter as he has summarized in his Affidavit. I was involved in discovery and attended roster meetings. I charged for the first day of the arbitration hearing, which I was able to attend. I have not charged any fees for the time during the arbitration except for the first day.<sup>1</sup> Nor have I charged any fees related to the Arbitration prior to the Panel's issuance of the Interim Award. The attachment to Mr. Jeter's affidavit entitled "ATC Site Construction Inc Item Actual Cost Detail" includes \$113,670.00 paid to Hull Barrett, PC. These are for fees and some costs.

5. Subsequent to the Interim Award, I have charged time as follows for participating with ATC attorneys as we anticipate further involvement and briefing:

|         |                                 |
|---------|---------------------------------|
| 1-29-25 | 1.33 (time in 10ths of an hour) |
| 2-17-25 | .25                             |
| 2-19-25 | 3.5                             |
| 2-20-25 | 1.59                            |
| 2-21-25 | .25                             |
| 2-24-25 | 1.0                             |
| 2-25-25 | 1.0                             |
| 2-26-25 | 3.0                             |

6. Mr. Jeter and I agreed to charge a lower hourly rate in this case, realizing the case would be intensive and time-consuming because of the complicated nature of the matter, the time, novelty and skill required to deal with the many complicated issues, and our realization that reasonable settlement opportunities did not exist in the case. However, all Hull Barrett bills were prepared in Augusta, Georgia, and I have not verified the rate at which ATC was billed.

7. I graduated from USC Law School in 1976. I was employed by the Williams and Johnson Law Firm in Aiken, SC first as an associate, and later as a partner. I formed Buchanan Law Office, PA in April of 1994 and practiced there until I joined Hull Barrett, PC approximately six years ago. I have enjoyed a Martindale Hubbell AV rating for many years and I am in Best Lawyers as a personal injury attorney. I have acted as a mediator and a special referee in the past.

---

<sup>1</sup> ATC was well represented in my absence by and through the presence and efforts of Mr. Jeter, Mr. Boineau and Mr. James.

FURTHER DEPONENT SAYETH NOT.

February 28, 2025

Robert L. Buchanan, Jr.  
Robert L. Buchanan, Jr.

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Sworn to and subscribed before me,  
this 28<sup>th</sup> day of February 2025

Jacquelyn M. Barron

Printed Name:

Jacquelyn M. Barron

Notary Public

My Commission Expires:

5/19/2032



**JACQUELYN M. BARRON**  
Notary Public for South Carolina  
Comm. Expires May 19, 2032

|                             |   |                                   |
|-----------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA     | ) |                                   |
|                             | ) | BEFORE THE ARBITRATION PANEL      |
| COUNTY OF RICHLAND          | ) |                                   |
|                             | ) |                                   |
| ATC SITE CONSTRUCTION, LLC, | ) |                                   |
|                             | ) |                                   |
| Plaintiff,                  | ) | <b>AFFIDAVIT OF RUSSELL JETER</b> |
|                             | ) |                                   |
| v.                          | ) |                                   |
|                             | ) |                                   |
| NKD, INC. AND AMERIS BANK,  | ) |                                   |
|                             | ) |                                   |
| Defendants.                 | ) |                                   |
|                             | ) |                                   |
|                             | ) |                                   |

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I, Russell Jeter, being duly sworn, depose and state:

(1) Time involved in the case.

I have attached as Ex. A to this affidavit, an actual cost detail through November 7, 2024, which I received from ATC. This detail shows the fees charged in this case. The fees paid to Austin & Pethick are unrelated to the Interim Award and the client is not seeking reimbursement. I have reviewed the fees on Ex. A shown as paid to the Jeter Law Firm, and can state that they are accurate. Those fees paid to The Jeter Law Firm total \$105,540.00. I have not billed any costs on this matter. I have an outstanding bill dated February 3, 2025 to ATC for \$36,270.00 for time from April 2024 through January 30, 2025. In addition, I have 30 unbilled hours this month through February 26<sup>th</sup> representing an additional \$9,000.00 owed. In all, the total paid, billed or unbilled over five years is \$150,810.00. ATC asks that it be awarded the attorneys' fees it has paid or will be paying.

Since I did not bill any costs, the \$150,810.00 in fees requested represent 502.7 hours of

legal services since February, 2020. The major categories of tasks include: preparing and filing the mechanics lien, lis pendens, and Complaint (11 hours); prepare for and attend four sessions of mediation (67 hours)<sup>1</sup>; successfully defending NKD's motion to dissolve the mechanics lien which raised numerous objections of every kind (36 hours); helping prepare for and attending significant depositions, including the client's depositions and those of the principals of NKD (65 hours); preparing for trial on two occasions when the case was number one on the roster (46 hours in the fall of 2023 and early 2024); working on an agreement to arbitrate, preparing for and engaging in trying the arbitration, helping to prepare the post-arbitration brief, and preparing the petition for attorneys' fees (165) hours, with 30 of those hours unbilled and 15 more hours anticipated to complete the arbitration. Just these major categories of tasks account for 375 hours of the 502 hours billed or unbilled. In my opinion, the attorneys' fees requested are reasonable and appropriate.

(2) Time, Novelty, and Skill (Nature, extent and difficulty of case)

This case involved significant time, novelty and skill, both because the subject matter often became complex and detailed, and because opposing counsel took some unusual positions and vigorously and uncompromisingly pursued them. There were delay claim issues, liquidated damage issues, technical issues regarding road construction and construction of utilities, interest claims, and attacks on the mechanics lien.

(3) Preclusion of other employment

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<sup>1</sup> There was a lot of work performed by the attorneys after the first mediation session to provide information and obtain a report from an agreed expert, on his opinion of what to do with the roads.

This was not an issue.

(4) Fee customarily charged for similar services

Both attorneys have charged \$300 per hour. In 2020, Bob Buchanan, who has represented ATC for many years, suggested this rate for his client and I agreed although the rate was lower than my standard rate of \$350. For work of this difficulty and complexity, I am generally aware of the rates that experienced and capable construction lawyers in this area charge for their services and it is common for those attorneys to charge a higher rate than \$300 per hour, at least where they do not represent an institutional client or do not represent an insurance company who sends them a substantial volume of business.

(5) Amount involved and Results obtained

This case involved a mechanics lien which was valued at \$847,236.20 when trial began. The Interim Award awarded ATC \$838,685.95 on that claim. Thus, ATC was awarded 98.99% of its claimed amount. On the other hand, NKD's pre-trial position was that it should prevail completely on the mechanics lien case and in addition, recover \$3,679,891.03. Instead, it recovered \$785,717.93. While not revealing specific negotiation amounts, it is fair to say that prior to the hearing, ATC's mechanics lien case was consistently given no value by NKD because, as stated in its pre-trial brief, NKD could demand repair costs for work for which it had not paid, but not be liable on the lien because the work was defectively performed. NKD stuck to this demand for a double recovery throughout negotiations and the trial. With respect to the demand for liquidated damages, there was an unwillingness on the part of NKD to negotiate down much from their maximum

position of \$1.4 million in liquidated damages. These maximalist positions on the lien and LD's, created a situation where the case could not settle. Had NKD bargained prior to the hearing for the result it attained in the arbitration, the case would have settled.

(6) Time limitations

Every case of this size and complexity puts a lot of time limitations on the attorneys. A wrinkle in this case is that it was number one on the trial roster twice, before finally being continued both times. I had to prepare for trial in December, 2023 and January/February, 2024. Furthermore, since the mechanics lien case would be tried first, I would be putting up John Henderson as the first witness. Once he finished direct, under the South Carolina Rules, he would be subject to cross examination that was not limited to the subjects covered on direct, and might go into the merits of the counterclaims. I spent significant time in preparation on both occasions that this case was at the top of the roster. This preparation then had to be repeated a third time months later at the arbitration until the order for the mechanics lien presentation was modified just before trial.

(7) Relationship with client

Bob Buchanan has represented ATC for years. I did not know the clients until Bob asked me to become involved in this matter. Bob's credibility with the client was important, in addition to the active role he played in the litigation. Bob would probably have played an important role at trial but was unable to attend more than the first day because of another case he had tried in which time deadlines required all of his time the rest of the week.

(8) Standing of the attorneys

I graduated from the University of Florida School of Law in 1978. I am a retired member of the Florida Bar and have been a member of the South Carolina Bar since 1979.<sup>2</sup> I began my career as a law clerk for U.S. District Court Judge Robert Hemphill. I then joined the McNair Law Firm in 1980, where I focused on commercial litigation, becoming a partner in 1986. In 1996, Daryl Williams and I formed Jeter & Williams, PA, which also focused on commercial litigation. In 2016, I was ready to start winding down toward retirement. I formed The Jeter Law Firm, LLC, again focused on commercial litigation. I have a good deal of experience in construction litigation, including trials involving similar subject matter to this one such as cases involving water treatment and wastewater treatment plants, sewer lines, and delay claims. In all, I would say I have tried about 60 cases involving subject matters such as anti-trust, securities fraud, class actions, tax issues, and corporate and LLC disputes, among others. I have tried difficult and complex cases to juries, judges, and arbitrators as part of my normal workload.

I have been involved with the Bar as a member of the Defense of Indigents committee, the Construction Law committee in the 1980's (Chair), and the Attorneys-CPA's committee (Chair).

With respect to the legal community, I have served as a mediator on probably 75-100 occasions, served as an arbitrator or special referee in about 10 cases, and was a reporter

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<sup>2</sup> I am in the process of winding down my trial practice, and have packed up documents, closed my website, and am now operating out of my home. Therefore, I do not have access to details, but can provide a good background of my experience. The dates mentioned are to my best recollection but are substantially accurate.

for the Committee which drafted the South Carolina Uniform Securities Act of 2005 which was enacted by the General Assembly.

I have received recognition in Commercial Litigation from Super Lawyers each year since 2012 or 2013, and from Best Lawyers in America each year starting a year earlier, for Commercial, Securities, and Construction Litigation.

(9) Nature of the fee (Contingency of compensation)

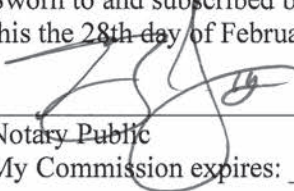
Hourly.

  
\_\_\_\_\_  
Russell Jeter

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Sworn to and subscribed before me,  
this the 28th day of February 2025.

