IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Consolidated Case No. 2010-CP-10-2271

Appellate Case No.: 2016-000076

Concord and Cumberland Horizontal Property Regime, And Thomas R. Mather, And Betty Y. Segal, And Signature Charleston, LLC and Wade Robinson, And James C. Kirkpatrick, And Paul A. Brim, And Fred Rappaport and Joyce Rappaport, And Thomas R. Debnam, as Trustee of The Trust Agreement of Thomas R. Debnam, And Pamela L. Vaughan, And 304 Concord & Cumberland, LLC, And 402 Concord & Cumberland, LLC, And Avant & Associates, LLC and Oakland Holding, LLC, And Mattison J. MacGillivray and Teresa E. MacGillivray And Pamela Queen, And Stuart Reeves, Plaintiffs,

v.

Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC, Estates, Inc., Estates Management Company, Superior Construction Corporation, Weather Shield Mfg., Inc., The Muhler Company, Inc., In The Wind, Inc., J. Davis Architects, PLLC, Wall Craft Construction, Inc., Weatherholtz Masonry, LLC, Philip Gasque d/b/a Philip Gasque Construction, Architectural Stone Company, Southern Mechanical, Inc., Greg Gasque Metal Works, Keating Roofing and Sheet Metal, Inc., Lowcountry Tile Contractors, Inc., Safeco Insurance Company of America, Companion Property and Casualty of America, Companion Property and Casualty Group, Watts Builders, LLC, Elias Duffy d/b/a Masonry Pros, Renaissance Steel, LLC, American Drywall Construction, Inc., Turner Electrical of SC, Inc., and Metro Waterproofing, Inc., Defendants

Of whom Superior Construction Corporation .....APPELLANT,
And
The Muhler Company, Inc.....RESPONDENT.

RECORD ON APPEAL

Volume III

Christopher A. Majure, Esquire
Timothy J. Newton, Esquire
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1210/1240
Attorneys for Appellant

Peter Gunner Nistad
Gallivan, White & Boyd, P.A.
Post Office Box 22768
Charleston, SC 29143
843-735-7600

Curtis L. Ott
Janice Holmes
Gallivan, White & Boyd, P.A.
Post Office Box 7368
Charleston, SC 29143
Attorneys for Respondent

§ 8.3.8 The Contractor is not entitled to a separate extension of the Contract Time for each one of the causes of delay that may have concurrent or interrelated effects on the progress of the Work. Concurrent causes of delay shall be considered a single delay.

~~§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.~~

§ 8.3.9 The Contractor shall not be entitled to any additional compensation for its inability to complete the Work early (or prior to the date of Substantial Completion set forth in the Agreement) due to a Class 1 or Class 2 cause, as enumerated above.

ARTICLE 9 PAYMENTS AND COMPLETION

§ 9.1 CONTRACT SUM

§ 9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

§ 9.2 SCHEDULE OF VALUES

§ 9.2.1 Before the first Application for Payment, the Contractor shall submit to the Architect a schedule of values allocated to various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

§ 9.3 APPLICATIONS FOR PAYMENT

§ 9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment for operations completed in accordance with the schedule of values. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of requisitions from Subcontractors and material suppliers, and reflecting retainage if provided for in the Contract Documents.

§ 9.3.1.1 As provided in Section 7.3.8, such applications may include requests for payment on account of changes in the Work which have been properly authorized by Construction Change Directives, or by interim determinations of the Architect, but not yet included in Change Orders.

§ 9.3.1.2 Such applications may not include requests for payment for portions of the Work for which the Contractor does not intend to pay to a Subcontractor or material supplier, unless such Work has been performed by others whom the Contractor intends to pay.

§ 9.3.1.3 With each Application for Payment, the Contractor shall issue Lien Waivers from the Contractor verifying that all parties submitting applications for payment to the Contractor have been or will be paid and that all Work billed for under the Application for Payment has passed to the Owner. Provided that the Owner is not in default in the payment of any uncontested amount, if any Subcontractor, sub-subcontractor, laborer or supplier of materials files a lien or notice of claim for unpaid labor or materials against the Owner's property, the Contractor agrees to immediately bond such lien in accordance with applicable law or to otherwise cause such lien to be discharged, at the Contractor's sole expense. If the Contractor fails to bond off such lien within fourteen (14) days of its filing, the Owner may bond off such lien by statutory cash bond and deduct the cash deposited and all associated costs, fees, and expenses from any amounts thereafter due to the Contractor.

§ 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site. In requesting payment for materials stored on or off the site, the Contractor shall submit with his Application for Payment the following:

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.1 An itemized list of the stored material prepared in sufficient detail to identify the materials and their value. Include an accounting for new items stored, paid items that continue in storage, and items previously stored and since incorporated in the Work.

.2 Evidence (such as bills of sale or such other proofs as may be requested by the Owner or Architect to substantiate that the materials listed have been paid for by the Contractor, or, for materials stored at the site only, a notarized statement from the materials supplier stating that the materials will become the property of the Owner upon payment by the Owner to the Contractor.

§ 9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

§ 9.4 CERTIFICATES FOR PAYMENT

§ 9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Section 9.5.1.

§ 9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of the Architect's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

§ 9.5 DECISIONS TO WITHHOLD CERTIFICATION

§ 9.5.1 The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Section 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Section 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 3.3.2, because of:

.1 defective Work not remedied;
.2 third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor;
.3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
.4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
.5 damage to the Owner or another ~~contractor~~contractor, including, but not limited to, failure of the Contractor to indemnify the Owner, Architect, and others entitled thereto by the Contract Documents;
.6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or

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.7 persistent failure to carry out the Work in accordance with the Contract Documents.

.8 Failure of the Contractor to provide Lien Waivers with the Application for Payment;

.9 Failure of the Contractor to correct damage to the Owner's property, as required by the Contract Documents; and

.10 Failure of the Contractor to provide the Owner and the Architect with the scheduling information and documentation required by Section 3.10.

§ 9.5.2 When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

§ 9.5.3 If there is written evidence of any threatened or asserted lien, claim, demand, dispute, and/or liability for which the Owner may become liable or suffer damage as the result of any act or omission of the Contractor or anyone for whom the Contractor may be liable, the Owner shall have the right to withhold payment in an amount equal to that reasonably necessary to protect the Owner against the same, including all expenses, costs and damages so sustained, as well as reasonable attorneys' fees, court costs and other costs and expenses which may be applicable until such time as the Owner's risk has been eliminated. Any amount withheld by the Owner must be verified by the Architect, in writing, as a reasonable amount. If the balance of the Contract sum is insufficient to compensate the Owner for the same, the Contractor shall be liable to the Owner for the excess. The Owner shall not have the right to withhold payment on account of any lien claims if the Contractor has bonded off the lien as provided for in Section 9.3.1.3.

§ 9.6 PROGRESS PAYMENTS

§ 9.6.1 After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect.

§ 9.6.2 The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of such Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

§ 9.6.3 The Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.

§ 9.6.4 Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor except as may otherwise be required by law.

§ 9.6.5 Payment to material suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, 9.6.3 and 9.6.4.

§ 9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

§ 9.6.7 Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.

§ 9.7 FAILURE OF PAYMENT

§ 9.7.1 If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the

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Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

§ 9.8 SUBSTANTIAL COMPLETION

§ 9.8.1 Substantial Completion is 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.

§ 9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

§ 9.8.3 Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion.

§ 9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

§ 9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment sufficient to increase the total payments to the full amount of ~~retainage applying to the Contract Sum, less 150% of such Work or designated portion thereof. Such payment amounts as the Architect shall be adjusted~~ determine for Incomplete Work ~~that is incomplete or not in accordance with and unsettled claims of the requirements of~~ Owner against the ~~Contract Documents.~~ Contractor.

§ 9.8.6 The Work will be considered suitable for Substantial Completion when (1) all Systems are operational as shown on the Contract Documents; (2) all designated or required governmental inspections and certifications have been made and posted, including all applicable inspections and approvals by any governmental agency, unless such inspections or certifications are not the responsibility of the Contractor; and (3) all final finishes are in place, subject only to such Punch List work as can be performed without unduly interfering with the Owner's use of the Project.

§ 9.9 PARTIAL OCCUPANCY OR USE

§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Section 11.4.1.5 and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

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§ 9.9.2 Immediately prior to such partial occupancy or use, the Owner, Contractor and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

§ 9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

§ 9.10 FINAL COMPLETION AND FINAL PAYMENT

§ 9.10.1 Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

§ 9.10.1.1 The final payment of retained amount due the Contractor on account of the Contract shall not become due until the Contractor has furnished to the Owner, through the Architect, completion documents as enumerated below, and as elsewhere noted in the contract Documents:

.1 Three sets of As-built drawings showing actual construction of all portions of the Work and incorporating all changes and amendments thereto.
.2 Guarantees and Warranties required by specific Sections of the Specifications.
.3 Release and Waiver of Claims – General Contractor, Subcontractors, Sub-subcontractors or Material Suppliers, excluding claims subject to Sections 4.5 and 4.6.
.4 All mechanical and electrical installations, operating and maintenance manuals called for under the Specifications, including instructing the Owner's personnel in the operation of the various systems.
.5 All test reports and certifications required under the Mechanical and Electrical Specifications.
.6 All forms required to be completed by the Contractor by regulatory governmental agencies will need to be completed prior to Substantial Completion, with two (2) copies delivered to the Architect prior to release of final payment.
.7 Shop Drawing submittals in accordance with Article 3.
.8 A copy of the unconditional Occupancy Permit or Certificate of Compliance issued by the local Building Inspection Department having jurisdiction, unless such is not issued for any reason that is not the responsibility of the Contractor under this Contract.
.9 Manufacturer's current detailed installation instructions for fire dampers, ceiling radiation dampers, smoke dampers, and duct smoke detectors as applicable to the Project.
.10 Two copies of the equipment operational and maintenance manuals.

§ 9.10.1.2 In addition to the above, all other submission required by the other Articles and Sections of the Specifications, including the final Schedule, shall be in the possession of the Architect before approval of Final Payment. If the failure to achieve Final Completion is due to any cause that is not the responsibility of the Contractor under this Agreement, then in no event shall final completion be deemed not to have been achieved.

§ 9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a

bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

§ 9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

§ 9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from:

.1 liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;
.2 failure of the Work to comply with the requirements of the Contract Documents; or
.3 terms of special warranties required by the Contract Documents.

§ 9.10.5 Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

§ 10.1 SAFETY PRECAUTIONS AND PROGRAMS

§ 10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

§ 10.2 SAFETY OF PERSONS AND PROPERTY

§ 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

.1 employees on the Work and other persons who may be affected thereby;
.2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
.3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

§ 10.2.2 The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss. In the event that review, inspection or other action by regulatory agencies or other parties results in the imposition of fines, fees, or other costs due to the failure of the Contractor to comply with said applicable laws, ordinances, rules, regulations and lawful orders, the Contractor shall hold harmless the Owner from all consequences arising from the Contractor's noncompliance.

§ 10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

§ 10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall give the Owner reasonable advance notice and shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

§ 10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed

by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 3.18.

§ 10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

§ 10.2.7 The Contractor shall not load or permit any part of the construction or site to be loaded so as to endanger its safety.

§ 10.3 HAZARDOUS MATERIALS

§ 10.3.1 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Architect in writing.

§ 10.3.2 The Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to verify that it has been rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. The Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shut-down, delay and start-up, which adjustments shall be accomplished as provided in Article 7.

§ 10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.

§ 10.4 The Owner shall not be responsible under Section 10.3 for materials and substances brought to the site by the Contractor unless such materials or substances were required by the Contract Documents.

§ 10.5 If, without negligence on the part of the Contractor, the Contractor is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall indemnify the Contractor for all cost and expense thereby incurred.

§ 10.6 EMERGENCIES

§ 10.6.1 In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Section 4.3 and Article 7.

ARTICLE 11 INSURANCE AND BONDS

§ 11.1 CONTRACTOR'S LIABILITY INSURANCE

§ 11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

.1 claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;

.2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;

.3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;

.4 claims for damages insured by usual personal injury liability coverage;

.5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;

.6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;

.7 claims for bodily injury or property damage arising out of completed operations; and

.8 claims involving contractual liability insurance applicable to the Contractor's obligations under Section 3.18.

§ 11.1.2 The insurance required by Section 11.1.1 shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

§ 11.1.3 Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Section 9.10.2. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.

§ 11.2 OWNER'S LIABILITY INSURANCE

§ 11.2.1 The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance.

§ 11.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE

§ 11.3.1 ~~Optionally, the Owner may require the Contractor to purchase and maintain Project Management Protective Liability insurance from the Contractor's usual sources as primary coverage for the Owner's, Contractor's and Architect's vicarious liability for construction operations under the Contract. Unless otherwise required by the Contract Documents, the Owner shall reimburse the Contractor by increasing the Contract Sum to pay the cost of purchasing and maintaining such optional insurance coverage, and the Contractor shall not be responsible for purchasing any other liability insurance on behalf of the Owner. The minimum limits of liability purchased with such coverage shall be equal to the aggregate of the limits required for Contractor's Liability Insurance under Sections 11.1.1.2 through 11.1.1.5.~~

§ 11.3.2 ~~To the extent damages are covered by Project Management Protective Liability insurance, the Owner, Contractor and Architect waive all rights against each other for damages, except such rights as they may have to the proceeds of such insurance. The policy shall provide for such waivers of subrogation by endorsement or otherwise.~~

§ 11.3.3 ~~The Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insureds on the Contractor's Liability Insurance coverage under Section 11.1.~~

§ 11.4 PROPERTY INSURANCE

§ 11.4.1 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.4 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

§ 11.4.1.1 Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss.

§ 11.4.1.2 If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance which will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor in writing, then the Owner shall bear all reasonable costs properly attributable thereto.

§ 11.4.1.3 If the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles.

§ 11.4.1.4 This property insurance shall cover portions of the Work stored off the site, and also portions of the Work in transit.

§ 11.4.1.5 Partial occupancy or use in accordance with Section 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

§ 11.4.2 Boiler and Machinery Insurance. The Owner shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

§ 11.4.3 Loss of Use Insurance. The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. ~~The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.~~

§ 11.4.4 If the Contractor requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, the Owner shall, if possible, include such insurance, and the cost thereof shall be charged to the Contractor by appropriate Change Order.

§ 11.4.5 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section

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11.4.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

§ 11.4.6 Before an exposure to loss may occur, the Owner shall file with the Contractor a copy of each policy that includes insurance coverages required by this Section 11.4. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire, and that its limits will not be reduced, until at least 30 days' prior written notice has been given to the Contractor.

§ 11.4.7 Waivers of Subrogation. The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

§ 11.4.8 A loss insured under Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.4.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

§ 11.4.9 If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or in accordance with an arbitration award in which case the procedure shall be as provided in Section 4.6. If after such loss no other special agreement is made and unless the Owner terminates the Contract for convenience, replacement of damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with Article 7.

§ 11.4.10 The Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection is made, the dispute shall be resolved as provided in Sections 4.5 and 4.6. The Owner as fiduciary shall, in the case of arbitration, make settlement with insurers in accordance with directions of the arbitrators. If distribution of insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

§ 11.5 PERFORMANCE BOND AND PAYMENT BOND

§ 11.5.1 The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as ~~stipulated in bidding requirements or~~ specifically required in the Contract Documents on the date of execution of the ~~Contract~~Contract (see A101-1997, as amended for this Project.

§ 11.5.2 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall permit a copy to be made.

§ 11.5.3 If the Contractor requires any of its Subcontractors to obtain payment or performance bonds, the Contractor shall require that each Subcontractor obtain dual obligee bonds with the Owner as a named obligee.

ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

§ 12.1 UNCOVERING OF WORK

§ 12.1.1 If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if required in writing by the Architect, be uncovered for the Architect's examination and be replaced at the Contractor's expense without change in the Contract Time.

§ 12.1.2 If a portion of the Work has been covered which the Architect has not specifically requested to examine prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such Work is not in accordance with the Contract Documents, correction shall be at the Contractor's expense unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.

§ 12.2 CORRECTION OF WORK

§ 12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION

§ 12.2.1.1 The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense.

§ 12.2.2 AFTER SUBSTANTIAL COMPLETION

§ 12.2.2.1 In addition to the Contractor's obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents or found not to function as required due to the Contractor's failure to comply with the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the ~~condition. During condition.~~ During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor ~~and to make a claim for breach of warranty.~~ If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.4.

§ 12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work.

§ 12.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Section 12.2.

§ 12.2.3 The Contractor shall remove from the site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

§ 12.2.4 The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

§ 12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

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§ 12.2.5 The obligations described herein shall be in addition to all other obligations and warranties required in the Contract Documents. The one-year obligation to correct work, as described herein shall not limit, alter, or prejudice any other right or remedy available to the Owner under the Contract Documents or implied by law. All of the Owner's rights under this one-year warranty are cumulative, and in addition to, all other rights and remedies under the Contract.

§ 12.3 ACCEPTANCE OF NONCONFORMING WORK

§ 12.3.1 If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made. The Owner shall not be deemed to have elected to accept defective work under this Section 12.3.1, or otherwise under the Contract Documents, unless such election is made in writing by the Owner specifically describing the Work that is to be accepted, and identifying any credit the Owner as a result of such acceptance.

ARTICLE 13 MISCELLANEOUS PROVISIONS

§ 13.1 GOVERNING LAW

~~§ 13.1.1 The Contract shall be governed by the law of the place where the Project is located.~~

§ 13.1.1 The Contract shall be governed by the law of the State of South Carolina. Any legal proceeding arising out of or relating to this Agreement shall include, by consolidation, joinder, or joint filing, any additional person or entity not a party to this Agreement to the extent necessary to the final resolution of the matter in controversy.

§ 13.2 SUCCESSORS AND ASSIGNS

§ 13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Section 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

§ 13.2.2 The Owner may, without consent of the Contractor, assign the Contract to an institutional lender providing construction financing for the Project. In such event, the lender shall assume the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate such assignment.

§ 13.3 WRITTEN NOTICE

§ 13.3.1 Written notice shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by registered or certified mail to the last business address known to the party giving notice.

§ 13.4 RIGHTS AND REMEDIES

§ 13.4.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

§ 13.4.2 No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

§ 13.5 TESTS AND INSPECTIONS

§ 13.5.1 Tests, inspections and approvals of portions of the Work required by the Contract Documents or by laws, ordinances, rules, regulations or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. The Owner shall bear costs of tests, inspections or approvals which do not become requirements until after bids are received or negotiations concluded.

§ 13.5.2 If the Architect, Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Section 13.5.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. Such costs, except as provided in Section 13.5.3, shall be at the Owner's expense.

§ 13.5.3 If such procedures for testing, inspection or approval under Sections 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses shall be at the Contractor's expense.

§ 13.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

§ 13.5.5 If the Architect is to observe tests, inspections or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

§ 13.5.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

§ 13.6 INTEREST

§ 13.6.1 Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

§ 13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

§ 13.7.1 ~~As between the Owner and Contractor:~~

~~.1 Before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any~~ The applicable ~~statute~~ statutes of ~~limitations~~ limitation shall commence to run and any ~~alleged cause~~ causes of action shall be deemed to have accrued in accordance with ~~any and all events not later than such date of Substantial Completion;~~

~~.2 Between Substantial Completion and Final Certificate for Payment. As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and~~

~~.3 After Final Certificate for Payment. As to acts or failures to act occurring after the relevant date~~ laws of ~~issuance of the final Certificate for Payment, any applicable statute~~ State of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of ~~any act or failure to act by the Contractor pursuant to any Warranty provided under Section 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Section 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.~~ South Carolina.

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

§ 14.1 TERMINATION BY THE CONTRACTOR

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

.1 issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped;

.2 an act of government, such as a declaration of national emergency which requires all Work to be stopped;

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.3 because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or

.4 the Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Section 2.2.1.

§ 14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Section 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and ~~damages~~ damages related to the Work actually performed, as well as the cost of any specially fabricated materials and costs unavoidably incurred in canceling purchase orders and subcontracts, paying restocking charges, making the Project safe, and demobilizing from the job site.

§ 14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3.

§ 14.2 TERMINATION BY THE OWNER FOR CAUSE

§ 14.2.1 The Owner may terminate the Contract if the Contractor:

1 persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;

.2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;

.3 persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or

.4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

§ 14.2.2 When any of the above reasons exist, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;

.2 accept assignment of subcontracts pursuant to Section 5.4; and

.3 finish the Work by whatever reasonable method the Owner may deem expedient. Upon request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 14.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

§ 14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the ~~Owner. The amount to be paid to the Contractor or~~ Owner, ~~as the case may be, shall be certified~~ together with all actual damages incurred by the ~~Architect, upon application, and this obligation for payment shall survive termination of the Contract.~~ Owner.

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§ 14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent:

.1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or

.2 that an equitable adjustment is made or denied under another provision of the Contract.

§ 14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall:

.1 cease operations as directed by the Owner in the notice;

.2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and

.3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work ~~executed~~ executed (including all retainage to the date of termination), and costs incurred by reason of such termination, including, but not limited to, all demobilization costs, costs of leaving the site in a safe condition, restocking charges, costs for specially fabricated materials that cannot be returned or used on other projects, along with reasonable overhead and profit on the Work ~~not executed~~ executed prior to the date of termination and a lump sum termination fee of $150,000.00.