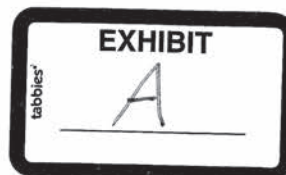
  
\_\_\_\_\_  
Notary Public

My Commission expires: 4/15/25

7:29 AM  
01/27/25

**ATC Site Construction Inc**  
**Item Actual Cost Detail**  
 June 1, 2003 through November 7, 2024

| Type          | Date       | Num             | Name                | Source Name          | Memo         | Account           | Qty | Amount     | Balance    |
|---------------|------------|-----------------|---------------------|----------------------|--------------|-------------------|-----|------------|------------|
| No Item       |            |                 |                     |                      |              |                   |     |            |            |
| Bill          | 03/09/2020 | 116014          | NKD Inc.:242-Riv... | Hull Barrett, PC     | Construc...  | 70600 Legal Ex... |     | 4,073.40   | 4,073.40   |
| Bill          | 03/30/2020 | 003720-00330... | NKD Inc.:242-Riv... | Richardson Plow...   | file#0037... | 70600 Legal Ex... |     | 1,649.86   | 5,723.26   |
| Bill          | 04/03/2020 | 116381          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 4,333.40   | 10,056.66  |
| Bill          | 05/06/2020 | 116932          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 3,221.30   | 13,277.96  |
| Bill          | 05/19/2020 | 5.19.2020       | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 9,360.00   | 22,637.96  |
| Bill          | 06/05/2020 | 117433          | NKD Inc.:242-Riv... | Hull Barrett, PC     | river sho... | 70600 Legal Ex... |     | 4,906.90   | 27,544.86  |
| Bill          | 07/07/2020 | 117875          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 274.10     | 27,818.96  |
| Bill          | 07/31/2020 | 118476          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 5,773.70   | 33,592.66  |
| Bill          | 09/08/2020 | 119057          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,436.40   | 36,029.06  |
| Bill          | 10/12/2020 | 119737          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 919.90     | 36,948.96  |
| Bill          | 11/10/2020 | 120322          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,187.35   | 39,136.31  |
| Bill          | 12/08/2020 | 120856          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,669.60   | 41,805.91  |
| Bill          | 01/11/2021 | 121517          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,935.95   | 43,741.86  |
| Bill          | 02/05/2021 | 121839          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 499.10     | 44,240.96  |
| Bill          | 02/24/2021 | 2.24.21         | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 17,370.00  | 61,610.96  |
| Bill          | 03/11/2021 | 122819          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 301.10     | 61,912.06  |
| Bill          | 04/15/2021 | 123456          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 3,570.00   | 65,482.06  |
| Bill          | 05/10/2021 | 123914          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 123.00     | 65,605.06  |
| Bill          | 06/07/2021 | 124357          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 372.00     | 65,977.06  |
| Bill          | 07/01/2021 | 6.23.2021       | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 4,830.00   | 70,807.06  |
| Bill          | 07/15/2021 | 125138          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 3,570.00   | 74,377.06  |
| Bill          | 07/15/2021 | 125137          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 48.00      | 74,425.06  |
| Bill          | 09/14/2021 | 126347          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 225.00     | 74,650.06  |
| Bill          | 10/07/2021 | 126768          | NKD Inc.:242-Riv... | Hull Barrett, PC     | RIVERS...    | 70600 Legal Ex... |     | 4,710.00   | 79,360.06  |
| Bill          | 11/12/2021 | 127525          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 99.00      | 79,459.06  |
| Bill          | 01/13/2022 | 128601          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,802.00   | 82,261.06  |
| Bill          | 02/14/2022 | 2.14.2022       | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 14,310.00  | 96,571.06  |
| Bill          | 02/16/2022 | 129294          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,356.00   | 97,927.06  |
| Bill          | 03/09/2022 | 129682          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 48.00      | 97,975.06  |
| Bill          | 05/10/2022 | 131118          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,824.60   | 99,799.66  |
| Bill          | 05/10/2022 | 131118-A        | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,176.60   | 100,976.26 |
| Bill          | 06/10/2022 | 6.10.2022       | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 1,770.00   | 102,746.26 |
| Bill          | 07/12/2022 | 132256          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 82.80      | 102,829.06 |
| Bill          | 08/09/2022 | 132957          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 304.50     | 103,133.56 |
| Bill          | 09/09/2022 | 133488          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,491.20   | 104,624.76 |
| Bill          | 10/07/2022 | 133963          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 6,229.80   | 110,854.56 |
| Bill          | 10/31/2022 | 10.31.2022      | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 8,130.00   | 118,984.56 |
| Bill          | 12/09/2022 | 135310          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 6,385.20   | 125,369.76 |
| Bill          | 01/12/2023 | 135783          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,563.90   | 126,933.66 |
| Bill          | 01/12/2023 | 135782          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 0.57       | 126,934.23 |
| Bill          | 01/23/2023 | 1.23.2023       | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 1,200.00   | 128,134.23 |
| Bill          | 02/07/2023 | 136138          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 514.70     | 128,648.93 |
| Bill          | 03/02/2023 | 03.2.2023       | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 1,350.00   | 129,998.93 |
| Bill          | 03/14/2023 | 136938          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,866.50   | 131,865.43 |
| Bill          | 04/10/2023 | 137296          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 11.10      | 131,876.53 |
| Bill          | 04/10/2023 | 137297          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,790.00   | 134,666.53 |
| Bill          | 05/15/2023 | 138069          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 7,215.00   | 141,881.53 |
| Bill          | 05/15/2023 | 138068          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 10.60      | 141,892.13 |
| Bill          | 05/31/2023 | 4978            | NKD Inc.:242-Riv... | Austin & Pethick ... |              | 70600 Legal Ex... |     | 70.00      | 141,962.13 |
| Bill          | 06/02/2023 | 138373          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 525.00     | 142,487.13 |
| Bill          | 07/05/2023 | 7.5.23          | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 10,620.00  | 153,107.13 |
| Bill          | 07/13/2023 | 139249          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 17.40      | 153,124.53 |
| Bill          | 08/15/2023 | 139800          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 5,119.50   | 158,244.03 |
| Bill          | 09/14/2023 | 140374          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,044.00   | 159,288.03 |
| Bill          | 10/12/2023 | 140883          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,499.00   | 161,787.03 |
| Bill          | 11/22/2023 | 141601          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,448.80   | 163,235.83 |
| Bill          | 01/01/2024 | 142213          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 10,936.20  | 174,172.03 |
| Bill          | 01/19/2024 | 142675          | NKD Inc.:242-Riv... | Hull Barrett, PC     | river shoals | 70600 Legal Ex... |     | 3,526.10   | 177,698.13 |
| Bill          | 01/31/2024 | 5840            | NKD Inc.:242-Riv... | Austin & Pethick ... | river shoals | 70600 Legal Ex... |     | 975.00     | 178,673.13 |
| Bill          | 02/20/2024 | 143283          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,909.20   | 181,582.33 |
| Bill          | 03/12/2024 | 143790          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 6,355.25   | 187,937.58 |
| Bill          | 04/22/2024 | 144580          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 733.90     | 188,671.48 |
| Bill          | 05/08/2024 | 145001          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 377.30     | 189,048.78 |
| Bill          | 07/15/2024 | 07152024        | NKD Inc.:242-Riv... | The Jeter Law Fir... | through ...  | 70600 Legal Ex... |     | 22,320.00  | 211,368.78 |
| Bill          | 07/23/2024 | 7.23.204        | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 22,410.00  | 233,778.78 |
| Bill          | 07/24/2024 | 146568          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 537.00     | 234,315.78 |
| Bill          | 08/13/2024 | 146995          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 75.00      | 234,390.78 |
| Bill          | 09/18/2024 | 147688          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 600.00     | 234,990.78 |
| Total no item |            |                 |                     |                      |              |                   |     | 234,990.78 | 234,990.78 |
| TOTAL         |            |                 |                     |                      |              |                   |     | 234,990.78 | 234,990.78 |



|                             |   |                                |
|-----------------------------|---|--------------------------------|
| STATE OF SOUTH CAROLINA     | ) | IN THE COURT OF COMMON PLEAS   |
|                             | ) |                                |
| COUNTY OF RICHLAND          | ) | FOR THE FIFTH JUDICIAL CIRCUIT |
|                             | ) |                                |
| ATC SITE CONSTRUCTION, LLC, | ) |                                |
|                             | ) | Case No.: 2020-CP-40-03915     |
| Plaintiff,                  | ) |                                |
|                             | ) |                                |
| vs.                         | ) | <b>NKD. INC.'S OMNIBUS</b>     |
|                             | ) | <b>MEMORANDUM RELATING TO</b>  |
| NKD, INC.,                  | ) | <b>PENDING MOTIONS</b>         |
|                             | ) |                                |
| Defendant.                  | ) |                                |
|                             | ) |                                |
|                             | ) |                                |

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It has been confirmed in this case that ATC Site Construction, LLC (“ATC”), a site work contractor that has ceased business operations, breached its contract with NKD, Inc. (“NKD”). The Arbitration Panel confirmed that ATC performed defective work, failed to achieve Substantial Completion in a timely manner, and was liable to NKD for repair damages, liquidated damages, and prejudgment interest. Although ATC denied any liability, it was confirmed that they owed NKD a net amount of \$785,717.93, after an offset. ATC previously filed a mechanic’s lien, but had no entitlement to a lien when ATC lost the case and the lien had already been bonded off. However, due to a perverse misconstruction of S.C. Code § 29-5-10(a), the Arbitration Panel awarded ATC \$228,600.00 in attorney’s fees while refusing to award NKD its requested fees of \$317,541.81.

The Final Award should be vacated in part and modified in part for several reasons. First, the Panel perversely misconstrued or manifestly disregarded controlling South Carolina law. ATC had no entitlement to fees because they had no entitlement to the mechanics’ lien upon the issuance of the Final Award. Additionally, the lien had already been bonded off at NKD’s expense, which eliminates any entitlement to a lien. A review of South Carolina jurisprudence reveals that no

contractor in South Carolina has ever received a fee award under S.C. Code 29-5-10(a) when the contractor lost the case, *i.e.*, did not receive a net award or judgment in his favor that would support the imposition of a lien against the owner. South Carolina law is clear:

**“[I]n a mechanic’s lien action the defendant is entitled to an award of attorney fees as the prevailing party if it is determined that a mechanic’s lien cannot be enforced against it.”**

*See, e.g., EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006)(emphasis added); *Seckinger v. Vessel Excalibur*, 326 S.C. 382, 388, 483 S.E.2d 775, 778 (Ct. App. 1997) (same).

Second, the Arbitration Panel lacked subject matter jurisdiction to award attorney’s fees. S.C. Code § 29-5-10(a) mandates that a fee award **“must be determined by the court in which the action is brought.”** (emphasis added). Furthermore, even if the Arbitration Panel were to have jurisdiction, ATC’s fee petition was so deficient that it cannot support a sustainable award under South Carolina law. Additionally, the Panel miscalculated prejudgment interest, resulting in an underpayment to NKD of \$34,701.40, which should be added to the award entered in NKD’s favor.

As the result of these errors, NKD was wrongfully dispossessed of \$580,843.21.<sup>1</sup> NKD received only **49%** of what it was lawfully entitled to receive, sucking all justice out of the result. Although it is acknowledged that courts are reluctant to disturb arbitration awards, the illogical outcome of this arbitration proceeding needs correction.

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<sup>1</sup> This amount is the sum of the attorney’s fees improperly awarded to ATC, the fees improperly not awarded to NKD, and the miscalculation of interest.

$$\underline{\$228,600.00} + \underline{\$317,541.81} + \underline{\$34,701.40} = \underline{\$580,843.21}$$

### **STANDARD OF REVIEW**

***PERVERSE MISCONSTRUCTION OF THE LAW:*** “An arbitrator's award may be vacated when the arbitrator exceeds his or her powers and/or manifestly disregards **or perversely misconstrues the law.**” *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (emphasis added). Although the standard for vacating or modifying an arbitration award is high, it is not insurmountable. *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 58, 742 S.E.2d 359, 361–62 (2013) (vacating award due to arbitrator’s failure to apply statutory requirements relating to licensing of contractors). When parties agree to arbitrate “they do not bargain to have their dispute resolved by a whim.” *Waldo v. Cousins*, 442 S.C. 662, 668, 901 S.E.2d 276, 279 (2024) (vacating award due to arbitrator’s failure to apply statutory requirements relating to written real estate listing agreements).

***MANIFEST DISREGARD OF THE LAW:*** An arbitrator’s manifest disregard for the law is a basis for vacating an arbitration award occurs when the arbitrator knows of a governing legal principal yet refuses to apply it. *See Gissel*, at 241, 676 S.E.2d at 323; *see also C-Sculptures, LLC v. Brown*, 403 S.C. 53, 58, 742 S.E.2d 359, 361-62 (2013) (holding that the manifest disregard standard is not insurmountable and vacating arbitration award where arbitrator was apprised of unambiguous, clearly applicable South Carolina statutory law but refused to apply it).

***ARBITRATORS CANNOT EXCEED THEIR POWERS:*** Courts may also vacate where “the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” *See* 9 U.S.C. § 10; *see also* S.C. Code § 15-48-130 (“Upon application of a party, the court shall vacate an award where . . . the arbitrators exceeded their powers.”).

**MODIFICATION OF AWARD TO CORRECT MISCALCULATIONS:** A court shall modify an arbitration award where there is "an evident miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award." 9 U.S.C. § 11; *see also* S.C. Code § 15-48-140.

**SUBJECT MATTER JURISDICTION:** Lack of subject matter jurisdiction is not waivable, may be raised at any time by the parties or *sua sponte* by the Court, and cannot be cured by the consent of the parties. *S.C. Dep't of Soc. Servs. v. Tran*, 418 S.C. 308, 314, 792 S.E.2d 254, 257 (Ct. App. 2016); *Bunkum v. Manor Props.*, 321 S.C. 95, 99–100, 467 S.E.2d 758, 761 (Ct. App. 1996).

### **FACTUAL BACKGROUND**

This dispute relates to a residential development project in Richland County known as “River Shoals.” NKD, a South Carolina corporation, was the owner and developer of River Shoals. ATC, a South Carolina limited liability company that has ceased operations, was the general contractor hired to clear and grade the property, install water and sewer lines, and to construct roads and sidewalks. NKD and ATC entered a site work construction contract (AIA 101-2007) and general conditions of contract (A201 – 2007) on May 16, 2017 (the “Contract”). Under the Contract, ATC was to achieve Substantial Completion of the project on or before the Substantial Completion date, which was extended to August 1, 2018.

On February 24, 2020, which was 573 days after the Substantial Completion date had passed, ATC abandoned the project. Due to ATC’s defective work and the accrual of liquidated damages, NKD did not believe further payment was due to ATC. They were correct, as it has since been confirmed that ATC owed NKD a net amount of \$785,717.93 in damages. Despite abandoning the River Shoals project and leaving it in a defective and incomplete state, ATC sought

to foreclose on NKD's property by filing a mechanic's lien in the amount of \$884,473.84, which was later reduced to \$847,236.20.