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EXHIBIT F

March 7, 2006

Superior Construction
3712-C Forestbrook Road
Myrtle Beach, SC 29588
Attention: Larry Taylor

RE: Concord & Cumberland, LLC

Dear Larry,

Thank you for all of your work and Superior's commitment to the Concord & Cumberland project. We look forward to working with Superior on this unique development and feel that we will all be proud of this project.

The attached AIA Contract reflects revisions agreed upon by both Superior Construction and C & C. The document is a red lined version with changes dated March 7, 2006 and initialed by our representatives. We submit this letter as clarifications to the contract executed by Superior Construction dated February 28, 2006.

1. **AIA Document A101-1997**
   Page 2, **ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION**
   The contract start date will remain as March 1, 2006. The hand written comment by Superior stating "letter to owner or issue of building permit" will be omitted. The demolition permit was approved on February 24, 2006. The foundation permit was approved on February 28, 2006. The building permit will be issued upon the Board of Architectural Review approval of the mock-up panel by the general contractor.

2. **AIA Document A101-1997**
   Page 7, **ARTICLE 9 INSURANCE AND BONDS**, Section 9.2.1
   Commercial general liability, line item number 4. The wording "or the City of Charleston" will be reinstated to the contract. This wording must remain to meet the City of Charleston requirements for in turn granting easements for construction, parking and storage, utility, maintenance, crane encroachment and indemnity, and insurance.

3. **AIA Document A201-1997**
   Page 16, **ARTICLE 3.10.4.7**
   A portion of this paragraph has been changed with white out. Although the original wording was not altered, a duplicate page located behind page 16 shows the correct language that will replace it.

4. **AIA Document A201-1997**
Page 19, **ARTICLE 3 CONTRACTOR,** Section 3.18.3
This wording must remain to meet the requirements of the City of Charleston to grant easements for construction, parking and storage, utility, maintenance, crane encroachment and indemnity, and insurance. All omitted wording by Superior Construction is to be reinstated. "To the fullest extent permitted by law, the contractor shall indemnify and hold harmless the owner and the City of Charleston from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from bodily injury, sickness, disease or death, or injury or destruction of property caused by the negligent acts or omissions of the contractor, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder."

Please contact me with any further questions you may have. We look forward to the construction phase of this project.

Sincerely,

Robert M. Mundy, Jr.

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

CONCORD AND CUMBERLAND HORIZONTAL PROPERTY REGIME,

And

THOMAS R. MATHER,

And

BETTY Y. SEGAL,

And

SIGNATURE CHARLESTON, LLC and WADE ROBINSON,

And

JAMES C. KIRKPATRICK,

And

PAUL A. BRIM,

And

FRED RAPPAPORT and JOYCE RAPPAPORT,

And

THOMAS R. DEBNAM, as TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM,

And

PAMELA L. VAUGHAN,

Plaintiffs,

vs.

Civil Action No. 2010-CP-10-2271

Civil Action No. 2010-CP-10-2919

Civil Action No. 2010-CP-10-3206

Civil Action No. 2010-CP-10-3207

Civil Action No. 2010-CP-10-3208

Civil Action No. 2010-CP-10-3209

Civil Action No. 2010-CP-10-3210

Civil Action No. 2010-CP-10-9580

Civil Action No. 2010-CP-10-9767

MUHLER'S AMENDED NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

CONCORD & CUMBERLAND, LLC, *et al.*,

Defendants.

TO: CHRIS MAJURE, ESQUIRE AND HENRY BROWN, ESQUIRE:

Please take notice that the Defendant The Muhler Company, Inc. will be move before The Honorable Clifton Newman at a time and date set by Judge Newman for an Order that grants Partial Summary Judgment to Defendant Muhler on all cross-claims alleged against Muhler by Defendant Superior Construction Corporation and Defendant Concord & Cumberland, LLC. This Motion is based upon Rule 56 of the South Carolina Rules of Civil Procedures. The grounds for this motion are that: 1) neither the Subcontract nor the 2007 Agreement indemnifies Superior or C&C for their own wrongdoing, and that the 2007 Agreement fails for lack of consideration and impossibility; 2) that neither Superior nor C&C is entitled to equitable indemnification because neither can prove it has "clean hands"; and 3) that C&C is not entitled to contribution because it failed to extinguish Muhler's exposure to Plaintiffs. Defendant Muhler reserves the right to submit a Memorandum of Law in support of the Motion for Partial Summary Judgment along with exhibits.

MCANGUS GOUDELOCK & COURIE, L.L.C.

Peter Gunnar Nistad
Post Office Box 650007
735 Johnnie Dodds Blvd, Suite 200 (29464)
Mt. Pleasant, South Carolina 29465
(843) 576-2900

ATTORNEYS FOR DEFENDANT THE MUHLER COMPANY, INC.

July 14, 2014

10-2271

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

CONCORD AND CUMBERLAND HORIZONTAL PROPERTY REGIME,

And

THOMAS R. MATHER,

And

BETTY Y. SEGAL,

And

SIGNATURE CHARLESTON, LLC and WADE ROBINSON,

And

JAMES C. KIRKPATRICK,

And

PAUL A. BRIM,

And

FRED RAPPAPORT and JOYCE RAPPAPORT,

And

THOMAS R. DEBNAM, as TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM,

And

PAMELA L. VAUGHAN,

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC, *et al.*,

Defendants.

Civil Action No. 2010-CP-10-2271

Civil Action No. 2010-CP-10-2919

Civil Action No. 2010-CP-10-3206

Civil Action No. 2010-CP-10-3207

Civil Action No. 2010-CP-10-3208

Civil Action No. 2010-CP-10-3209

Civil Action No. 2010-CP-10-3210

Civil Action No. 2010-CP-10-9580

Civil Action No. 2010-CP-10-9767

THE MUHLER COMPANY, INC'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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JULIE J. ARMSTRONG
CLERK OF COURT
BY_____

Defendant, The Muhler Company, Inc. ("Muhler" or "Defendant") respectfully submits this Memorandum of Law in support of its Motion for Partial Summary Judgment, filed October 17, 2013 ("Motion") against Superior Construction Corporation's ("Superior") and Concord and Cumberland, LLC ("C&C"). Muhler's Motion is based, in part, upon two agreements: an original subcontract between Superior and Muhler, dated May 17, 2006 ("Subcontract") (Att. A), and a later agreement, dated June 11, 2007, among Weather Shield Manufacturing, Inc. ("Weather Shield"), Muhler and Superior ("2007 Agreement") (Att. B).

Background

This is a construction defect case relating to a condominium project located at the corner of Concord and Cumberland Streets in Charleston, South Carolina ("Subject Property"). C&C was the original owner and developer of the property. Superior was the general contractor for construction of the building shell. (Subcontract, Art. 1, Att. A). Among others, C&C hired J. Davis Architects, PLLC ("JDavis") as the architect for the project, and Sutton-Kennerly Associates ("SKA") as waterproofing experts. (Andrews Dep. p. 24, lines 4-14, Att. C) (Hodge Dep. p. 37, lines 10-12, Att. D).

Superior entered into the Subcontract with Muhler to supply and install windows and doors manufactured by Weather Shield. While the Subcontract called for the installation of windows, the scope of that installation was limited to setting windows in rough openings which were prepared by Superior and/or its subcontractors. (*See* the Affidavit of Ron Sykora, Att. E) (Andrews Dep. p. 372, line 18 – 373, line 1, Att. C) (Clardy Dep. p. 436, lines 17-22, Att. F). Muhler employed two different subcontractors, In the Wind and Watts Builders, Inc., to install the windows. In the Wind also worked as

a direct subcontractor for Superior by preparing rough openings that included the installation of sill pans and bucks within the pans. (Lawson Dep. p. 25, lines 1-6, Att. G) (Id., Dep. p. 28, lines 4-8) (Clardy Dep. p. 441, lines 8-18, Att. F (Mr. Clardy clarifying that In the Wind was serving as Superior's direct subcontractor when it was installing rough openings for the windows).

Muhler did not take on any design responsibility for the project but, instead, looked to the architect for design and to the window manufacturer, Weather Shield, to provide installation instructions. Mr. Sykora, Muhler's vice president of new construction sales, stated that, "[a]s the supplier of the windows and the installer of the windows, we look to the design professional to create an installation procedure and detail and then we perform that detail procedure. That's what was done here at this project." (Sykora Sept 24, 2012 Dep. p. 53, lines 16-21, Att. I-1) (Id., p 61, lines 18-22) (Sykora May 24, 2013 Dep. p. 24, line 18 – 26, line 22, Att. I-2). Mr. Andrews, project manager with Estates Management,[1] testified that Muhler "adhered to those instructions." (Andrews Dep. p. 375, line 18 – 376, line 3, Att. C).

At some point during a mock-up of a wall, it became apparent that the proposed method for installing the windows did not conform to Weather Shield's installation instructions. The main problems involved Window Shield's requirement that the window be installed against the buck, and an issue with the pans. (Lawson Dep. p. 18, line 22 – 19, line 25, Att. G). In meetings where these problems were discussed, Brad Lawson, Muhler's production manager, confirmed that Muhler served as "the referee between Superior, JDavis and Sutton & Kennerly," to "make sure that Weather Shield's installation documents were complied with .... So we were there to get these parties to

[1] Estates Management provided project management for C&C on the Subject Property.

agree to how they wanted to put it in, as long as it complied with Weather Shield's documents." (Id., p. 66, line 15 – 67, line 5).

Mr. Lawson testified that, "the design that Sutton-Kennerly and Estates and Superior came up with, I didn't have confidence in it that it was going to be waterproof." Although Muhler voiced its objection, it used the installation design provided to it because, "at that point, they're the experts, that's their building, this is how they wanted it put in." (Lawson Dep. p. 184, lines 4-13, Att. G) (Trial Exh. 356, Att. H). Mr. Sykora explained that Muhler "just, [was] being instructed how to put windows and doors in. Certainly ... this particular installation with the bucks sitting in a pan and attached as they were in a pan was something we hadn't seen before, but we're not design professionals. We're not waterproofing professionals. So we wouldn't be interjecting what we felt to be a proper waterproofing method." (Sykora Sept 24, 2012 Dep. p. 135, lines 10-18, Att. I-1). Mr. Chip Clardy, Superior's president during construction of the Subject Property, confirmed that Superior simply was "told how to" install the windows in the bucks that were sitting in the pans. (Clardy Dep. p. 672, line 8 – 674, line 7, Att. F (agreeing that "Superior was told by the architect we're going to use a pan and we're going to put two bucks in the pan and then we're going to put the window – attach the window to those bucks that are in the pan").

After twenty-five windows were installed, objections were raised by C&C and/or the architect, and Muhler was asked to remove those windows and reinstall them following a different protocol. Mr. Clardy testified that the procedure for installing windows from that point forward came from either C&C and/or the architect, and also agreed that any problems with the design of how the windows were to be installed was

the responsibility of C&C and/or the architect. (Clardy Dep. p. 677, line 3 – 678, line 15, Att. F) (Sykora Sept 24, 2012 Dep. p. 53, line 16 – 54, line 18, Att. I-1).

Sometime in 2007, the Subject Property began to experience water intrusion issues, including but not limited to leaking at the windows and doors. Weather Shield, Superior and Muhler entered into the 2007 Agreement, under which C&C is identified as a third party beneficiary, to address the issues of leaking windows. The 2007 Agreement required, among other things, that Superior satisfy any outstanding balances due to Muhler related to the subcontract. (2007 Agreement, Section 10, Att. B). Superior has not complied with that provision of the contract. (*See* Affidavit of Tali Vereen, Att. J).

The individual units in the Subject Property were completely sold out before construction was finished. (Hodge Dep. p. 60, lines 8-10, Att. D). Control over the Subject Property was transferred from C&C to the unit owners in March 2008. (Receipt & General Release, p. 2, Att. K).

Ken Lies was brought on site in late 2008 to develop a "remedy [for] concerns that were being expressed regarding the windows." (Lies Dep. p. 9, line 12 – 10, line 19, Att. L). He developed what later became known as the Ken Lies repair protocol, (Att. M), which was circulated to all the parties and then applied to three windows in 2009. (Lies Dep. p. 47, lines 1-11, Att. L). With some adjustments, the windows produced generally passing results. (Id., p. 47, line 12 – 49, line 21). The Ken Lies repair protocol did not require removing the windows from their openings. (Id., p. 132, lines 24-25).

In February 2009, Myles Glick was engaged by the Plaintiffs "to find the causes of the water intrusion into the exterior skin of the building and ultimately into the units." (Glick Dep. p. 25, lines 1-3, Att. N). Significantly, Mr. Glick testified that he was

engaged to examine the Subject Property and provide an opinion as to the problems with leaking windows. However, on his first trip to the Subject Property, he immediately noticed that there was no flashing and called Plaintiffs' counsel and told him, "I think you got more problems than you do just trying to keep water out of these windows. I think you got some other problems. So I saw it when I got out of my car." (Id., p. 112, lines 6-17) (Id., p. 552, lines 4-14) (Id., p. 665, lines 1-25). Ultimately, Mr. Glick testified that there were problems associated with almost every "trade that touched the building." (Id., p. 734, lines 2-13).

In 2010, the Plaintiffs began filing lawsuits against Superior and C&C, along with numerous other defendants.[2] The Plaintiffs complained about specific issues with various components of the Subject Property, including: 1) the Stucco system, 2) Windows, 3) Wall Sheathing, 4) Brick, 5) Balconies, 6) Roof, and 7) Miscellaneous. (Amended Complaint, ¶ 49, Att. O). The Amended Complaint alleged numerous causes of action against Superior and C&C that had nothing to do with the windows and/or Muhler's work under the Subcontract. More importantly, a number of the Plaintiffs' complaints that were related to windows or leaking are directly attributable to failures or negligence on the part of C&C, SKA, JDavis, Superior and/or other subcontractors.

C&C filed an Answer which contained a third-party complaint against Muhler. (Answer of Concord & Cumberland, LLC and Crossclaims against Superior Construction Corporation; Weather Shield Mfg., Inc. and J. Davis Architects, PLLC and Third-Party Complaint against The Muhler Company, Inc., et al., filed June 11, 2010 ("C&C Third-

[2] The complaints were later amended to add parties and other allegations and claims. For purposes of completeness, Muhler refers herein to the Amended Complaint of Plaintiff Concord and Cumberland Horizontal Property Regime, filed June 1, 2012 ("Amended Complaint"), Att. O), for substantive allegations by the Plaintiffs.

Party Complaint"), Att. P). Among other allegations, claims and cross-claims, C&C's First Cause of Action alleged that it was entitled to equitable indemnity from Muhler, as well as from other third-party defendants. Its Fourth Cause of Action alleged C&C was entitled to contractual indemnity from Muhler. And its Sixth Cause of Action alleged C&C was entitled to contribution from Muhler.

Superior also filed an Answer which contained a third-party complaint naming Muhler. (Superior Construction Corporation's Answer, Cross Claims, and Third Party Complaint, filed May 27, 2010 ("Superior's Third Party Complaint"), Att. Q). Superior's First Cause of Action alleged that it was entitled to full contractual indemnity from Muhler, among others. Superior's Second Cause of Action alleged that it was entitled to equitable indemnity from Muhler.

STANDARD FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c), SCRCP, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 557, 671 S.E.2d 79, 84 (Ct. App. 2008). Once the party moving for summary judgment meets the initial burden of showing it is entitled to summary judgment as a matter of law, the opposing party must then present specific facts showing genuine issues for trial. Gauld, 380 S.C. at 558-559, 671 S.E.2d at 85.

ARGUMENTS

I. **Neither the Subcontract nor the 2007 Agreement provides indemnity to Superior or C&C for their own wrong-doing.**

Although under South Carolina law parties can agree to indemnify each other for various types of damages or losses, neither of the agreements at issue here indemnify either Superior or C&C for their own negligence. In South Carolina, "a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in **clear and unequivocal terms.**" Laurens Emerg. Med. Spec. v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) (emphasis added); *see also* Murray v. The Texas Co., 172 S.C. 399, 402, 174 S.E. 231, 232 (1934 (finding "broad and comprehensive" language was insufficient to prove the contract relieved a party from its own negligence). Indemnification for one's own negligence is "not favored in the law," and because "[l]iability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary ... there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation, and no inference from words of general import can establish it." 41 Am. Jur. 2d Indemnity 16.

Other states are in accord. "Indemnification agreements seeking to indemnify a party for losses resulting from that party's own negligent acts are not favored in the law." Braegelmann v. Horizon Dev. Co., 371 N.W.2d 644, 646 (Minn. Ct. App. 1985). As a consequence, an intent to indemnify a party from the consequences of its own negligence must be explicit and be "specifically stated in the four corners of the document." Cabo Constr., Inc. v. R. S. Clark Constr., Inc., 227 S.W.3d 314, 317 (Tex. App. 2007). In fact, "if parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and

unequivocal language. No inference from words of general import can establish such indemnification." Greer v. City of Philadelphia, 795 A.2d 376 (Pa. 2002), *quoting* Perry v. Payne, 66 A. 553 (Pa. 1907) ("there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation"); *see also* Nusbaum v. Kansas City, 100 S.W.3d 101, 106 (Mo. 2003) ("an indemnification contract 'will not be construed so as to indemnify one against loss or damage resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms'"); East-Harding, Inc. v. Horace A. Piazza & Assoc., 91 S.W.3d 547, 551 (Ark. Ct. App. 2002) (a "subcontractor's intention to obligate itself to indemnify a prime contractor for the prime contractor's own negligence must be expressed in clear and unequivocal terms and to the extent that no other meaning can be ascribed"); Hagerman Constr. Corp. v. Long Elec. Co., 741 N.E.2d 390, 392 (Ind. Ct. App. 2000) (because indemnification clauses indemnifying a party for its own negligence are disfavored as "a harsh burden that [an indemnifying] party would not lightly accept," any such provision must "stated in clear and unequivocal terms"); Dillard v. Shaughnessy, Fickel & Scott Architects, Inc., 884 S.W.2d 722, 724 (Mo. Ct. App. 1994) (applying Kansas law) (under general contract construction, indemnification clauses do not indemnify for "damages caused by the indemnitee's own negligence unless the agreement specifically states").

Because courts require clear and unequivocal language in order to find an agreement to indemnify a party for its own negligence, "indemnification contracts claimed to contain these provisions are construed more strictly than other contracts." Maxim Tech., Inc. v. City of Dubuque, 690 N.W.2d 896, 901 (Iowa 2005); *see also*

Laurens Emerg. Med. Spec., 355 S.C. at 111, 584 S.E.2d at 378-379 (applying "the rule requiring strict construction of a contract containing an indemnity provision purporting to relieve an indemnitee from the consequences of its own negligence"); *see also* McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005) (contract provisions "that seek to exculpate a party from liability for the party's own negligence are not favored by the law," and are strictly construed because "such provisions tend to induce a want of care").

A. The Subcontract does not obligate Muhler to indemnify either Superior or C&C for their own wrong-doing.

There are two contractual indemnity provisions at issue in this case. The first is contained in the initial Subcontract between Superior and Muhler. (Subcontract, Att. A). This is the form clause for AGC Document No. 600, Subcontract for Building Construction, August 1984 by the Associated General Contractors of America. Article 12.1 of the Subcontract provides:

> 12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, and Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, **arising out of or resulting from the performance of the Subcontractor's Work** provided that
>
> > (a) any such claim, damage, loss, or expenses is attributable to ... injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, **to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor** or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, **regardless of whether it is caused in part by a party indemnified hereunder.**

> (b) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Article 12.

(Subcontract, ¶ 12.1, Att. A) (emphasis added). Courts uniformly interpret this language as **not** providing indemnification for the indemnitee's own negligence. *See, e.g.*, Braegelmann, 371 N.W.2d at 646-647 (interpreting same operative language as not providing indemnification to the general contractor for its own negligence); Mautz v. J.P. Patti Co., 688 A.2d 1088, 1092-1093 (N.J. Super. Ct. App. Div. 1997 (finding virtually identical language did not indemnify indemnitee for its own negligence but instead provided indemnification "only to the extent the [indemnitor's] negligence contributed to the loss"); Cabo Constr., 227 S.W.3d at 317-318 (finding same language did not expressly state that the subcontractor would indemnify the contractor for the contractor's own negligence); Brown v. Boyer-Washington Blvd Assoc., 856 P.2d 352, 355 (Utah 1993) (limiting similar indemnification language to damages caused in whole or in part by acts of the subcontractor); MT Builders, LLC v. Fisher Roofing Inc., 197 P.3d 758, 765 (Ariz. Ct. App. 2008) (explaining that identical indemnification language created "a comparative fault or negligence arrangement whereby the indemnitor's liability is limited 'to the extent' it and its supervisees were at fault"); Frank v. MSI Constr. Mgrs., Inc., 527 N.W.2d 79, 81 (Mich. Ct. App. 1995) (construing practically identical language to mean the subcontractor is liable to the general contractor only "to the extent of its own negligence but is not required to indemnify" the general contractor for the general contractor's own negligence); Glendale Constr. Servs., Inc. v. Accurate Air Syst., Inc., 902 S.W.2d 536, 539 (Tex. Ct. App. 1995) (holding that nearly identical language does not indemnify the indemnitee for its own negligence); Hagerman, 741 N.E.2d at 393-394

(similar language in AIA standard construction form contract does not "clearly and unequivocally" provide coverage for indemnitee's own negligence).