The mechanic's lien imposed a cloud over NKD's title and forced NKD to refinance the construction loan to resolve the default triggered by the filing of the lien. In addition, in order to allow for finished lots in River Shoals to be sold, NKD filed a Cash Bond to Release Mechanic's Lien pursuant to S.C. Code § 29-5-110, by delivering a certified check payable to the Register of Deeds for Richland County in the amount of One Million One Hundred Twenty-Nine Thousand Six Hundred Forty-Eight and 27/100 Dollars (\$1,129,648.27). By filing the cash bond, NKD agreed to become bound to ATC for payment of any sum, not to exceed the amount of the cash bond, as may be recovered or found due and owing to ATC by virtue of any action to foreclose the mechanic's lien. However, it was ATC who owed NKD, not the other way around.

The matter was mediated unsuccessfully on two occasions. The progress of the litigation was affected by a number of factors, including the need to devote attention to identifying, correcting and quantifying the actual damages that resulted from ATC's defective work, the COVID-19 Pandemic, the joinder of two additional parties to the litigation proceeding, and delays encountered with the Court. In 2024, the parties agreed to submit the matter to arbitration before the Panel of three (3) arbitrators (the "Arbitration Panel"). The arbitration hearing took place in Columbia, South Carolina over four (4) days beginning Tuesday, November 19, 2024 and concluding Friday, November 22, 2024. At the time of the arbitration hearing, ATC asserted a mechanic's lien in the amount of \$847,236.20.

The Arbitration Panel issued an Interim Award dated January 21, 2025. A copy of the Interim Award is attached as Exhibit A. On April 9, 2025, the Arbitration Panel issued the Final Award, which reduced the amount awarded to NKD in the Interim Award by \$228,600.00 to allow

for an improper award of attorney's fees to ATC. A copy of the Final Award is attached as Exhibit B. The Final Award incorporates the Arbitration Panel's findings and conclusions set forth in the Interim Award and reduces the amount awarded to NKD in the Interim Award.

The Arbitration Panel found that ATC breached the Contract and breached its warranties to NKD. The Arbitration Panel also found that: "ATC was behind schedule from the beginning of the project and did not progress the work in a diligent manner." *See Interim Award*, at p. 6. Regarding the defective work, the Arbitration Panel awarded NKD approximately 98% of its requested repair costs. Furthermore, to provide for liquidated damages during the remedial period, the Interim Award states that: "the Panel finds that ATC is responsible for 365 days of delay which would have been a reasonable amount of time to complete the remedial work." *See Interim Award* at 7. The Arbitration Panel concluded that "the total Interim Award against ATC and in favor of NKD is \$785,717.93." NKD's total damages were \$1,476,787.83, against which the Arbitration Panel applied an offset for the contract balance and unsigned change orders. *See Interim Award*, p. 10.

NKD submitted a Motion to Correct Interim Award pursuant to R-52 of the AAA Construction Industry Arbitration Rules to address miscalculations and inconsistencies by the Arbitration Panel as to the amounts awarded to NKD. However, the perverse misconstructions of applicable law and miscalculations of damages were not corrected.

Based on the Interim Award in favor of NKD and against ATC, NKD submitted a Petition for Attorney's Fees and Costs to be award awarded to the "prevailing party" in a mechanic's lien action. *See S.C. Code § 29-5-10(a)* (authorizing the prevailing party to recover the costs which may arise in defending against the mechanic's lien, including a reasonable attorney's fee). ATC also submitted a fee petition despite the fact receiving no award of damages and being the party liable to NKD. Thereafter, the Arbitration Panel issued the Final Award in favor of NKD and

against ATC, and reduced the total award to NKD from \$785,717.93, to \$568,437.71. The Arbitration Panel's decision to reduce the amount awarded to NKD by \$228,600.00 was based upon the Panel's finding that "ATC is the 'prevailing party' pursuant to the South Carolina Mechanic's Lien statute" such that "a reasonable amount of attorneys' fees to be awarded to ATC as the prevailing party is \$228,600.00." See Final Award, pp. 3, 5.

As discussed more fully below, the Arbitration Panel ignored well-defined, explicit, and clearly applicable statutory law in finding that ATC is the "prevailing party" for purposes of an award of attorney's fees under S.C. Code § 29-5-10(A) where the Panel knew that:

- "NKD discovered certain defects in the work performed by ATC and proceeded to correct those defects and complete the project without ATC" [Interim Award, p. 6];
- "ATC was behind schedule from the beginning of the project and did not progress the work in a diligent manner" (Interim Award, p. 6);
- "ATC is responsible for 365 days of delay" [Interim Award, p. 7];
- "The installation performed by ATC did not meet the contract requirements" [Interim Award, p. 7];
- "Work was necessary and proximately caused by ATC's breach of contract and/or warranty for failing to meet the project requirements and failing to correct the issue when it was discovered" [Interim Award, p. 8];
- "The damages awarded to NKD are a proximate result of ATC's breach of contract and breach of warranty" [Interim Award, p. 9]; and
- "The net award, or one verdict, resulted in an Interim Award in favor of NKD of \$638,101.88 before interest or \$785,717.93 with interest through January 24, 2025" [Final Award, p. 3].

### **ARGUMENTS**

The Arbitration Panel lacked subject matter jurisdiction, exceeded its powers and perversely misconstrued the law when it awarded attorney's fees to ATC and failed to award fees to NKD. Furthermore, the Panel manifestly disregarded South Carolina law awarding attorney's fees to ATC based on an evidentiary record that was fundamentally deficient and without

conducting the required analysis to ensure that a fee award is reasonable. These defects require partial vacatur of the Final Award regarding all findings and conclusions on the issues of attorney's fees as to both parties. Additionally, the Final Award needs to be modified to correct a miscalculation of prejudgment interest.

# **I. THE ARBITRATION PANEL LACKED SUBJECT MATTER JURISDICTION TO MAKE A FEE AWARD UNDER S.C. CODE § 29-5-10**

Even if the Panel had correctly identified NKD as the prevailing party, it exceeded its powers and lacked the authority to determine the amount of any fee award under Section 29-5-10.

In relevant part, the statute provides:

The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party. **The fee must be determined by the court in which the action is brought** but the fee and the court costs may not exceed the amount of the lien.

*See* S.C. Code § 29-5-10(a) (emphasis added).

This action was brought in the Court of Common Pleas for Richland County, South Carolina. According to the statute the fee "must" be determined by this Court. The word "must" is mandatory and leaves no room for interpretation. *See Seckinger*, 326 S.C. at 387, 483 S.E.2d at 777 ("The cardinal rule of statutory construction is that words used in a statute should be given their plain and ordinary meaning unless something in the statute requires a different interpretation."). As such, the Arbitration Panel is not a "court" and cannot do what a statute reserves to a court. *See Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 703–04, 869 S.E.2d 859, 866 (Ct. App. 2022) (holding that a claim for the appointment of a receiver, an accounting, and judicial dissolution cannot be sent to arbitration because that claim can only be resolved by the circuit court under applicable statutes.) Because Section 29-5-10(a) mandates that the fee be determined by "the court in which the action is brought," the Arbitration Panel lacks

subject matter jurisdiction over the issue of attorney's fees under S.C. Code 29-5-10. This Court is where the issues of fees must be determined.

Because the Panel had no subject matter jurisdiction to determine the fee award, its rulings that "ATC is the 'prevailing party' pursuant to the South Carolina Mechanic's Lien statute" and that "a reasonable amount of attorneys' fees to be awarded to ATC as the prevailing party is \$228,600.00" are void. *See Bunkum*, 321 S.C. at 99, 467 S.E.2d at 761 (finding that where a court had no subject matter jurisdiction to hear a motion for fees, its order entering judgment was void). Lack of subject matter jurisdiction cannot be waived by the parties and may be raised at any time. *Tran*, 418 S.C. at 314, 792 S.E.2d at 257.

ATC attempts to argue that the mandatory language in Section 29-5-10(a) merely denotes the venue for the determination of an attorney's fee award, relying on *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 442 S.E.2d 598 (1994), for the proposition that a statutory designation of a specific court is a venue provision. The Supreme Court in *Dove* addressed a narrow question: whether a workers' compensation appeal filed in the correct court system but in the wrong county should be dismissed for lack of subject matter jurisdiction. *Id.* The court correctly found that the issue in *Dove* was related to venue and not subject matter jurisdiction, because the matter was filed in the correct court system. The issue before this Court is fundamentally different, which is whether an arbitration panel may exercise powers expressly reserved to "the court in which the action was brought." (emphasis added).

The case of *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 703–04, 869 S.E.2d 859, 866 (Ct. App. 2022), is directly on point. There, the Court of Appeals held that a claim for the appointment of a receiver, an accountant, and judicial dissolution of an LLC could not be sent to arbitration because the applicable statutes mandated resolution by the circuit court. The same

principle controls here. Section 29-5-10(a) provides that the attorney's fee **“must be determined by the court in which the action is brought.”** (emphasis added). An arbitration panel is not a court, and cannot be “the court in which this action [was] brought.” Accordingly, based on a plain reading and application of the statute, the Arbitration Panel does not have subject matter over the determination of attorney’s fee under S.C. Code § 29-5-10(a).

NKD acknowledges that both ATC and NKD submitted the issue of attorney's fees to the Panel. However, subject matter jurisdiction cannot be conferred by consent of the parties, and the Court is required to take notice of the lack of jurisdiction regardless of whether it was raised below. *Bunkum*, 321 S.C. at 99–100, 467 S.E.2d at 761. Upon the Court’s vacating the portion of the Final Award relating to attorney’s fee issue, NKD asks the Court to allow for appropriate proceedings relating to the determination of attorney’s before this Court, which is the “court in which the action is brought.”

## **II. THE FINAL AWARD MUST OTHERWISE BE VACATED IN PART**

To be awarded attorney’s fees pursuant to the South Carolina Mechanic’s Lien statute, the party must have prevailed in the mechanic’s lien action. For the contractor to prevail, the contractor must have “some entitlement to the mechanic’s lien.” *See* S.C. Code § 29-5-10. On the other hand, when an owner successfully defends against a contractor’s mechanic’s lien, attorney’s fees must be awarded to the owner. It was a perverse misconstruction of the law for the Arbitration Panel to award attorney’s fees to ATC when there was no entitlement to a lien. As their wording demonstrates, “perverse misconstruction” and “manifest disregard” are not one in the same.

An arbitrator's award may be vacated when the arbitrator “perversely misconstrues the law.” *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). Separately, an arbitration award can be vacated for manifest disregard of the law when the arbitrator knows of a governing

legal principal yet refuses to apply it. *See Gissel*, at 241, 676 S.E.2d at 323; *see also C-Sculptures, LLC v. Brown*, 403 S.C. 53, 58, 742 S.E.2d 359, 361-62 (2013) (holding that the manifest disregard standard is not insurmountable and vacating arbitration award where arbitrator was apprised of an unambiguous, applicable South Carolina statute but refused to apply it). A perverse misconstruction of a law, on the other hand involves the application (rather than rejection) of a law but doing so in a manner that is clearly illogical and incorrect.

Although the statutory authority mandating the award of fees to the prevailing party is clear, explicit, and well-defined, the Arbitration Panel relied on its own subjective beliefs by awarding “prevailing party” fees to the contractor who has no entitlement to the lien and is indebted to the owner and refusing to award fees to the owner who prevailed in the mechanic’s lien action. To deem ATC, the party liable to NKD and to whom NKD is not liable, the “prevailing party” is a flagrant misapplication of law that warrants vacatur of the Final Award, or, in the alternative, modification of the Final Award to correct the calculation of the total Final Award in favor of NKD.

**A. The Arbitration Panel Exceeded Its Powers by Manifestly Disregarding Controlling Law in Awarding Attorney’s Fees to ATC**

The Arbitration Panel manifestly disregarded and/or perversely misconstrued known, well-defined, explicit, and clearly applicable South Carolina statutory law in reducing the award in favor of NKD by \$228,600.00, based on the Arbitration Panel’s finding that ATC is entitled to an award of attorneys’ fees as the “prevailing party” under the Mechanic’s Lien statute. The Panel’s finding that ATC is the “prevailing party” for purposes of an award of attorney’s fees under the Mechanic’s Lien statute cannot be reconciled with applicable controlling law.

South Carolina law is clear: “[I]n a mechanic’s lien action the defendant is entitled to an award of attorney fees as the prevailing party if it is determined that a mechanic’s lien cannot be enforced against it.” *See, e.g., EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C.

612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006). For a contractor to be determined the prevailing party for purposes of an award of attorney's fees under S.C. Code § 29-5-10, the contractor must have "some entitlement to the lien." The owner is the prevailing party where "it is determined that a mechanic's lien cannot be enforce against it," which is the case here. *See Seckinger v. Vessel Excalibur*, 326 S.C. 382, 388, 483 S.E.2d 775, 777-78 (Ct. App. 1997) (confirming that "in a mechanic's lien action the defendant is entitled to an award of attorney fees as the prevailing party if it is determined that a mechanic's lien cannot be enforced against it.").