As the Missouri Supreme Court explained in a case containing language similar to Article 12.1 of the Subcontract, the "phrase 'to the extent caused' expresses an intention to limit the indemnitor's liability to the portion of fault attributed to the indemnitor .... The preferred construction of the indemnification provision at issue, one that provides a reasonable meaning to each phrase of the provision, requires nothing more than that [the indemnitor] indemnify [the indemnitee] for [the indemnitor's] negligence even if [the indemnitee] participates in part in [the indemnitor's] negligent conduct. To hold otherwise would make the intended expression to limit liability to the acts of indemnitor meaningless." Nusbaum, 100 S.W.3d at 106-107. Courts have routinely held that the language "to the extent" in this indemnification clause means that the indemnifying party is liable to the indemnitee "to the extent of its own negligence but is not required to indemnify [the indemnitee] for [the indemnitee's] negligence." Frank, 527 N.W.2d at 81.[3] This Court should reach the same conclusion here.

B. The 2007 Agreement does not obligate Muhler to indemnify Superior or C&C for their own wrong-doing.

Even though the 2007 Agreement contains somewhat broader indemnification language than the Subcontract, it does not state clearly and explicitly that Muhler agrees to indemnify either Superior or C&C for their own negligence and/or wrong-doing. Instead, Section 11 of that Agreement provides:

> 11. In the event either Superior or Concord and Cumberland, LLC, are sued hereafter by or on behalf of any subsequent owner, alleging that one

[3] In Hagerman, the Indiana court explained that the "phrase 'to the fullest extent permitted by law' is a preservation clause that preserves [the indemnitee's] rights under the law to the extent that [the indemnitor] and/or its sub-subcontrators, etc. are negligent." 741 N.E.2d at 394.

> or more of the windows and/or doors-do not comply with the original and amended Contract Documents, or are defectively installed, **Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations** and will pay **all damages (including reasonable attorneys' fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration**, liability incurred by either or both as consequence including, but not limited to, costs and attorneys' fees, any remedial costs of expert witnesses, cost of arbitration and all other damages incurred.

(2007 Agreement, Section 11, Att. B) (emphasis added).

First, to the extent this provision purports to indemnify Superior or C&C "unconditionally," it is unconscionably broad. *See* Fisher v. Stevens, 355 S.C. 290, 296, 584 S.E.2d 149, 152 (Ct. App. 2003) (holding that an overly broad indemnification provision "offend[s] notions of public policy"). Although Fisher involved a so-called exculpatory contract, or waiver, the reasoning applies equally here where the phrase "unconditionally" is as objectionably broad, if not broader, as the phrase at issue there, which released "'any person in any restricted area" from liability." Id.[4]

Second, Section 11 of the 2007 Agreement does not clearly, explicitly or unequivocally state that Muhler is agreeing to indemnify either Superior or C&C for their own negligence. Although "formulaic language expressly stating that 'X indemnifies Y for Y's own negligence' is not mandatory," the "agreement **must speak to the negligence of the indemnitee.**" Snohomish County Pub. Transp. Benefit Area Corp. v FirstGroup America, Inc., 271 P.3d 850, 854 (Wash. 2012) (emphasis added). Here, as was the case in Snohomish County, the indemnity provision "does not tell a court 'clearly

[4] In addition, Section 32-2-10 provides, in pertinent part, that "a promisee or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building ... purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of ... property damage proximately caused by or resulting from the sole negligence of the promise, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable." S.C. Code Ann. § 32-2-10 (2013).

and unequivocally' that the parties considered the effect of the negligence of the indemnitee and intended to indemnify for the indemnitee's own negligence." 271 P.3d at 862. Indemnity provisions promising to indemnify "from and against any and all claims," or where the indemnitor assumed "all responsibility for claims asserted by any person whatever," are "general terms" that are "insufficiently clear and unequivocal," to provide indemnification for the indemnitee's own negligence. Cox Cable Corp. v. Gulf Power Co., 501 So.2d 627, 629 (Fla. 1992). The use of the term "unconditionally" similarly does not express any intent to indemnify Superior for its own negligence.

Two Texas cases provide examples of indemnification agreements that evidence an express intent to indemnify an indemnitee for its own negligence. *See* Enserch Corp. v. Parker, 794 S.W.2d 2 (Tex. 1990) and Atlantic Richfield Co. v. Petroleum Personnel, Inc., 768 S.W.2d 724 (Tex. 1989). In Enserch, the indemnification clause provided that J.W. "Bill" Christie, Inc., assumed "entire responsibility and liability for any claim or actions based on or arising out of injuries ... sustained or alleged to have been sustained in connection with" Christie's performance of the contract **"regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of [Enserch]**, [Enserch's] representative, or the employees, agents, invitees, or licensees thereof. [Christie] further agrees to indemnify and hold harmless [Enserch] ... in respect of any such matters ..." 794 S.W.2d at 6-7 (emphasis added). In Atlantic Richfield, the Contractor agreed "to hold harmless and unconditionally indemnify the Company against and for all liability, cost, expenses, claims and damages which [the Company] may at any time suffer or sustain or become liable for by reason of any accidents, damages or injuries ... in any matter arising from the work performed hereunder, *including but not limited to*

any negligent act or omission of [the Company], its officers, agents or employees ..." 768 S.W.2d at 724 (emphasis in original). The Court held that the italicized language was sufficient to give the indemnitor notice that he was agreeing to indemnify the Company for its own negligence. Id., at 726. The Texas Court did **not** find significant or rely in any way on the inclusion of the word "unconditionally" in its analysis of whether the indemnity provision covered the indemnitee for its own negligence.

The use of the term "unconditionally" could mean many things[5] but does not, on its face, indicate Muhler ever intended to indemnify Superior or C&C for their own negligence. In fact, indemnity agreements are strictly construed against the party seeking to be indemnified. *See* Federal Pac. Elec. v. Carolina Prod. Enterprise, 298 S.C. 23, 28-29, 378 S.E.2d 56, 58-59 (Ct. App. 1989); *see also* East-Harding, 91 S.W.3d at 551 (same); Frank, 527 N.W.2d at 81 (construing "the contract most strictly against the party who is the indemnitee"). As noted above, indemnification agreements purporting to indemnify an indemnitee for its own negligence are even more strictly construed. Maxim Tech., 690 N.W.2d at 901; McCune, 364 S.C. at 248, 612 S.E.2d at 465. Applying this construction principle to the 2007 Agreement inevitably results in the conclusion that Section 11 does not cover Superior or C&C for their own negligence.

Third, the plain language of the 2007 Agreement provides that Muhler will indemnify Superior or C&C for "all damages (including reasonable attorneys' fees) incurred by either or both ... as determined by a court of competent jurisdiction or award of arbitration." (2007 Agreement, Section 11, Att. B). This language clearly and

[5] For instance, the parties' intent may have been that Muhler would indemnify Superior or C&C for the acts of Weather Shield and/or In the Wind and/or Watts Builders, regardless of whether Muhler was also negligent. Or, the parties may have intended that Muhler would indemnify Superior or C&C regardless of whether Muhler was made a party to the suit.

unambiguously limits damages payable under that provision, including attorneys' fees, to those determined by a court or arbitrator. *See* MT Builders, 197 P.3d at 763 (recognizing that some indemnification clauses limit or restrict losses to those incurred by an award or judgment). Under Section 11, the term "damages" specifically is modified by the phrase "as determined by a court of competent jurisdiction or award of arbitration." Here, there has been no court determination of either Superior's or Muhler's liability, which Mr. Clardy conceded, (Clardy Dep. p. 739, lines 9-16, Att. F), or of C&C's liability. Therefore, no obligation to indemnify either Superior or C&C has arisen in this case.

This Court should hold, as a matter of law, that neither the Subcontract nor the 2007 Agreement indemnifies Superior or C&C for their own negligence.

C. The 2007 Agreement fails for lack of consideration and impossibility.

Even if the 2007 Agreement were deemed to provide indemnification for Superior's or C&C's own negligence, which Muhler strenuously denies, that Agreement fails for lack of consideration and impossibility. As to lack of consideration, Section 10 of the 2007 Agreement provides that:

> In exchange for the payment by Superior of all amounts due Muhler in accordance with the Subcontract Agreement and in accordance with the terms of the Memorandum of Understanding executed by Superior and Muhler on June 7, 2007, Muhler agrees that it will complete the installation of all uninstalled products and accessories promptly upon execution of this Agreement ..."

(2007 Agreement, Section 10, Att. B). The referenced Memorandum of Understanding, dated June 7, 2007 specifically states that "Superior will deliver a check to Muhler for $120,745.00 immediately upon receipt of" referenced performance bonds. (Att. R).[6] The

[6] In fact, Mr. Andrews characterized the 2007 Agreement among Superior, Weather Shield and Muhler as a "payment agreement." (Andrews Dep. p. 297, lines 4-8, Att. C) (*see also* Affidavit of Todd R. Meyer, Esq., dated May 7, 2014, ¶¶ 8, 15, Att. S (explaining that one of the purposes

performance bond was delivered by Muhler but Superior has never made the promised payment. (*See* Affidavit of Tali Vereen, Att. J). As Muhler was never paid pursuant to this promise, the 2007 Agreement lacks consideration.

It is important to note in this respect that Mr. Sykora explained that Superior failed to timely pay Muhler even before "any problems with the windows and doors and we were induced to get into this agreement so that we would get paid for the work that we had already done." (Sykora Sept 24, 2012 Dep. p. 164, lines 15-19, Att. I-1). Superior "was withholding payment prior to any window tests. They weren't paying us. They weren't performing their portion of their contract. They then – once the water tests came up, they used that as an excuse not to pay us any more money, but they were in default ... way before the tests." (Id., p. 167, lines 7-15). Mr. Clardy confirmed. (Clardy Dep. p. 478, line 3 – 479, line 17, Att. F (explaining that in January of 2007, Muhler had not been paid and Mr. Clardy did not know of a reason why Muhler was not paid at that time)) (Id., p. 480, lines 19-24).[7]

Furthermore, actions and positions taken by Superior and/or C&C made Muhler's performance under the 2007 Agreement impossible. Muhler agreed "to remedy any defects in the installation of the windows." (June 2007 Agreement, Section 5, Att. B; *see also* Section 9 (Muhler agreeing "that in the event of any future window or door failure or defect in installation, that Weather Shield will repair or replace any defective window or door, and Muhler will repair any other component of the building damaged in the process

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of the 2007 Agreement was to address "Superior's failure to pay Muhler for amounts due pursuant to its construction subcontract," and that Superior's promise to pay amounts due "was a crucial component of the deal")).