At the time the Final Award was issued, the Arbitration Panel had received the law in South Carolina establishing that ATC is not the prevailing party under the Mechanic's Lien statute where ATC has no "entitlement to the mechanic's lien" and the mechanic's lien cannot be enforced against NKD. NKD provided the Arbitration Panel with a summary of reported and unreported decisions in South Carolina over the past forty (40) years indicating that the contractor is never entitled to attorney's fees when the mechanic's lien is not enforced, at least in part, based on some net judgment or award in favor of contractor. As the Interim Award confirms, the Arbitration Panel found that: (i) ATC breached the Contract and is liable to NKD; and (ii) NKD is not liable to ATC.

Based on the plain wording of the mechanics' lien statute, as well as a half century of precedent, a contractor like ATC cannot breach a contract, be required to pay \$785,717.93 in damages, have no entitlement to a lien, and also be awarded attorney's fees as a purported "prevailing party" under the South Carolina Mechanic's Lien statute. The Mechanic's Lien Statute cannot reasonably be interpreted to allow ATC to recover costs and attorney's fees as the "prevailing party" when it is, in fact, ATC who owes a debt to NKD. *See EFCO*, at 618, 635 S.E.2d at 925 (recognizing that a prevailing party "clearly envisions a victory to some degree on the merits"). Any interpretation of the law that would allow for ATC to receive attorney's fees when

they were at fault and forced to pay a net amount of \$800,000 to NKD is clearly a perverse misconception of the law.

All rules of statutory construction must yield to the principle that courts should endeavor to ascertain the real intention of the legislature. See *Horn v. Davis Elec. Constructors, Inc.*, 307 S.C. 559, 416 S.E.2d 634 (1992). “[T]he intent of the legislature in allowing the prevailing party in an action brought under the mechanic’s lien statute to recover attorney fees and costs stems from a desire to deter both wrongful filing of liens and unjustified refusal to pay debts subject to mechanic’s liens.” See *Cedar Creek Properties v. Cantelou Assocs., Inc.*, 320 S.C. 483, 486, 465 S.E.2d 774, 775 (Ct. App. 1995). The purpose and intent of the fee shifting statute was not to reward a contractor who breached a contract, abandoned the project, caused hundreds of thousands of dollars in damages, filed a lien for non-payment, and was then ordered to pay the owner nearly \$800,000 in damages.

The Arbitration Panel was also aware that ATC’s mechanic’s lien could not be enforced against NKD for the additional reason that the lien had been bonded out by the filing and maintenance of the cash bond by NKD in the amount of \$1,129,648.27. If a property has been released from the lien by “bonding out,” the lien is no longer enforced against the property. See *Keeney’s Metal Roofing, Inc. v. Palmieri*, 345 S.C. 550, 555, 548 S.E.2d 900, 902 (Ct. App. 2001) (reversing trial court’s refusal to award fees to owners who were determined to have been the “prevailing party” in the mechanic’s lien action because the lien could not be enforced against the property due to the filing of a bond). ATC is not entitled to bring a lien enforcement action against the cash bond because no judgment was entered in favor of ATC. See S.C. Code § 29-5-110; see also *Moorhead Const., Inc. v. Enter. Bank of S.C.*, 410 S.C. 386, 391, 765 S.E.2d 1, 3 (Ct. App. 2014) (“If there is no right to foreclosure because the right to a lien is not established, there is no

right to recover against the surety on the bond”) (*citing* Am.Jur.2d *Mechanics’ Liens* § 308 (2007)). One claiming a mechanic’s lien has the burden of establishing that there are funds due and owing to which the lien can attach. *See* 53 Am. Jur. 2d *Mechanics’ Liens* § 372; *see also* 53 Am. Jur. 2d *Mechanics’ Liens* § 373 (“In addition, the lienor has the burden of establishing the amount of the outstanding debt”).

Notwithstanding the factual record before it and controlling law, the Arbitration Panel found that “ATC is the ‘prevailing party’ pursuant to the South Carolina Mechanic’s Lien statute” such that “a reasonable amount of attorneys’ fees to be awarded to ATC as the prevailing party is \$228,600.00.” *See* Final Award, pp. 3, 5. The Arbitration Panel’s conclusion that ATC was “closer to the verdict reached” and therefore, the “prevailing party” is irreconcilable with the plain language of the Mechanic’s Lien statute. *See* Final Award, p. 3. Section 29-5-10 of the Mechanic’s Lien statute sets forth guidance for determining who is the “prevailing party:”

For purposes of the award of attorney’s fees, the determination of the prevailing party is based on one verdict in the action. **One verdict assumes some entitlement to the mechanic’s lien** and **the consideration of compulsory counterclaims.**

*See* S.C. Code § 29-5-10 (emphasis added). Consideration of NKD’s compulsory counterclaims resulted in a net award in favor of NKD against ATC. Because “[o]ne verdict assumes some entitlement to the mechanic’s lien,” and ATC had no entitlement to the mechanic’s lien, it was not necessary to consider the party whose offer is closer to the verdict. *See* S.C. Code § 29-5-10(b).

The Arbitration Panel proceeded to undertake an improper calculation to determine whose position was “closer.” The Arbitration Panel found that, since the Mechanic’s Lien statute “utilizes ‘offers of settlement’ that are made prior to the start of a trial to determine the ‘prevailing party,’” more weight should be given to NKD’s damages prior to the arbitration hearing than to the evidence presented during the arbitration hearing. *See* Final Award, p. 2. As the Arbitration Panel

noted, “[n]either party made an offer of settlement as allowed in Section 29-5-10(b).” *See* Final Award, p. 2. Based on a misapplication of clearly defined statutory law, the Arbitration Panel found that attorney’s fees in the amount of \$228,600.00 are “to be awarded to ATC as the prevailing party.” *See* Final Award, p. 5.

Regardless of the Arbitration Panel’s subjective belief that “ATC achieved a beneficial result on the mechanic’s lien action,” the Panel exceeded its powers by awarding attorney’s fees to ATC. The Panel knew of well-defined, explicit, and clearly controlling law establishing that an award of fees under the Mechanic’s Lien is authorized to the extent that the party requesting the award is the “prevailing party.” For a contractor to be determined the prevailing party for purposes of an award of attorney’s fees under S.C. Code § 29-5-10, the contractor must have “some entitlement to the lien,” which does not exist when the contractor owes a net amount to the owner. The owner is the prevailing party if “it is determined that a mechanic’s lien cannot be enforced against it.” *See* S.C. Code § 29-5-10 (“The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney’s fee, may be recovered by the prevailing party”); *see also Seckinger*, 326 S.C. at 388, 483 S.E.2d at 777-78 (confirming that “in a mechanic’s lien action the defendant is entitled to an award of attorney fees as the prevailing party if it is determined that a mechanic’s lien cannot be enforced against it”).

**B. A Contractor Has NEVER Received an Award of Fees Under S.C. 29-5-10 When the Contractor Did Not Have Some Amount of an Enforceable Lien in its Favor**

As NKD attempted to inform the Arbitration Panel, a review of the case law demonstrates that a contractor has never received an award of attorney’s fees unless a net judgment was entered in favor of the contractor. Below is a table of the cases from 1984 through 2025:

| <b>Year</b> | <b>Case</b>                                                                                               | <b>Was<br/>“Some”<br/>Amount of<br/>the Lien<br/>Enforced?</b> | <b>Was Party<br/>Who Sought<br/>the Lien<br/>Entitled to<br/>Fees?</b> |
|-------------|-----------------------------------------------------------------------------------------------------------|----------------------------------------------------------------|------------------------------------------------------------------------|
| 1984        | <i>D.A. Davis Const. Co. v. Palmetto Properties, Inc.</i> , 281 S.C. 415, 315 S.E.2d 370 (1984)           | YES                                                            | YES                                                                    |
| 1985        | <i>Sentry Eng’g &amp; Const., Inc. v. Mariner's Cay Dev. Corp.</i> , 287 S.C. 346, 338 S.E.2d 631 (1985)  | YES                                                            | YES                                                                    |
| 1992        | <i>A.V.A. Const. Corp. v. Palmetto Land Clearing, Inc.</i> , 308 S.C. 377, 418 S.E.2d 317 (Ct. App. 1992) | NO                                                             | NO                                                                     |
| 1994        | <i>T.W. Morton Builders, Inc. v. von Buedingen</i> , 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994)          | YES                                                            | YES                                                                    |
| 1994        | <i>Maddux Supply Co. v. Safhi, Inc.</i> , 316 S.C. 404, 450 S.E.2d 101 (Ct. App. 1994)                    | NO                                                             | NO                                                                     |
| 1995        | <i>Cedar Creek Properties v. Cantelou Assocs., Inc.</i> , 320 S.C. 483, 465 S.E.2d 774 (Ct. App. 1995)    | NO                                                             | NO                                                                     |
| 1996        | <i>Utilities Const. Co. v. Wilson</i> , 321 S.C. 244, 468 S.E.2d 1 (Ct. App. 1996)                        | NO                                                             | NO                                                                     |
| 2001        | <i>Keeney’s Metal Roofing, Inc. v. Palmieri</i> , 345 S.C. 550, 548 S.E.2d 900 (Ct. App. 2001)            | NO                                                             | NO                                                                     |
| 2002        | <i>Lauro v. Visnapuu</i> , 351 S.C. 507, 570 S.E.2d 551 (Ct. App. 2002)                                   | YES                                                            | NO                                                                     |
| 2004        | <i>Zepa Const., Inc v. Randazzo</i> , 357 S.C. 32, 591 S.E.2d 29 (Ct. App. 2004)                          | YES                                                            | YES                                                                    |
| 2004        | <i>Zahn v. Allen</i> , 2004 WL 6251614 (S.C. Ct. App. Apr. 19, 2004)                                      | YES                                                            | YES                                                                    |
| 2004        | <i>Lynn Whitsett Corp. v. Norbord S.C., Inc.</i> , 2004 WL 6331127 (S.C. Ct. App. May 18, 2004)           | NO                                                             | NO                                                                     |
| 2005        | <i>JRS Builders, Inc. v. Neunsinger</i> , 364 S.C. 596, 614 S.E.2d 629 (2005)                             | YES                                                            | NO                                                                     |

| <b>Year</b> | <b>Case</b>                                                                                                                                             | <b>Was<br/>“Some”<br/>Amount of<br/>the Lien<br/>Enforced?</b> | <b>Was Party<br/>Who Sought<br/>the Lien<br/>Entitled to<br/>Fees?</b> |
|-------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------|------------------------------------------------------------------------|
| 2005        | <i>Southeastern Realty &amp; Const., Inc. v. Burdge</i> , 2005 WL 7085177 (S.C. Ct. App. Dec. 9, 2005)                                                  | NO                                                             | NO                                                                     |
| 2006        | <i>EFCO Corp. v. Renaissance on Charleston Harbor, LLC</i> , 370 S.C. 612, 635 S.E.2d 922 (Ct. App. 2006)                                               | NO                                                             | NO                                                                     |
| 2006        | <i>Lancaster v. Sanders</i> , 2006 WL 7287902 (S.C. Ct. App. Dec. 20, 2006)                                                                             | YES                                                            | YES                                                                    |
| 2008        | <i>Mozingo &amp; Wallace Architects, L.L.P. v. Grand</i> , 379 S.C. 478, 666 S.E.2d 267 (Ct. App. 2008)                                                 | YES                                                            | YES                                                                    |
| 2011        | <i>Witt Gen. Contractors, Inc. v. Farrell</i> , 2011 WL 11734314 (S.C. Ct. App. May 4, 2011)                                                            | YES                                                            | YES                                                                    |
| 2015        | <i>Mevers Kitchens &amp; Baths, LLC v. Maryann Wagner &amp; Stipp Contracting, LLC</i> , 2015 WL 5836884 (S.C. Ct. App. Oct. 7, 2015)                   | YES                                                            | YES                                                                    |
| 2017        | <i>Terlizzi Home Improvement, LLC v. Boheler</i> , 2017 WL 4786434 (S.C. Ct. App. July 5, 2017)                                                         | NO                                                             | NO                                                                     |
| 2019        | <i>Carolina Comfort Specialists, LLC v. Weddle</i> , 2019 WL 2290475 (S.C. Ct. App. May 29, 2019)                                                       | YES                                                            | YES                                                                    |
| 2020        | <i>United Tank Servs., Inc. v. United Indus. Grp., Inc.</i> , 453 F. Supp. 3d 826 (D.S.C. 2020)                                                         | NO                                                             | NO                                                                     |
| 2022        | <i>Brown Contractors, LLC v. McMarlin</i> , 2022 WL 1162809 (S.C. Ct. App. Apr. 20, 2022)                                                               | NO                                                             | NO                                                                     |
| 2023        | <i>Kitchen Planners, LLC v. Friedman</i> , 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020), <i>aff’d as modified</i> , 440 S.C. 456, 892 S.E.2d 297 (2023) | NO                                                             | NO                                                                     |
| 2023        | <i>Marsh Waterproofing, Inc. v. Steeple Dorchester Ltd.</i> , 2023 WL 3614306 (S.C. Ct. App. May 24, 2023)                                              | YES                                                            | YES                                                                    |

As indicated by the case law, there has never been a situation in reported jurisprudence where a contractor had no enforceable lien at the conclusion of the case, but was awarded fees. This is the clearest indication that the Arbitration Panel perversely misconstrued the law or manifestly disregarded the law.