[7] Muhler also was never paid for the 25 windows it was instructed to remove and reinstall so that the bucking configuration could be altered. (Sykora Sept 24, 2012 Dep. p. 122, lines 2-13, Att. I-1).

of repairing or replacing such window or door installation")). Even though Mr. Lies developed a protocol for repairing the windows that proved to be successful, (Att. M (Protocol)) (Lies Dep. p. 262, lines 22-25, Att. L),[8] Muhler was not allowed to execute that repair protocol. Thus, Muhler was placed in a position that it could not resolve this issue. *See* Payne v. Melton, 67 S.C. 233, 45 S.E. 154 (1903).

This court should hold that neither Superior nor C&C are entitled to indemnification under the 2007 Agreement because of lack of consideration and impossibility.

II. Superior's and C&C's equitable indemnity claims fail as a matter of law because neither party can prove they have "clean hands."

Although both Superior and C&C allege that they are entitled to equitable indemnity from Muhler, (C&C Third-Party Complaint, ¶¶ 99-100, Att. P) (Superior's Third Party Complaint, ¶ 105, Att. Q), neither Superior nor C&C can prove that they did not contribute to the failure of the windows and doors at the Subject Property. Therefore, neither Superior nor C&C has clean hands, which is a prerequisite for establishing entitlement to equitable indemnity. "Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second part is not. [citation omitted] If the second party is also at fault, he comes to court without equity and has no right to indemnity. **The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault** and the indemnifying party is the one at fault." Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 63,

[8] The only leak was the result of an area where "the sealant didn't quite cure." Mr. Lies explained that they had to go ahead and test it without the sealant cured because they "were on a time crunch. The owner wanted us out of there ... the owner, Dr. Mather I think his name was, was very anxious to have us done and out of there." (Lies Dep. p. 262, line 14 – 264, line 11, Att. L).

518 S.E.2d 301, 307 (Ct. App. 1999) (emphasis added); *see also* Otis Elevator, Inc. v. Hardin Constr. Co., 316 S.C. 292, 295, 450 S.E.2d 41, 43 (1994) (equitable indemnity is permissible where an "innocent indemnitee ... has been sued by a third party"); Griffin v. Van Norman, 302 S.C. 520, 527, 397 S.E.2d 378, 382 (Ct. App. 1990) (the party claiming equitable indemnity must be "totally innocent of wrongdoing" and free "from any fault").

As noted above and explained in more detail below, C&C hired both the architect, JDavis, and the waterproofing expert, SKA. Actions by Superior, JDavis and SKA contributed to the water intrusion issues, and are responsible for damage caused to the windows and doors themselves.

A. Superior and C&C contributed to the Plaintiffs' alleged damages, both in general and specifically with respect to the windows and doors.

Mr. Glick reviewed Paragraph 49 of the Amended Complaint, which tracks closely with the issues raised in his expert reports, and opined that each one was the result of design deficiencies, contract administration[9] and/or construction. (Glick Dep. p. 671, line 2 – 680, line 9, Att. N). In his most recent deposition, Mr. Glick opined that the architect and general contractor missed numerous opportunities to see and correct issues with the Subject Property, including the windows. "Those are contractual obligations and the contractor didn't do things right and that's well documented and the architect didn't catch things that were wrong and that's documented because we wouldn't be here today. If no one violated the standard of care, we wouldn't be here today." (Glick Dep. p. 682,

[9] For his part, Mr. Clardy blamed the architect for failures in contract administration "when the windows were at issue ... quite frankly, they just disappeared from the job ... I don't recall ... there being any architect appearance on the jobsite to assist in working out the problems, making sure that we were, in fact, meeting their intent of the plans and specifications." (Clardy Dep. p. 589, line 10 – p. 590, line 4, Att. F).

line 22 – 683, line 22, Att. N). For example, installation of the Weather Shield windows into a barrier system, as opposed to a drainable system, was not only a violation of the Weather Shield installation instructions, but also a violation of code. (Id., p. 688, line 20 – 689, line 16). Mr. L.G. "Skip" Lewis, Superior's forensic expert, was in agreement, opining that "the biggest criticism" he had of the building design drawings was that they "basically combine elements of drainage systems in barrier systems," which was not done in "a competent manner," which ran "the risk of encapturing unintended drainage or water within ... the cladding system." (Lewis Dep. p. 289, line 6 – 290, line 14, Att. V).

There is overwhelming evidence and testimony that Superior failed miserably in its role as General Contractor for the Subject Property. Mr. Glick was highly critical of Superior's management of the construction of the Subject Property: "I say this not lightly but ... I don't think there was any management or supervision because of what's out there .... I'm not sure but, I mean, the stucco problems and the brick problems, that's Construction 101." (Glick Dep. p. 738, line 14 – 739, Att. N). Mr. Sykora agreed that Superior did not provide adequate supervision on the project: "the superintendents not keeping the various other subcontractors well supervised ... extension cords coming through windows and doors, and windows and doors being left open. On other projects that I've been on, typically at the end of the day, there's somebody at the contractor level that would go through the building, close everything up for the night, if anything had been left open. Most projects today – or over the last few years – that I've been involved in typically don't allow windows and doors to be open." (Sykora May 24, 2013 Dep. p. 77, lines 5-14, Att. I-2).

Mr. Andrews testified that there were concerns about Superior being able to adequately staff the Project. "There was issues that came up during the construction that [Superior] just didn't have the right manpower to bring in the resources as they fell behind, or didn't seem to. I'm not sure why they made the decisions to do what they did." (Andrews Dep. p. 31, line 23 – 32, line 8, Att. C). The minimal number of change orders in the Project was "atypical. It's a picture into the lack of resources to get things organized." (Id., p. 73, lines 2-7). Mr. Andrews testified that, other than Superior's supervisor, Johnny Barfield, "[e]verybody else was either a subcontractor's employee or a temporary labor force that they hired to buy carpentry work from, labor to clean up the project, various tasks that they tried to tackle completely with temporary labor." (Id., p. 331, lines 3-11). Vince Hood, a consultant hired by the developer (Estates Management) to investigate construction problems at the Subject Property, echoed these criticisms, indicating that the project was understaffed: "There were no craftsmen or carpenters that were employed by Superior," and "no foremen to assist [Superior's] superintended on site..." (Hood Dep. p. 26, line 22 – 28, line 11, Att. T) (Id. p. 37, line 23 – 38, line 14 (citing a lack of skilled labor/carpenters, on the project)).

Mr. Hood explained that the problems with Superior's management of the project went deeper than Superior's staffing problems:

> Q: Tell me how they go deeper.
>
> A: Well, when you have work that needs to be done and subcontracts have not been written. When you have material – important material that needs to be delivered, you don't know what the delivery dates are and you don't even have copies of the submittals that would have been approved by the architects or engineers. You don't have copies of those on site, you don't know when the material's coming or whether it's even been ordered. Subcontracts for certain installations that were not written or, if they were, the superintendent on site did

not – was not aware of who it was. Just numerous problems and flow of information problems.

Q: If you had to grade Superior's performance for Concord & Cumberland, what grade would you give them?

A: It would be, at best, a very poor grade. If you want to call it a D, D minus. Very little support from the home office, which you would expect. Apparently a cash flow problem since ... a lot of subcontractors are not being paid on time and walking off the jobsite. A lack of planning. And the project manager was overwhelmed with the other projects and really didn't pay much attention to this project.

(Hood Dep. p. 39, line 9 – 40, line 13, Att. T). Another problem Mr. Hood identified was "that not all of the subcontractors had current plans on site." (Id., p. 69, lines 5-10).

Superior's failures as General Contractor directly contributed to water intrusion problems. For example, Mr. Andrews testified that, when they examined a balcony that had been installed improperly, they "found that the waterproofing system that Superior had put in, that they had poked a hole in the waterproofing membrane as it was being required to bridge over a void ... that one hole, which was a persistent leak." (Andrews Dep. p. 143, line 17 – 144, line 2, Att. C). When asked about Superior's response afterwards, Mr. Andrews indicated that Superior admitted "the quality of the workmanship was extremely poor and negligent." (Id., p. 283, line 16 – 284, line 13).

B. Actions taken by Superior, C&C, and/or their direct subcontractors (other than Muhler) affected both the installation and performance of the windows.

Mr. Lies was critical of the design the architect used to incorporate the windows into the building envelope, saying he did not believe "it was completely thought out. So I do have criticism of the design in that respect ... and let me be specific on that. I don't think there was a good plan ... of what the final detailing was going to be prior to ... Muhler and their subs getting out there to start installing windows. I think it was kind of

made up on the spot in the preconstruction meeting." (Lies Dep. p. 147, line 23 – 148, line 10, Att. L). Mr. Lies noted that the pans under the bucks were not back sealed, which allowed water to percolate in, and there was "too big a gap between the back of the pan and anything you could reliably seal against." In addition there was no positive slope to the pans, "[s]o you have a water collection device that you put into your design to collect incidental water, but it has nowhere to go." (Id., p. 149, lines 1-22). Mr. Lies also opined that "[t]here should have been some instruction on how to attach the buck, what size screws, what spacing, how to attach that buck to the opening." (Id., p. 161, line 15 – 162, line 11). Superior's Chip Clardy asserted that "there were significant design defects in the plans that were given to it for Concord & Cumberland," that related to "the design of the window installation," as well as to the exterior cladding. (Clardy Dep. p. 671, line 18 – 672, line 5, Att. F).[10]

In fact, in defense of his own company, Mr. Clardy testified that the problems lay not so much with Superior's failure to coordinate the work properly but, instead, pointed the finger at the architect and developer:

> Majority I think on this project was in a failure of the project to be designed correctly and the contract documents to be complete and clearly show how the project was to be properly constructed .... That's the design issue .... I think that performance wound up being significantly integrated to the design problem to the point that it did have a significant ripple-down effect .... I pretty much agree that it is a step-down process. If the owner and architect don't provide adequate documentation to the contractor, the contractor doesn't provide adequate documentation to the subcontractor, then it's going to be exactly what we got here.
>
> (Clardy Dep. p. 722, line 12 – 723, line 14, Att. F).

[10] Theresa Hodge, the 30(b)(6) designee for C&C, confirmed that the architect came up with the sealant detail to resolve the problem that arose when they realized that Weather Shield's installation instructions said that pans were not to be used with the doors. (Hodge Dep. p. 66, line 8 – 67, line 11, Att. D).

Mr. Andrews recalled that the window installation was delayed because Superior did not have the rough openings, the bucks, ready in time. (Andrews Dep. p. 274, lines 20-25, Att. C). Sequencing the subcontractors was the general contractor's responsibility and Mr. Andrews testified that "Superior did a very, very, very poor job of getting the subcontractors sequenced in, the right materials and the right equipment, the right products in at the right time." (Id., p. 281, line 11 – 282, line 3). As a result, some windows were installed in the brick without their fins. (Id., p. 282, lines 5-22).

Mr. Lawson testified that Superior used temp labor, which he described as "very incompetent," (Lawson Dep. p. 174, line 20 – 175, line 21, Att. G), to install the bucks. "We wouldn't install the window until the buck was corrected, so we were seeing poor workmanship, and we would have to make them correct it sometimes two or three times before we would install the window." (Id., p. 183, lines 2-6). Mr. Sykora explained that Muhler advised Superior when they encountered bucks that were not square. (Sykora May 24, 2013 Dep. p. 50, line 14 – 51, line 12, Att. I-2).

Mr. Lawson testified that Muhler installed the windows square and plumb and indicated that events that occurred after installation may have caused windows to become unsquared, unplumbed and/or unleveled. (Lawson Dep. p. 103, line 15 – 104, line 10, Att. G). Mr. Sykora testified similarly. (Sykora May 24, 2013 Dep. p. 51, line 13 – 52, line 25, Att. I-2 (testifying that only one window was slightly out of square but it was adjusted to within the accepted tolerance)). Mr. Glick agreed that it was possible that the windows were installed plumb but having wood bucks sitting in pans that were constantly wet would warp the wood and cause the window to "go out of plumb and square." (Glick Dep. p. 754, lines 3-19, Att. N). Mr. Lies added that the use of pressure-treated lumber

for the bucks may have contributed to the problem "because that's not a real stable – dimensionally stable wood," (Lies Dep. p. 70, line 20 – 71, line 6, Att. L), concluding that it was "a bad idea to use Womanized or pressured-treated lumber, because that stuff is never straight. It curls and warps as it dries out." (Id., p. 163, lines 1-5). Even Ms. Quigley, a senior associate with Stafford Engineering, admitted that, although she criticized the windows for being out of plumb, (Quigley Dep. p. 182, lines 14-16, Att. U), she could not state that the windows had not been installed plumb and square. (Id., p. 413, lines 6-9). Nor could Mr. Lewis state that the windows had not been plumb and square when installed. (Lewis Dep. 348, lines 13-22, Att. V).

Mr. Glick explained that the leaking around the windows is the result, in part, of the design and location of the pans. (Glick Dep. p. 728, line 7 – 729, line 7, Att. N) (Id., p. 731, lines 6-24). When asked about the architectural detail for the pans underneath the windows, Mr. Glick stated, "[h]ow they're used in the details, in other words, a pan – there's nothing wrong with a pan but how it's detailed, that's a problem and then how it's built is even worse." (Id., p. 727, lines 2-5). Superior was responsible for installing the pans under the windows. (Hodge Dep. p. 148, line 23 – 149, line 7, Att. D). Mr. Andrews testified to problems with getting Superior to install the pans properly. (Andrews Dep. p. 168, lines 1-25, Att. C) (*see also* Trial Exh. 356, Att. H (although the pans were at the site and each was labeled "for the opening that it fits ... Superior is using any pan that comes close and hammering it into the opening. Many pans are being damaged ...")). Significantly, in order to correct the pan issue, the windows would have to be removed and replaced even if there was absolutely nothing wrong with the

windows. (Glick Dep. p. 732, line 3 – 734, line 1, Att. N) (Clardy Dep. p. 670, lines 12-18, Att. F) (concurring).

Mr. Lies testified that, during the testing process, they observed water penetration between the window and the buck, "[q]uite often," and attributed that "[p]ossibly due to the waterproofing." (Lies Dep. p. 315, line 25 – 316, line 9, Att. L). JDavis, SKA, and/or other entities other than Muhler were responsible for waterproofing. (*See* Sykora May 24, 2013 Dep. p. 25, line 24 – 26, line 22, Att. I-2) (Id., p. 97, lines 5-17) (Id., p. 119, lines 9-11).

Mr. Andrews also explained that the subcontractor for the stucco exterior was provided the window details because that subcontractor would have "installation responsibility towards any subsequent flashings that are integral with the stucco system to help remove water ... from inside the wall cavity to the outside face of the stucco." (Andrews Dep. p. 59, line 12 – 60, line 8, Att. C). Mr. Andrews testified as to the importance of the windows being flashed properly so that they could drain. (Id., p. 43, lines 1-7). It was Mr. Andrews' understanding that Superior and/or its stucco subcontractor "would be installing window head and sill flashing ... [p]er the JDavis details and/or the manufacturer's stucco typical details." (Id., 79, lines 6-10). It is widely agreed that the lack of proper flashing and/or weep holes contributed to the water intrusion problems at the Subject Property. (Id., p. 43, lines 1-7) (Id., p. 59, line 12 – 60, line 8) (Glick Preliminary Report, dated Dec 15, 2009, pp. 11-12, Att. W) (Glick Supplemental Report #1, dated March 11, 2010, p. 7, Att. X) (Glick Dep. p. 92, line 19 – 93, line 7, Att. N) (Quigley Dep. p. 388, line 15 – 389, line 10, Att. U) (Lewis Dep., p 37, line 16 – 38, line 16, Att. V (noting the significance of the rough opening flashing

"particularly given the design of the wall systems, especially the stucco wall systems by the prime design professional ... the exterior cladding and its seal with the perimeter of the window frame is, in my mind, a very important barrier to water intrusion from the exterior of the building to the space between your cladding and your sheathing")) (Id., p. 147, lines 22-25 (through-wall flashing "is a critical element")).

C. Superior was responsible for other contractors who damaged the windows and doors after they were installed and Muhler had left the Subject Project.

Both Mr. Glick and Mr. Lewis testified that it was Superior's responsibility to ensure that other subcontractors did not damage the windows once Muhler left the Subject Property. (Glick Dep. p. 756, line 14 – 757, line 8, Att. N) (Lewis Dep. 278, lines 3-18, Att. V). Superior's Mr. Clardy agreed. (Clardy Dep. p. 338, lines 6-13, Att. F). However, Mr. Sykora testified that "there were a number of ... different trades that came onto the project after [Muhler] completed [its] work, and there was quite a bit of damage done by various trades to the windows and doors." (Sykora May 24, 2013 Dep. p. 15, line 21 – 16, line 7, Att. I-2) (Id., p. 182, lines 6-15). Mr. Andrews recalled "seeing some scaffolding/walk boards being placed inside of a window that was already installed so that people could come and go some. That was not really a good thing." (Andrews Dep. p. 184, lines 4-8, Att. C). "There were extension cords left ... run through windows, around doors, the windows being open so long, and when they were doing the stucco work, there was quite a bit of stucco that fell on to the hardware, fell on to the lock mechanism that's on the sash ... And when you went to close the windows, they would grind closed because of all of that masonry material that fell into the hinges, into the hardware. ... [Muhler] had to replace weather stripping, as well, because the

weather stripping got torn up during construction by other trades." (Sykora May 24, 2013 Dep. p. 17, line 14 – 18, line 2, Att. I-2) (Id., p. 71, line 6 – 73, line 11).

Mr. Clardy admitted that the windows were left open during construction and that materials were "delivered through opened windows." (Clardy Dep. p. 571, lines 7-12, Att. F). He explained the windows were left open, in part, because of cost concerns. (Id., p. 684, line 25 – 685, line 3). Ms. Quigley acknowledged that people using the windows "as a means of ingress and egress during the construction phase," could have caused the windows to sag. (Quigley Dep. p. 328, line 8 – 329, line 4, Att. U). In addition, Ms. Quigley admitted that it was possible that the leaking she observed on the one door that she tested could have been the result of damage caused by construction workers at the site after the door had been installed. (Id., p. 194, line 11 – 195, line 11). Mr. Lies explained that, "leaving [the casement windows] open fully to pass materials through or for ventilation ... really does put a toll and weight on the hardware that you wouldn't normally see in everyday operating conditions." (Lies Dep. p. 57, lines 16-21, Att. L).

Mr. Andrews also testified that Superior "didn't do a good job" of protecting the windows from other subcontractors. Windows were left open to allow the interior workers to have ventilation and, in addition, windows were open during a "strong storm." (Andrews Dep. p. 214, line 20 – 218, line 18, Att. C) (Id., p. 287, line 25 – 288, line 4). In fact, Superior employees reported that windows had been damaged when they were left open during a wind event. (Id., p. 287, lines 8-15). Mr. Lawson recalled that "a lot of the sash had been left open during construction and sagged and had been damaged during construction, which wouldn't allow it to contact the weather stripping properly ... I have pictures of every window, just about, in the building, standing open in rainstorms

..." (Lawson Dep. p. 49, lines 13-21, Att. G) (Id., p. 80, lines 17-23). Mr. Lies testified that if the windows were left open during a rain and the interior wood had not been finished or painted, and that wood "gets wet ... you would lose the bond of the sealant, glazing sealant ..." (Lies Dep. p. 296, lines 6-11, Att. L).

When he examined the windows, Mr. Lies observed:

> a lot of leaves [of] weather stripping that was damaged, that was broken off at corners where the whole side of the leaf was broken off and taken out. There was areas where it was missing. There was areas where – or there were windows – and not just one or two – that had all kinds of debris in the sills ... I remember seeing mortar dust, I remember seeing drywall compound on the weather stripping. I remember seeing all kinds of abuse ... and then I measure some of these units or tried to open them up and I can see that the operators have been damaged, where they're rotating inside as you crank them open and the seal's been gone. I saw sashes that are basically scraping as you open and close them.

(Id., p. 119, line 6 – 120, line 3). Mr. Lewis agreed that these issues could have caused the windows to fail the tests. (Lewis Dep. p 105, line 9 – 106, line 7, Att. V).

Mr. Lies testified that water that came in over the window sash could have been caused by abuse or misuse of the windows. (Lies Dep. p. 317, lines 15-19, Att. L) (Id., p. 64, lines 8-18). Ms. Quigley acknowledged that "leaving windows open in a high-speed wind event," could have caused the windows to sag. (Quigley Dep. p. 328, line 8 – 329, line 4, Att. U). Mr. Lewis agreed, (Lewis Dep. p. 265, lines 4-6, Att. V), and Mr. Lies concurred that he saw conditions that might correlate to damage caused by windows being left open in high winds. (Lies Dep. p. 297, line 16 – 298, line 14, Att. L).

D. There were numerous sources of leaks and water intrusion into the Subject Property attributable to work for which Superior and/or C&C were responsible.