**C. The Arbitration Panel Exceeded Its Powers, Perversely Misconstrued the Law and Manifestly Disregarded Controlling Law By Disregarding the Underlying Requirements for Awarding Attorney's Fees**

Even if this Court were to find that the Panel did not manifestly disregard controlling law in determining that ATC was the prevailing party, the Panel disregarded controlling law by awarding fees based on a fundamentally deficient petition that cannot sustain such an award on the record presented.

A review of the petition demonstrates that it failed to include the information required in order to allow an award of fees to be made. This requires reversal. *See, e.g., TCC of Charleston, Inc. v. Concord & Cumberland, LLC*, 446 S.C. 202, 229, 918 S.E.2d 699, 713 (Ct. App. 2025), *reh'g denied* (July 30, 2025), *cert. denied* (Jan. 16, 2026) (confirming that “**absent sufficient evidentiary support on the record for each factor, the award should be reversed and the issue remanded for the trial court to make specific findings of fact.**”). In this case, as any fee petition must be resolved by the court in which the action is brought, this means that the existing fee award petition must be vacated and that further proceedings to confirm the amount of fees must proceed in this Court.

The evidence provided in support of the fee award was scant and self-serving. This also requires reversal. *See, e.g., Sunrise Sav. & Loan Ass'n v. Mariner's Cay Dev. Corp.*, 295 S.C. 208, 211, 367 S.E.2d 696, 698 (1988) (reversing fee award where “the circuit court had before it only an affidavit from Sunrise's counsel stating, in conclusory fashion, that the fees were reasonable”

and confirming that “[b]ased upon this record, we conclude that the award is unsupported by the evidence.”)

The fee applicant bears the burden of proving the hours spent and how those hours were allotted to specific tasks. *See Nutramax Lab'ys, Inc. v. Manna Pro Prods., LLC*, 2017 WL 6523616, at \*4 (D.S.C. Dec. 21, 2017). Courts “must ensure that the time is reasonable and that the work billed by different attorneys is not duplicative.” *Id.* A court “may not simply accept as reasonable the number of hours reported by counsel.” *Alexander S. By & Through Bowers v. Boyd*, 929 F. Supp. 925, 938 (D.S.C. 1995). Furthermore, duplication must be excluded from any fee award. *Nutramax*, 2017 WL 6523616, at \*4.

Absent detailed records of time entries and specific findings as to each *Jackson* factor, an award of attorney’s fees cannot stand. A self-serving affidavit and a one-page list of invoices cannot support a fee award of any amount:

The only evidence in the record as to attorney's fees is the affidavit of Rowell's collection attorney. At best, this affidavit merely provides a general description of the tasks he performed. Although the record shows counsel authored ten or eleven letters over a thirteen-year period, and that payments were tendered through him, this alone is not enough to support the amount of attorney's fees awarded. Accordingly, because the trial court did not make specific findings of fact as to each of the six factors and there are not enough facts in the record to support the amount of attorney's fees awarded, we remand the award of attorney's fees for such findings to be made.

*See Rowell v. Whisnant*, 360 S.C. 181, 186, 600 S.E.2d 96, 99 (Ct. App. 2004) (remanding award of fees that was improperly documented and insufficiently evaluated). In another case, a fee award was reversed and remanded where “the court's original order was a brief three pages, did not explicitly review the time submitted by Brawley's attorneys, and then awarded the requested fees in full.” *See Brawley v. Richland Cnty.*, 445 S.C. 80, 94, 911 S.E.2d 156, 164 (Ct. App. 2025), *reh’g denied* (Jan. 28, 2025), *cert. denied* (June 3, 2025). In this case, it is important for the

Arbitration Panel to have reviewed or considered something that ATC's attorneys did not even submit. All that was submitted by ATC was a one-page list of invoice amounts. The failures of the Arbitration Panel were rampant on the attorney's fees issue. The Panel acted without subject matter jurisdiction, exceeded their powers, perversely misconstrued the law, and manifestly disregarded the law.

A court should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). "**Absent sufficient evidentiary support on the record for each factor, the award should be reversed.**" *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993) (emphasis added).

The fee petition does not relate to fees for the services of Trippett Bonneau and George James, who wrote the pleadings, provided discovery, conducted depositions, and did the work. The \$228,000.00 fee award was for two other attorneys, Bob Buchanan and Russ Jeter, who observed but did not participate in depositions. The support submitted with regarding the time incurred and amounts was a **one-page** list of invoice amounts out from ATC's internal QuickBooks Ledger, which is attached as Exhibit C. This document contains a list of invoices identified only by date, number, and amount, with no description of the tasks performed, hours billed, hourly rate, and no identification of the timekeeper(s) performing the work. There was no itemization as to the nature of the fees and expenses charged from which the Panel could consider the reasonableness, duplication, redundancy, or excessiveness. This is especially important when considering ATC had

four or more attorneys present at depositions. There is no ability for anyone, let alone the panel, to determine that ATC was not duplicating work or excessively billing.

As an example, four attorneys for ATC were generally present at depositions. This is beyond duplicative; it is “**quadruplicative**.” The Arbitration Panel conducted zero analysis of the duplication of effort or whether it is appropriate to reduce ***actual damages*** incurred by NKD in order to pay ATC \$228,600.00 to have two lawyers generally watch two other lawyers. While Mr. Buchanan and Mr. Jeter performed some non-duplicative tasks, such as filing the mechanics’ lien and negotiating an escrow of funds after ATC sold its assets in 2023, the non-duplicative tasks would not have exceeded \$25,000.00 in fees over the life of the case. The Arbitration Panel’s actions were a miscarriage of justice imposed by whim. Accordingly, this court should vacate the \$228,600.00 attorney’s fees in favor of ATC because the Panel manifestly disregarded controlling law, perversely misconstrued the law, and exceeded their powers.

**D. The Lien Was Terminated By NKD’s Filing of a Cash Bond, which is Another Reason Why NKD Was The Prevailing Party**

NKD was able to bond out the mechanic’s lien. *See Notice of Cash Bond* (attached as Exhibit D). If the property has been released from the lien by “bonding out,” the lien is no longer enforced against the property. *See Shelley*, 287 S.C. at 30, 336 S.E.2d at 492 (“If the property has been released from the lien by ‘bonding out,’ the lien is no longer enforced against the property”). Because there was no longer a lien on the property, ATC could no longer recover from NKD since the lien had been discharged. NKD is the prevailing party as a matter of law because NKD could not be liable for the lien due to the posting of the surety bond. *See Keeney’s Metal Roofing, Inc. v. Palmieri*, 345 S.C. 550, 555, 548 S.E.2d 900, 902 (Ct. App. 2001) (determining that appellants were the “prevailing party” because the mechanic’s lien could not be enforced since the surety

bond replaced the property as the subject of the lien and appellants could not be held liable for damages due to the bond).

The law authorizes NKD to recover its reasonable attorney's fees and costs incurred in defending against the lien that was terminated by the bond. *see also Cedar Creek Properties v. Cantelou Assocs., Inc.*, 320 S.C. 483, 486, 465 S.E.2d 774, 776, (Ct. App. 1995) (holding that property owner was the "prevailing party" in defending against contractor's mechanic's lien, as the owner still had to defend against the lien until the issue was resolved, and it incurred attorney fees and costs during that time). The termination of the lien through the filing of the bond renders the mechanic's lien unenforceable against NKD. It was impossible for ATC cannot be a "prevailing party" under the mechanic's lien statute when the mechanic's lien could not be enforced. The Arbitration Panel was aware of these legal decisions<sup>2</sup> but manifestly disregarded them or perversely misconstrued them.

### **III. THE FINAL AWARD SHOULD BE MODIFIED TO CORRECT THE MISCALCULATION OF PREJUDGMENT INTEREST**

The Final Award contains an evident miscalculation of prejudgment interest that requires correction. The Panel calculated NKD's prejudgment interest on the net repair damages after deducting the \$150,000.00 settlement with Gearig Civilworks from the base repair amount, rather than first calculating interest on the full repair damages and then applying the Gearig settlement as an offset once received. This method is contrary to controlling South Carolina law.

South Carolina law provides that the right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. *Miller Constr. Co., LLC v. PC Constr.*

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<sup>2</sup> See NKD's Opposition to ATC's Motion for Attorney's Fees (attached as Exhibit E), at p. 3, which cites *Keeney's Metal Roofing, Inc. v. Palmieri*, 345 S.C. 550, 555, 548 S.E.2d 900, 902 (Ct. App. 2001). The arguments and authorities presented by NKD to the Arbitration Panel are restated and reincorporated herein.

of *Greenwood, Inc.*, 418 S.C. 186, 207, 791 S.E.2d 321, 333 (Ct. App. 2016). NKD incurred its repair expenses in 2020, 2021, and 2022. The settlement from Gearig was not received until January 2025. NKD was out of pocket for those repair costs during the entire intervening period, and it is entitled to interest on those funds from June 3, 2022, the date the Panel found that NKD's claims were fully liquidated. Gearig was ATC's subcontractor, such that ATC was liable for Gearig's actions and inactions. As a result, it was improper for the Arbitration Panel to pretend like NKD received \$150,000.00 from Gearig in 2022 when it was not received until 2025.

The statutory prejudgment interest rate is 8.75% per annum. *See* S.C. Code § 34-31-20(A). Applying this rate correctly, calculating interest on the full repair damages from June 3, 2022, and then deducting the Gearig settlement as an offset once received, results in total prejudgment interest of \$182,317.45, which is \$34,701.40 more than the Panel awarded. This is a straightforward error of that S.C. Code § 15-48-140 is designed to correct. S.C. Code § 15-48-140 provide that upon an application made within ninety days after delivery of the a copy of the award to the applicant, the court shall modify or correct the award [. . .] [t]here was an evident miscalculation of figures. . ."; *see also* 9 U.S.C. § 11 (providing that court may make an order modifying or correcting the award upon the application of any party to the arbitration "[w]here there awas an evidence material miscalculation of figures[.]") Accordingly, the Final Award should be modified to reflect total prejudgment interest of \$182,317.45, inclusive of the additional \$34,701.40 that accrued on the Gearig setoff amount for the period from June 3, 2022, to January 25, 2025.

#### IV. CERTAIN PORTIONS OF THE FINAL AWARD SHOULD BE CONFIRMED

NKD does not challenge the Panel's merits findings. The following portions of the Final Award should be confirmed pursuant to S.C. Code § 15-48-120 and 9 U.S.C. § 9: the finding that ATC breached the Contract and breached its warranties to NKD; the finding that ATC is liable to NKD for repair damages, liquidated damages, and prejudgment interest; the finding that the net award resulted in an Interim Award in favor of NKD; and the requirement that the Final Award “shall be paid by ATC within 30 days and, if not paid by then, shall accrue interest at the South Carolina Judgment Rate.” However, the portions relating to attorney’s fees and prejudgment interest must be vacated for further proceedings.

#### CONCLUSION

**WHEREFORE**, having stated its Petition and Motion to Vacate, in Part, Modify, in Part, and Confirm, in Part, the Arbitration Award against Respondent ATC Site Construction, LLC, Petitioner NKD, Inc., respectfully requests that the Court grant NKD the following relief:

- i. an order vacating the Final Award, in part, with respect to the award of attorney’s fees to ATC and all supporting or related findings, resulting in a additional amount due to NKD from ATC in the amount of \$228,600.00, with prejudgment interest;
- ii. an order modifying the Final Award, in part, with respect to the amount of the Total Final Award in favor of NKD, awarding \$317,541.81 in attorney’s fees, or in the alternative, for a hearing to be set for NKD’s updated petition for attorney’s fees and costs to be separately determined by this Court;
- iii. an order awarding an additional \$34,701.40 in prejudgment interest due to NKD resulting from the miscalculation of prejudgment interest by the Arbitration Panel;
- iv. an order confirming the Final Award, in part, with respect to the Panel’s findings that ATC is liable to NKD; and
- v. such other and further relief as the Court deems just and proper.

Respectfully submitted,

By: s/ Ellis R. Lesemann

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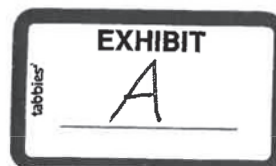
March 18, 2026

Charleston, South Carolina

7:29 AM  
01/27/25

**ATC Site Construction Inc**  
**Item Actual Cost Detail**  
 June 1, 2003 through November 7, 2024

| Type          | Date       | Num             | Name                | Source Name          | Memo         | Account           | Qty | Amount     | Balance    |
|---------------|------------|-----------------|---------------------|----------------------|--------------|-------------------|-----|------------|------------|
| No Item       |            |                 |                     |                      |              |                   |     |            |            |
| Bill          | 03/09/2020 | 116014          | NKD Inc.:242-Riv... | Hull Barrett, PC     | Construc...  | 70600 Legal Ex... |     | 4,073.40   | 4,073.40   |
| Bill          | 03/30/2020 | 003720-00330... | NKD Inc.:242-Riv... | Richardson Plow...   | file#0037... | 70600 Legal Ex... |     | 1,648.86   | 5,723.26   |
| Bill          | 04/03/2020 | 116381          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 4,333.40   | 10,056.66  |
| Bill          | 05/06/2020 | 116932          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 3,221.30   | 13,277.96  |
| Bill          | 05/19/2020 | 5.19.2020       | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 9,360.00   | 22,637.96  |
| Bill          | 06/05/2020 | 117433          | NKD Inc.:242-Riv... | Hull Barrett, PC     | river sho... | 70600 Legal Ex... |     | 4,906.90   | 27,544.86  |
| Bill          | 07/07/2020 | 117875          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 274.10     | 27,818.96  |
| Bill          | 07/31/2020 | 118476          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 5,773.70   | 33,592.66  |
| Bill          | 09/08/2020 | 119057          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,436.40   | 36,029.06  |
| Bill          | 10/12/2020 | 119737          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 919.90     | 36,948.96  |
| Bill          | 11/10/2020 | 120322          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,187.35   | 39,136.31  |
| Bill          | 12/08/2020 | 120856          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,669.00   | 41,805.31  |
| Bill          | 01/11/2021 | 121517          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,935.95   | 43,741.86  |
| Bill          | 02/05/2021 | 121539          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 499.10     | 44,240.96  |
| Bill          | 02/24/2021 | 2.24.21         | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 17,370.00  | 61,610.96  |
| Bill          | 03/11/2021 | 122819          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 301.10     | 61,912.06  |
| Bill          | 04/15/2021 | 123456          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 3,570.00   | 65,482.06  |
| Bill          | 05/10/2021 | 123914          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 123.00     | 65,605.06  |
| Bill          | 06/07/2021 | 124357          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 372.00     | 65,977.06  |
| Bill          | 07/01/2021 | 6.23.2021       | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 4,830.00   | 70,807.06  |
| Bill          | 07/15/2021 | 125138          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 3,570.00   | 74,377.06  |
| Bill          | 07/15/2021 | 125137          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 48.00      | 74,425.06  |
| Bill          | 09/14/2021 | 126347          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 225.00     | 74,650.06  |
| Bill          | 10/07/2021 | 126768          | NKD Inc.:242-Riv... | Hull Barrett, PC     | RIVERS...    | 70600 Legal Ex... |     | 4,710.00   | 79,360.06  |
| Bill          | 11/12/2021 | 127525          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 99.00      | 79,459.06  |
| Bill          | 01/13/2022 | 128601          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,802.00   | 82,261.06  |
| Bill          | 02/14/2022 | 2.14.2022       | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 14,310.00  | 96,571.06  |
| Bill          | 02/16/2022 | 129294          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,356.00   | 97,927.06  |
| Bill          | 03/09/2022 | 129682          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 48.00      | 97,975.06  |
| Bill          | 05/10/2022 | 131118          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,824.60   | 99,799.66  |
| Bill          | 05/10/2022 | 131118-A        | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,176.60   | 100,976.26 |
| Bill          | 06/10/2022 | 6.10.2022       | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 1,770.00   | 102,746.26 |
| Bill          | 07/12/2022 | 132258          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 82.80      | 102,829.06 |
| Bill          | 08/09/2022 | 132957          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 304.50     | 103,133.56 |
| Bill          | 09/09/2022 | 133488          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,491.20   | 104,624.76 |
| Bill          | 10/07/2022 | 133963          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 6,229.80   | 110,854.56 |
| Bill          | 10/31/2022 | 10.31.2022      | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 8,130.00   | 118,984.56 |
| Bill          | 12/09/2022 | 135310          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 6,385.20   | 125,369.76 |
| Bill          | 01/12/2023 | 135783          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,563.90   | 126,933.66 |
| Bill          | 01/12/2023 | 135782          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 0.57       | 126,934.23 |
| Bill          | 01/23/2023 | 1.23.2023       | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 1,200.00   | 128,134.23 |
| Bill          | 02/07/2023 | 136138          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 514.70     | 128,648.93 |
| Bill          | 03/02/2023 | 03.2.2023       | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 1,350.00   | 129,998.93 |
| Bill          | 03/14/2023 | 136938          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,866.50   | 131,865.43 |
| Bill          | 04/10/2023 | 137296          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 11.10      | 131,876.53 |
| Bill          | 04/10/2023 | 137297          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,790.00   | 134,666.53 |
| Bill          | 05/15/2023 | 138069          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 7,215.00   | 141,881.53 |
| Bill          | 05/15/2023 | 138068          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 10.60      | 141,892.13 |
| Bill          | 05/31/2023 | 4978            | NKD Inc.:242-Riv... | Austin & Pethick ... |              | 70600 Legal Ex... |     | 70.00      | 141,962.13 |
| Bill          | 06/02/2023 | 138373          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 525.00     | 142,487.13 |
| Bill          | 07/05/2023 | 7.5.23          | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 10,620.00  | 153,107.13 |
| Bill          | 07/13/2023 | 139249          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 17.40      | 153,124.53 |
| Bill          | 08/15/2023 | 139800          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 5,119.50   | 158,244.03 |
| Bill          | 09/14/2023 | 140374          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,044.00   | 159,288.03 |
| Bill          | 10/12/2023 | 140883          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,499.00   | 161,787.03 |
| Bill          | 11/22/2023 | 141601          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 1,448.80   | 163,235.83 |
| Bill          | 01/01/2024 | 142213          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 10,936.20  | 174,172.03 |
| Bill          | 01/19/2024 | 142675          | NKD Inc.:242-Riv... | Hull Barrett, PC     | rivershoals  | 70600 Legal Ex... |     | 3,526.10   | 177,698.13 |
| Bill          | 01/31/2024 | 5840            | NKD Inc.:242-Riv... | Austin & Pethick ... | rivershoals  | 70600 Legal Ex... |     | 975.00     | 178,673.13 |
| Bill          | 02/20/2024 | 143283          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 2,909.20   | 181,582.33 |
| Bill          | 03/12/2024 | 143790          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 6,355.25   | 187,937.58 |
| Bill          | 04/22/2024 | 144580          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 733.90     | 188,671.48 |
| Bill          | 05/08/2024 | 145001          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 377.30     | 189,048.78 |
| Bill          | 07/15/2024 | 07152024        | NKD Inc.:242-Riv... | The Jeter Law Fir... | through ...  | 70600 Legal Ex... |     | 22,320.00  | 211,368.78 |
| Bill          | 07/23/2024 | 7.23.204        | NKD Inc.:242-Riv... | The Jeter Law Fir... |              | 70600 Legal Ex... |     | 22,410.00  | 233,778.78 |
| Bill          | 07/24/2024 | 146568          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 537.00     | 234,315.78 |
| Bill          | 08/13/2024 | 146995          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 75.00      | 234,390.78 |
| Bill          | 09/18/2024 | 147688          | NKD Inc.:242-Riv... | Hull Barrett, PC     |              | 70600 Legal Ex... |     | 600.00     | 234,990.78 |
| Total no item |            |                 |                     |                      |              |                   |     | 234,990.78 | 234,990.78 |
| TOTAL         |            |                 |                     |                      |              |                   |     | 234,990.78 | 234,990.78 |



|                             |   |                                     |
|-----------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA     | ) | IN THE COURT OF COMMON PLEAS        |
|                             | ) |                                     |
| COUNTY OF RICHLAND          | ) | FOR THE FIFTH JUDICIAL CIRCUIT      |
|                             | ) |                                     |
| ATC SITE CONSTRUCTION, LLC, | ) | Case No.: 2020-CP-40-03915          |
|                             | ) |                                     |
| Plaintiff,                  | ) | <b>NOTICE OF FILING OF NKD'S</b>    |
|                             | ) | <b>PETITION FOR ATTORNEY'S FEES</b> |
| vs.                         | ) | <b>IN ARBITRATION ACTION</b>        |
|                             | ) |                                     |
| NKD, INC.,                  | ) |                                     |
|                             | ) |                                     |
| Defendant.                  | ) |                                     |
|                             | ) |                                     |
|                             | ) |                                     |

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Defendant, NKD, Inc., ("NKD"), by and through its undersigned counsel, hereby gives notice of NKD's Petition for Attorney's Fees and Expenses ("Petition"), which was submitted in the arbitration action on February 28, 2025. A true and correct copy of the Petition is attached hereto as **Exhibit 1**.

NKD's Petition is being provided so that the Court may consider the information contained therein, to the extent the Court deems it relevant, in connection with its ruling on Defendant's pending Motion to Vacate in Part, Modify in Part, and Confirm in Part the Arbitration Award.

Respectfully submitted,

By: s/ Robert T. Bonds  
 Ellis R. Lesemann (S.C. Bar No. 15315)  
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 LESEMAN & ASSOCIATES LLC  
 418 King Street, Suite 301  
 Charleston, SC 29403  
 (843) 724-5155

March 18, 2026  
 Charleston, South Carolina

***Attorneys for Defendant NKD, Inc.***

**Exhibit 1**

***NKD, INC.'S PETITION FOR ATTORNEY'S FEES  
AND EXPENSES***

**BEFORE THE ARBITRATION PANEL  
IN THE MATTER OF**

|                                 |   |                                 |
|---------------------------------|---|---------------------------------|
| ATC SITE CONSTRUCTION, LLC,     | ) |                                 |
|                                 | ) |                                 |
| Claimant,                       | ) |                                 |
|                                 | ) |                                 |
| vs.                             | ) | <b>NKD, INC.'S PETITION FOR</b> |
|                                 | ) | <b>ATTORNEY'S FEES</b>          |
| NKD, INC.,                      | ) | <b>AND EXPENSES</b>             |
|                                 | ) |                                 |
| Respondent and Counterclaimant, | ) |                                 |
|                                 | ) |                                 |
|                                 | ) |                                 |

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After filing and prosecuting a mechanic's lien claim against NKD, Inc. ("NKD"), ATC Site Construction, LLC ("ATC") has been determined to have no entitlement to the lien. In fact, pending potential corrections or adjustments, ATC owes NKD \$785,717.93. ATC can only prevail under the "one verdict" rule when it has "some entitlement to the mechanics' lien," *i.e.*, a net judgment in ATC's favor. As there is no judgment in ATC's favor, there is a significant judgment in NKD's favor, and there is no entitlement on the part of ATC to a lien, NKD is the prevailing party. The "who is closer" analysis applies only when the outcome of the case confirms a lien of some amount in favor of the contractor, which certainly did not occur here.

NKD successfully defended against the mechanics' lien by proving that ATC caused far more in actual damages and liquidated damages than the amount ATC alleged it was due. Although the Arbitration Panel decided to award NKD a materially lower amount of liquidated damages than had been requested, it does not change the fundamental fact that ATC has no entitlement to a lien and owes a significant award to NKD due to ATC's defective and untimely work.

Therefore, NKD submits this Petition for Award of Attorney's Fees and Expenses against ATC in accordance with the Arbitration Panel's Interim Award and S.C. Code § 29-5-10. NKD is entitled to a supplemental award of reasonable attorney's fees and costs authorized by South

Carolina law. *See* S.C. Code § 29-5-10(a) (authorizing the prevailing party to recover the costs which may arise in defending against the mechanic's lien, including a reasonable attorney's fee).

As the result of the Interim Award confirms, ATC has no entitlement to the mechanic's lien and is the **non**-prevailing party. There is no lien, no right to foreclose, and no potential auction of the property, because ATC is not entitled to any money. It owes money. *See* S.C. Code § 29-5-10(a) (providing, "[f]or purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action," which "verdict assumes some entitlement to the mechanic's lien").

All "prevailing party" provisions, including S.C. Code § 29-5-10, are interpreted under South Carolina law such that the prevailing party is " [t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.'" *Seckinger v. Vessel Excalibur*, 326 S.C. 382, 388, 483 S.E.2d 775, 777-78 (Ct. App. 1997) (confirming that "in a mechanic's lien action the defendant is entitled to an award of attorney fees as the prevailing party **if it is determined that a mechanic's lien cannot be enforced against it.**") (emphasis added). On every measure, NKD is the prevailing party.

Therefore, pursuant to the express statutory authority providing that an owner who successfully defends against a contractor's mechanic's lien should recover attorney's fees and costs in defending against the lien, NKD respectfully requests that the Panel enter a supplemental award of reasonable attorney's fees and expenses in the amount of **\$317,541.81**, which includes: (i) **\$224,456.50** in legal fees for services expended in defending against the lien; and (ii) **\$93,085.31** in expenses incurred by counsel and reimbursed by NKD. The requested amount of fees and

expenses are limited to those incurred to prove that ATC was not entitled to a lien and are 43% less than what NKD has actually paid.

### **FACTUAL BACKGROUND**

Prior to the initiation of litigation by ATC, NKD requested that ATC repair the defective work. ATC refused and instead filed a mechanic's lien on the project that ATC placed into a defective and incomplete state. The matter was mediated unsuccessfully on two occasions. The progress of the litigation was affected by a number of factors, including the need to devote attention to identifying, correcting and quantifying the actual damages that resulted from ATC's defective work, the COVID-19 Pandemic, the joinder of two additional parties to the litigation proceeding, and delays encountered with the Richland County Court of Common Pleas, among other things. In 2024, the parties agreed to submit the matter to arbitration. The arbitration hearing took place in Columbia, South Carolina over four (4) days beginning Tuesday, November 19, 2024 and concluding Friday, November 22, 2024. A post-hearing conference was held with the Panel on November 25, 2024.

As the Panel is aware, this action was initiated by ATC, who sought to put NKD's project into foreclosure through the enforcement of a mechanic's lien in the original amount of \$884,473.84. As a result of the Interim Award, ATC has no entitlement to a lien because ATC actually owes money to NKD. Since there is no lien in favor of ATC, NKD is the prevailing party having received a favorable decision on liability. This entitles NKD to an award of fees and expenses incurred in successfully defending against the lien to which ATC has no entitlement.

ATC has no "entitlement to the mechanic's lien" against NKD based on the following facts: (i) the Panel determined that ATC breached the construction contract with NKD; (ii) NKD incurred \$1,261,787.83 in actual damages due to the defective work performed by ATC and ATC's

subcontractors, including Gearig Civilworks, LLC, which has been determined to be the proximate cause of NKD's damages; (iii) ATC did not undertake to make any repairs; (iv) ATC did not progress the work in a diligent manner; and (v) ATC failed to reach substantial completion by the extended contract date and was levied with \$365,000.00 in liquidated damages payable to NKD. This entitles NKD to an award of fees and expenses incurred in successfully defending against the lien, as ATC has no entitlement to a lien as a result of the Interim Award. When there is **no entitlement to a lien**, it is immaterial that the net judgment awarded to NKD is less or even substantially less than what could have been awarded.

NKD is not seeking all fees and expenses incurred in this action, but rather seeks those incurred in defending against the lien, which necessarily involved the efforts necessary to prove NKD's damages as this was the basis of the defense against enforcement of the lien. The amount of fees and expenses incurred in successfully defending against the lien are as follows:

|                                           |                     |
|-------------------------------------------|---------------------|
| <b>FEES TO DEFEND MECHANIC'S LIEN</b>     | <b>\$224,456.50</b> |
| <b>EXPENSES TO DEFEND MECHANIC'S LIEN</b> | <b>\$93,085.31</b>  |
| <b>TOTAL FEES AND EXPENSES</b>            | <b>\$317,541.81</b> |

The fees and expenses summarized in the table above are fully itemized within the Itemization of Fees and Expenses attached hereto as Exhibit A. The requested amount is a 43% reduction from what NKD has actually incurred in the litigation. Specifically, NKD has incurred and paid Lesemann & Associates \$431,640.00 in attorney's fees and has incurred and paid \$123,670.41 in expenses, for a total of \$553,310.41. The fees and expenses actually incurred are documented in the invoices that were sent to and paid by the client, attached as Exhibit B. The difference between the incurred amount and the requested amount accounts for what was incurred in successfully defending against the mechanics' lien.

As set forth in the Affidavit of Ellis R. Lesemann, Esq., attached as Exhibit C, each time entry and expense being requested in this Petition has been reviewed to ensure relevance, reasonableness, accuracy and lack of duplication. As indicated in the supporting documentation, a significant number of deletions and reductions have been made. Below are examples of deletions and reductions that have been made:

- The hourly rates for each timekeeper have been frozen at their original amount, although the hourly rates actually charged increased during the litigation;
- Pre-suit entries prior to the filing of have been removed;
- The fees and expenses relating to the two mediations have been removed, including the \$7,500 expense relating to the “neutral” expert who never communicated with anyone at Richland County;
- All travel time to/from Columbia and all mileage expenses have been removed so that the fees and expenses resemble what would be charged by counsel with similar experience in the Midlands area;
- The time entries and expenses relating to affirmative claims against Gearig Civilworks and Geo-Systems have been removed;
- The expenses for the discovery requests, motions to dismiss, and motions for summary judgment served or filed by Gearig and/or Geo-Systems have been removed;
- The entries relating to ensuring that ATC did not become “judgment proof” through its asset sale and securing an escrow of funds to pay a judgment/award have been removed;
- Entries relating to the Gearig settlement have been removed;
- Expenses incurred for consultation with NKD’s CPA (Barb & Co.) relating to damages, interest expense, and related matters have been removed;
- All time entries for timekeepers with lesser involvement, including Taylor Powell, Grace Heaton, and Stacy Villarose, have been removed;
- The requested fees and expenses stop at the point that the post-hearing brief was submitted and do not include any fees relating to the Motion to Correct the Interim Award or NKD’s Fee Petition; and

- Numerous entries were reduced or where removed when they were not tied to the core issues of proving that ATC caused damages in excess of the amount claimed by ATC and therefore was not entitled to enforce a mechanics' lien.

As indicated in the supporting documentation and discussed more fully below, the relevant factors in determining the reasonableness of NKD's fee request support a supplemental award of the full amount requested for the legal fees and expenses incurred by NKD in successfully defending against ATC's mechanic's lien and obtaining an award against ATC.<sup>1</sup>

### **SUPPORTING MATERIALS**

NKD submits the following materials in support of this Petition for an Award of Attorney's Fees and Expenses:

|                  |                                                                                                                                                           |
|------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------|
| <u>Exhibit A</u> | Itemization of Fees and Expenses Incurred by NKD in Defending the Mechanic's Lien                                                                         |
| <u>Exhibit B</u> | Combined Lesemann & Associates LLC Invoices from February 2020 – January 2025                                                                             |
| <u>Exhibit C</u> | Affidavit of Ellis R. Lesemann, Esq.                                                                                                                      |
| <u>Exhibit D</u> | Affidavit of Bonum Sams Wilson, III, Esq.                                                                                                                 |
| <u>Exhibit E</u> | Order Awarding Attorneys' Fees and Costs to Party Defending Mechanic's Lien in <i>Balfour Beatty Construction, LLC v. Library Associates, LLC, et al.</i> |

### **LEGAL STANDARD**

Under South Carolina law, attorney's fees may be awarded based either upon rule of court or express or statutory or contractual authority. *See, e.g., Baron Data Systems, Inc. v. Loder*, 297 S.C. 382, 377 S.E.2d 296 (1989). South Carolina's mechanic's lien statute provides that the prevailing party may recover reasonable attorney's fees and costs incurred in defending against a

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<sup>1</sup> The Affidavit of Bonum Sams Wilson, III, Esq., attached as Exhibit D, is presented in support of the reasonableness and scope of NKD counsel's legal fees and expenses relating to the defense of the mechanic's lien.

mechanic's lien. *See* S.C. Code § 29-5-10 ("The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party"). The amount of the "reasonable attorney's fee" is left to the discretion of the trial court. *See* S.C. Code § 29-5-10(a); *see also* *Seckinger v. Vessel Excalibur*, 326 S.C. 382, 386, 483 S.E.2d 775, 777 (Ct. App. 1997) ("The determination as to the amount of attorney fees which should be awarded under the mechanic's lien statute is addressed to the sound discretion of the trial court and its decision will not be disturbed absent an abuse of discretion").

Rule 1.5 of the South Carolina Professional Rules of Conduct sets for the following factors to be considered in determining the reasonableness of a fee: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. *See* Rule 1.5(a), RPC, Rule 407, SCACR. "The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance." *See* Rule 1.5(a) cmt. 1, RPC, Rule 407, SCACR.

Also, in determining the reasonable time expended and a reasonable hourly rate for purposes of calculating attorneys' fees, South Carolina courts have historically relied on six common law factors of reasonableness that overlap with the factors listed in Rule 1.5: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results

obtained; and (6) the customary legal fees for similar services. *See, e.g., Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). The specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion. *Id.*

### **ARGUMENT**

As the prevailing party, NKD is entitled to recover the reasonable fees and expenses incurred relating to its defense of the mechanic's lien claim in accordance with South Carolina law.

#### **I. AS THE PREVAILING PARTY, NKD IS ENTITLED TO A SUPPLEMENTAL AWARD OF ATTORNEY'S FEES AND COSTS INCURRED IN DEFENDING AGAINST THE LIEN**

Under South Carolina law, a party who successfully defends against the mechanic's lien may recover reasonable attorney's fees and costs. *See* S.C. Code § 29-5-10 ("The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party"). Section 29-5-10 sets forth guidance for determining who is the "prevailing party:"

For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. **One verdict assumes some entitlement to the mechanic's lien** and the consideration of compulsory counterclaims.

*See* S.C. Code § 29-5-10 (emphasis added).

In a mechanic's lien action, the party defending the mechanic's lien claim is entitled to an award of attorney fees as the prevailing party if it is determined that a mechanic's lien cannot be enforced against it. *See EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006). Under the mechanic's lien statute, a party who successfully defends a claim for a lien is entitled to recover attorney fees regardless of the outcome

of any remaining causes of action. *Id.*, at 620, 635 S.E.2d at 926. The fees are limited, however, to those actually incurred in defending the lien. *Id.*

***A. Having Failed to Successfully Prosecute the Mechanic's Lien, ATC is Not the Prevailing Party***

The Interim Award confirms that: (i) ATC is liable to NKD; and (ii) NKD is not liable to ATC. Although the Panel awarded NKD less liquidated damages than were requested, NKD's prevailing party status should be undisputed. NKD received a favorable decision and award on liability; ATC did not. Because there is no "entitlement to the mechanic's lien" by ATC, it is not necessary for the Panel to entertain ATC's attempt to present manipulated sums and calculations to determine whose position was "closer." *See* S.C. Code § 29-5-10(b). Notwithstanding the statutory requirement of an "entitlement to the mechanic's lien," ATC believes that the Panel's reduction in the amount of liquidated damages awarded to NKD makes ATC the prevailing party, even though ATC breached the contract, owes money to NKD, and has no entitlement to enforce the mechanics' lien.

Based on the outcome of the arbitration, the Panel is not to consider who "who was closer to the midpoint," as this analysis applies only when there is "some entitlement to the mechanic's lien," *i.e.*, a net monetary award or judgment in favor of ATC that could be enforced by foreclosure of the mechanic's lien. When the owner prevails and receives a net award in its favor, there is no entitlement to the mechanic's lien since the contractor is not owed any money as a result of the award or judgment. The Mechanic's Lien Statute cannot reasonably be interpreted to allow ATC to recover costs and attorney's fees as the "prevailing party" when it is, in fact, ATC who owes a debt to NKD. *See EFCO*, at 618, 635 S.E.2d at 925 (recognizing that a prevailing party "clearly envisions a victory to some degree on the merits"). All rules of statutory construction must yield to the principle that courts should endeavor to ascertain the real intention of the legislature. *See*

*Horn v. Davis Elec. Constructors, Inc.*, 307 S.C. 559, 416 S.E.2d 634 (1992). “[T]he intent of the legislature in allowing the prevailing party in an action brought under the mechanic’s lien statute to recover attorney fees and costs stems from a desire to deter both wrongful filing of liens and unjustified refusal to pay debts subject to mechanic’s liens.” See *Cedar Creek Properties v. Cantelou Assocs., Inc.*, 320 S.C. 483, 486, 465 S.E.2d 774, 775 (Ct. App. 1995).

***B. NKD is the Prevailing Party in Defending Against the Lien***

NKD successfully defended against ATC’s mechanic’s lien claim and is the prevailing party in this proceeding.

The South Carolina Supreme Court has defined a “prevailing party” as [t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.” *Seckinger v. Vessel Excalibur*, 326 S.C. 382, 388, 483 S.E.2d 775, 777-78 (Ct. App. 1997) (quoting *Heath v. County of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990)). A party does not need to be successful as to all issues in order to be found to be a prevailing party. *Id.*

The Panel found in favor of NKD on the main issue relating to ATC’s failure to perform the work in accordance with the Contract and failure to achieve Substantial Completion of the project. While NKD disagrees with the calculations of liquidated damages and prejudgment interest in the Interim Award, the Panel correctly determined that ATC is liable to NKD. Although the Panel found both sides responsible for a portion of the delays that arose between August 1, 2018 and February 24, 2020, the Panel ultimately determined that “ATC was behind schedule from the beginning of the project and did not progress the work in a diligent manner.” See *Interim Award*,

p. 6. Accordingly, pursuant to S.C. Code § 29-5-10, NKD is entitled to recover its reasonable attorney's fees and costs incurred in defending against ATC's mechanic's lien.

## **II. THE FEES AND EXPENSES REQUESTED ARE REASONABLE UNDER THE CIRCUMSTANCES**

As discussed above, NKD's right to an award of reasonable attorney's fees and costs as the "prevailing party" is governed by S.C. Code § 29-5-10. As the prevailing party, NKD is entitled to recover reasonable attorney's fees based on statutory authority and the amount is to be determined by the Panel. *See T.W. Morton Builders, Inc. v. von Buedingen*, 316 S.C. 388, 403, 450 S.E.2d 87, 95 (Ct. App. 1994) (holding that the award of fees to the prevailing party under Section 29-5-10 is mandatory, but the amount of the fee to be awarded is left to the sound discretion of the court).

South Carolina law calls upon the Panel to consider the nonexclusive factors of reasonableness set forth in Rule 1.5 of the South Carolina Professional Rules of Conduct, as well as applicable caselaw. The results obtained in defending against ATC's mechanic's lien and obtaining an award against ATC, along with the other factors addressed below, support the award of reasonable fees and expenses requested. *See Order Awarding Attorneys' Fees and Costs in the matter of Balfour Beatty Construction, LLC v. Library Associates, LLC, et al.*, attached as Exhibit E (awarding attorney's fees and costs in the amount of \$2,782,789.00 to prevailing party who obtained a judgment against contractor in the amount of \$3,320,329.00 and successfully defended against contractor's mechanic's lien).

### **A. The Time and Labor Required, Novelty and Difficulty of The Questions Involved, and Skill Requisite to Perform the Legal Service Properly**

The nature, extent, and difficulty of the legal services rendered support a full award of the fees and expenses requested. As confirmed by the supporting Affidavits, the time and labor expended in this case was reasonable and appropriate. This matter involved claims, counterclaims,

cross-claims, and third-party claims between five different parties. Prosecuting NKD's claims and defending against ATC's claims required review of a substantial number of documents exchanged in discovery, preparation of necessary pleadings, legal research of South Carolina case law and statutes relating to the unique issues in this case, extensive preparation, preparation of motions and supporting memorandum, and drafting detailed proposed orders. This case involved extensive discovery over the course of several years. A substantial number of documents were reviewed and exchanged between the parties. There were depositions of fourteen (14) witnesses, which required extensive preparation, coordination amongst the parties and witnesses, and travel time. This proceeding involved a four-day arbitration hearing during which the parties presented fifteen (15) live witnesses and submitted deposition designations for two additional witnesses. It involved extensive pre-hearing and post-hearing briefing and motions.

Counsel for NKD used their time efficiently, employing the attorneys in this case in the most cost-efficient manner to work on tasks as dictated by the skill level required. In all, NKD counsel performed 956.1 hours of work in successfully defending against the mechanic's lien and securing the award of significant damages in favor of NKD as the prevailing party.

***B. The Likelihood that the Acceptance of the Particular Employment Will Preclude Other Employment by the Lawyer***

This factor is not applicable in this particular case. NKD's counsel was not required to turn down other matters as a result of accepting this case. However, there were time demands and constraints presented by this case that required counsel to concentrate full effort and attention on this case notwithstanding the existence of other pressing matters.

***C. The Fee Customarily Charged in the Locality for Similar Legal Services***

Mr. Lesemann served as litigation counsel for NKD since the outset of this proceeding. His hourly rate was \$350.00 per hour. As indicated in the Affidavit of Ellis R. Lesemann, Esq., Mr.

Lesemann delegated specific tasks to associate attorneys working under his direct supervision whose hourly rates ranged from \$250.00 per hour to \$295.00 per hour. The hourly rate for paralegal work was \$125.00 per hour. As confirmed in the Affidavits accompanying this Fee Petition, the hourly rates of \$350.00 per hour for a partner, associates rates ranging from \$250.00 per hour to \$295.00 per hour, and the paralegal rate of \$125.00 per hour are consistent with the amount of rate of fees that would be customarily charged in South Carolina and/or Richland County for similar claims and disputes. The hourly rates charged, as reflected in the supporting materials attached hereto, are reasonable in light of the hourly rates billed in the prevailing markets for similar services offered by attorneys of reasonably comparable skills and experience. The billing rates for the attorneys and paralegals as set forth in the invoices are reasonable and customary rates for persons of their respective experience.

***D. The Amount Involved and Results Obtained***

The amounts involved in this case were high and the results obtained were positive, which weighs heavily in favor of awarding NKD the fees and expenses requested. ATC requested an award of damages against NKD in the amount of \$1,186,766.00, inclusive of prejudgment interest. *See Interim Award*, p. 1. ATC received no award of damages and was ordered to pay NKD. The Panel awarded NKD repair damages, liquidated damages, and prejudgment interest against ATC.<sup>2</sup> While NKD disagrees with the calculation of liquidated damages which fails to account for the

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<sup>2</sup> ATC sought to enforce its mechanic's lien claim in the amount of \$847,236.20, exclusive of prejudgment interest. However, the Panel determined that ATC caused NKD to incur damages exceeding the claim amount in the mechanic's lien. The Panel found that NKD incurred damages totaling \$1,624,403.88, as follows: (i) \$1,111,787.83 for the "total net repair damages due to NKD;" (ii) "Plus Liquidated Damages of \$365,000;" and (iii) "pre-judgment interest in the amount of \$147,616.05." *See Interim Award*, p. 10. The Panel reduced the damages awarded to NKD by \$838,685.95; it did not award any damages to ATC. The Panel entered an award in favor of NKD and against ATC in the total amount of \$785,717.93. ATC's lien claim failed completely.

delay allocated to ATC prior to February 24, 2020, and the miscalculation of prejudgment interest, NKD obtained an award in each category of damages sought. The supporting documentation accompanying this Petition confirms the reasonableness of the hourly rates and the time expended in this matter.

The time devoted to NKD's successful defense against the mechanic's lien claim is intertwined with the breach of contract claim against ATC, as both claims involved ATC's failure to perform the work in accordance with the Contract and abandonment of the project. NKD's counterclaims were closely related to the defense of the mechanic's lien such that only one true controversy existed. The main issue involved in this proceeding related to NKD's decision to withhold further payments to ATC due to the delay in the completion of the project on or before the Substantial Completion date and the multiple defects in ATC's work that precluded final receipt of the Permits to Operate ("PTOs"). It was necessary for NKD to prove that no further net payments were due to ATC in order to prevail on both the mechanic's lien claim and the breach of contract claim, as NKD incurred more in damages than ATC claimed to be owed. Given the nature and extent of the defects involved, a substantial amount of time was incurred during discovery relating to the condition of the roadways and utilities at River Shoals. Numerous witnesses were deposed in connection with the work performed by ATC and the failure to conform with the contract requirements and specifications. Both sides presented expert witnesses who provided opinions relating to the multiple defects and the scope of repairs. From time to time throughout the proceeding, the efforts of more than one individual timekeeper was necessary to complete certain tasks, such as the review of documents produced during discovery and the preparation of briefs and other submissions by NKD.

Counsel for NKD devoted an appropriate amount of time to preparing for the document-intensive arbitration hearing and developing the factual record, which is common to both NKD's breach of contract claim and ATC's mechanic's lien claim. The Panel found that ATC breached the contract, delayed the project, and caused NKD to incur costs and expenses to repair the work performed by ATC. Specifically, the Panel found that ATC failed "to meet the project requirements" and failed "to correct the issue when it was discovered." *Interim Award*, p. 8. The "installation performed by ATC did not meet the contract requirements." *Id.*, p. 7. The results of this proceeding support a full award of the fees and expenses requested.

***E. The Time Limitations Imposed by the Client or the Circumstances***

There were no time limitations imposed by the client or the circumstances. The parties were allowed modifications to the scheduling order whenever requested and were given ample time to pursue and complete discovery.

***F. The Nature and Length of the Professional Relationship with the Client***

The undersigned counsel for NKD has worked extensively with NKD's owner and principal, Karl Haslinger. Mr. Lesemann has worked continually with Mr. Haslinger since 2011 and has handled eight litigation matters or disputes for his entities and his family. This includes a construction matter relating to the defective work that was used in the construction of his personal residence, which was favorably settled.

***G. The Experience, Reputation, and Ability of the Lawyers Performing the Services***

The primary attorney involved in this case on behalf of NKD is Ellis R. Lesemann, Esq., who is a member in good standing with the South Carolina Bar. For the past 26 years, Mr. Lesemann has represented clients in contract disputes. He received his undergraduate degree from the South Carolina Honors College at the University of South Carolina after spending two years

in the Honors Program at the University of Michigan at Ann Arbor. Thereafter, in 1998, he completed the four-year joint degree program in Law and International Business Studies (JD/IMBA) at the University of South Carolina and was admitted to the South Carolina bar in November 1998. Mr. Lesemann has worked extensively in business litigation and real estate disputes. During his practice, Mr. Lesemann has listed or recognized by Chambers USA, Best Lawyers in America, Super Lawyers, the Multi-Million Dollar Advocates Forum, the Charleston Business Magazine, the Greenville Business Journal, and has been rated “AV” by Martindale Hubbell.

Two associate attorneys working under Mr. Lesemann’s direct supervision have also been involved in the representation of NKD: (i) Michelle A. Stewart; and (ii) Benjamin H. Joyce. Ms. Stewart graduated from the College of Charleston in 2008 and obtained her law degree from the Charleston School of Law in 2012. Ms. Stewart joined Lesemann & Associates LLC in March 2014. She has twelve years of legal experience in the areas of civil litigation, business disputes, and appeals, as well as disputes with state and local governments, and also handles a wide variety of transactional matters. Benjamin Joyce graduated from the University of Georgia and obtained his law degree from the Charleston School of Law in 2012. Prior to entering private practice, he served as a law clerk to South Carolina Circuit Court Judge George C. James, Jr., who now serves on the Supreme Court of South Carolina. Mr. Joyce previously worked with Hood Law, the McNair Law Firm, and Burr Forman LLP. He has experience in a civil matters involving commercial contracts, business torts, real property and land use disputes, product liability, premises liability, and general negligence.

### ***H. Whether the Fee is Fixed or Contingent.***

The fee arrangement with NKD is not contingent but fixed at specific hourly rates for all timekeepers involved.<sup>3</sup> NKD did, in fact, incur more than \$500,000.00 in fees and expenses in connection with this multiyear litigation, including arbitration expenses.

NKD asserted claims in this arbitration proceeding to recover a significant amount of out-of-pocket expenses that it incurred to complete a delayed, abandoned, and defective project. NKD had to incur expenses for amounts paid to repair contractors due to ATC's failure to perform the work in accordance with the contract. In addition to the amounts paid to repair contractors for site work and utility repairs, NKD incurred amounts for loan interest, property taxes, and carrying costs due to ATC's failure to achieve Substantial Completion. NKD has actually incurred the full amount of the legal fees and expenses sought in this Petition, which should not erode its recovery of the damages caused by ATC. The additional expenses required to enforce NKD's contractual rights should be reimbursed by ATC, the party who refused to perform the contract. Without a supplemental award of reasonable attorney's fees and expenses, NKD is not made whole.

### **CONCLUSION**

NKD prevailed on the lien claim because, at the conclusion of the litigation, there is no entitlement to a lien due to the amount of damage that ATC caused and refused to address. Having incurred \$224,456.50 in attorney's fees in the successful defense against ATC's mechanic's lien, along with \$93,085.31 in expenses to prevail in the defense of this action and obtaining an award for breach of contract, NKD, Inc., respectfully requests that the Panel enter an award in favor of NKD in the amount of **\$317,541.81**.

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<sup>3</sup> See Rule 1.5(a) cmt 2, RPC, Rule 407, SCACR ("When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible.").

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February 28, 2025  
Charleston, South Carolina