Mr. Glick pointed to numerous causes of water intrusion at the Subject Property that either had nothing to do with the windows, or were not caused by Muhler's window

installation. (*See* Glick Preliminary Report, Att. W))Glick Supplemental Report #1, Att. X) (Glick Supplemental Report #3, dated Feb. 4, 2012, Att. Y)). Although Mr. Hood testified that "the windows themselves were leaking," he clarified that the leaking he observed was "[n]ot around the edges, which would indicate an installation problem." (Hood Dep. p. 84, lines 1-5, Att. T).

In his reports, Mr. Glick identified numerous construction defects, including but not limited to the following:

Stucco System

1. Lack of Weep holes at window heads
2. Lack of through wall Flashing (TWF) at window heads resulting in water intrusion to the studs and deterioration of sheathing
3. Lack of a Functional Water Management System
4. Lack of proper slope at EIFS horizontal trim
5. System thickness varies
6. Lack of proper sealant joints at stucco and window intersections
7. Installation methods do not follow building code and ASTM requirements C 926 & C 1063. Therefore, Stucco System is in violation of the building code.

Windows

1. Water test failures
2. Lack of proper spacing for effective sealant joints with adjacent dissimilar materials
3. Negative slope of pan flashing
4. Negative slope of exterior sill at tower (precast) window
5. Lack of a window mullion cap at unit #304. All windows should be checked.
6. Lack of nailing fins.
7. Lack of fasteners. Weathershield shall confirm that this installation is an approved method.

Wall Sheathing

1. Lack of proper installation around window openings.
2. High moisture content resulting from water intrusion and therefore, deteriorating densglass gold sheathing.
3. Lack of proper fasteners and fasteners not secured properly.

Brick

1. Lack of functioning weep holes with TWF at brick sills and heads
2. Lack of proper gap for sealant joints at window intersections with brick
3. Lack of proper slope at brick sills.

Miscellaneous

1. Flashing on top of window sill nailing fin (hole #9)
2. Lack of end dams in TWF at brick sill flashing
3. Lack of proper weep holes at brick sills
4. Lack of a drip detail allowing water to roll under the balcony onto the soffit
5. Lack of proper sealant at rail post penetrations into the tile balconies
6. Lack of weeps at brick and stucco walls at the first floor cornice (stone) intersection.
7. Lack of proper flashing at floor/wall intersections and lack of drip lip at all balconies

(Glick Preliminary Report, pp. 11-12, Att. W) (Glick Supplemental Report #1, p. 7, Att. X). The vast majority of these issues are unrelated to the performance of the windows or their installation.

With respect to "weeps and other areas of concerns, such as flashing," Mr. Glick concluded that the architectural drawings did not provide sufficient detail for the builder to know how to install these features. "If the contractor did not ask for clarification and built it without any other documentation, the builder would be responsible for the design at the end of the day." (Glick Dep. p. 76, line 4 – 77, line 10, Att. N) (Id. p. 79, lines 4-11) (Id., p. 104, lines 3-19) (Id., p. 228, lines 4-9) (Id., p. 435, lines 10-14). Mr. Glick pointed to the lack of through-wall flashing and weeps at the windows as violations of both the applicable building codes and the architect's design. (Id., p. 92, line 19 – 93, line 7). Mr. Lewis concurred that the lack of weeps was "the key element." (Lewis Dep. 290, lines 11-14, Att. V). Mr. Glick said, "just look at the soffits where the water's staining. That means water is getting through intersections, which it could be the front intersection at the brick of stucco. Could be the wall. Any number of sources." (Glick Dep. p. 244, lines 9-14, Att. N). He observed "water intrusion at crown moulding and water coming down the plane of the wall itself," (id., p. 249, lines 17-19), water "coming

in way above the window .... probably at a cornice line ..." (Id., p. 251, lines 17-18). Mr. Glick observed "massive water intrusion" from the balcony decks. (Id., p. 197, line 21 – 198, line 9).

When asked whether the various defects he observed were the "result of a design defect or construction defect or both," Mr. Glick responded that he thought it was construction. (Glick Dep. p. 276, lines 10-13, Att. N). He confirmed that the construction deficiencies he observed, including the lack of through-wall flashing, "exist[ed] everywhere." (Id., p. 332, line 22 – 333, line 3).

Mr. Glick identified instances where water was coming in at the windows because they were "not flashed properly." (Glick Dep. p. 281, lines 1-11, Att. N). Mr. Glick observed bucks that were soaked because, once water got in, water just sat in the pans because "there's a negative slope on that flashing sitting on the buck." Mr. Glick opined that water was present because either the window was leaking "or the joint – and/or the joint at the sill window" allowed water to enter. (Id., p. 303, line 12 – 304, line 25). Water was coming into the units under the doors on the patios or balconies because of negative slope of the balconies, not necessarily because of any defect in the doors. (Id., p. 714, line 4 – 715, line 25).

Mr. Andrews confirmed that pipes leaked, water could get behind the stucco system, and some balconies were angled to allow water to flow into a unit. (Andrews Dep. p. 343, line 13 – 346, line 14, Att. C). Theresa Hodge with Estates Management made a site visit on October 26, 2007 where she documented leaks in various units, a number of which were not window leaks. (Hodge Dep. p. 152, line 12 – 156, line 14, Att. D) (*see also* Id. p. 172, lines 16-21 ("We had one issue where the gas line going

through the wall was installed – it wasn't balanced, so the water was coming into the unit instead of going out. I mean, there were various different reasons that were given for water intrusion")).

III. C&C's contribution claims fail as a matter of law.

In its Third-Party Complaint, C&C alleges it is entitled to contribution from Muhler, as well as from other third-party defendants. (C&C Third-Party Complaint, ¶ 116, Att. P). However, as a matter of law, C&C is not entitled to contribution because it cannot prove that the settlement it entered into with the Plaintiffs contained a release that included Muhler.

Under the common law, there was no right to contribution among tortfeasors. Therefore, any right to contribution arises solely under the South Carolina Contribution Among Tortfeasors Act ("Act"), S.C. Code Ann. §§ 15-38-10 to -70. Cowden Enter., Inc. v. East Coast Millwork Distrib., 363 S.C. 540, 543, 611 S.E.2d 259, 260 (Ct. App. 2005). Section 15-38-20(D) provides, in pertinent part that "[a] tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury ... is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable." S.C. Code Ann. § 15-38-20(D). Because the Act is in derogation of the common law, its provisions are strictly construed. G&P Trucking v. Parks Auto Sales Serv. & Salvage, Inc., 357 S.C. 82, 87, 591 S.E.2d 42, 44 (Ct. App. 2003). The party claiming contribution must prove facts entitling it to contribution. Id. Specifically, the party seeking contribution must prove that it "paid more than [its] pro rata share of the common liability," Vermeer Carolina's, 336 S.C. at 68, 518 S.E.2d at 309, and that

"extinguishment of the defending joint tortfeasor's liability ... resulted directly from the settlement itself." G&P Trucking, 357 S.C. at 88, 591 S.E.2d at 45. Here, C&C cannot prove either fact. Therefore, this Court should hold that C&C's claim for contribution fails as a matter of law.

CONCLUSION

For the reasons stated herein, this Court should grant Muhler's Motion for Partial Summary Judgment, and hold, as a matter of law, that: 1) neither the Subcontract nor the 2007 Agreement indemnifies Superior or C&C for their own wrongdoing, and that the 2007 Agreement fails for lack of consideration and impossibility; 2) that neither Superior nor C&C is entitled to equitable indemnification because neither can prove it has "clean hands"; and 3) that C&C is not entitled to contribution.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC

Peter Gunnar Nistad
Post Office Box 650007
735 Johnnie Dodds Blvd, Suite 200 (29464)
Mount Pleasant, South Carolina 29465
(843) 576-2900

ATTORNEYS FOR DEFENDANT,
THE MUHLER COMPANY, INC.

July 14, 2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Concord and Cumberland Horizontal Property Regime,
And
Thomas R. Mather,
And
Betty Y. Segal
And
Signature Charleston, LLC and Wade Robinson,
And
James C. Kirkpatrick,
And
Paul A. Brim,
And
Fred Rappaport and Joyce Rappaport,
And
Thomas R. Debnam, as Trustee of the Trust Agreement of Thomas R. Debnam,
And
Pamela L. Vaughn,
And
304 Concord & Cumberland, LLC,
And
402 Concord & Cumberland, LLC,
And
Avant & Associates, LLC and Oakland Holding, LLC,
And
Mattison J. MacGillivray and Teresa E. MacGillivray,
And
Pamela Queen,
And

Stuart Reeves,

Plaintiffs,

v.

Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC, Estates, Inc., Estates Management Company,

CIVIL ACTION NO: 2010-CP-10-2271

FILED
2014 JUL 14 PM 3:22
JULIE J. ARMSTRONG
CLERK OF COURT
BY

SUPERIOR CONSTRUCTION CORP.'S SUPPLEMENT TO ITS MEMORANDUM OF LAW IN SUPPORT OF PARTIAL SUMMARY JUDGMENT AGAINST THE WEATHER SHIELD MFG, INC.

Superior Construction Corporation, Weather Shield Mfg., Inc., The Muhler Company, Inc., In The Wind, Inc., J. Davis Architects, PLLC, Safeco Insurance Company of America, Companion Property and Casualty of America, Companion Property and Casualty Group, Watts Builders, LLC, Elias Duffy d/b/a Masonry Pros, Renaissance Steel, LLC, American Drywall Construction, Inc., Turner Electrical of SC, Inc., and Metro Waterproofing, Inc.,

Defendants.

TO: CHRISTINE VARNADO, ESQUIRE, ATTORNEY FOR DEFENDANT WEATHER SHIELD MFG, INC.:

Superior Construction Corporation ("Superior") provides this Supplement to its previously issued Memorandum of Law in support of its motion for Partial Summary Judgment Against Weather Shield, Mfg., Inc.

In section II(c)(ii) of Superior's previously issued Memorandum, subtitled as the "Second Griffen Element" (beginning at page 12 of the Memorandum) Superior sets forth certain key items of documentary and testimonial evidence in discovery in support of this element of Griffen v.Van Norman, 302 S.C. 520, 523, 397 S.E.2d 378 (Ct. App. 1990), which is directed towards ascertaining if, under the circumstances, the decision by Superior to settle the window and door claims against it by Plaintiffs was a reasonable means of protecting its interests. Superior offers the following additional items in further support of this Griffen element.

Kenneth Lies, AIA is one of the named expert witnesses on behalf of The Muhler Company. He has been a practicing architect for over twenty-five years, and is a member of the American Society of Testing and Materials (ASTM), sitting on the task group for several testing standards for window water penetration testing of window products. Deposition of Kenneth

Lies, AIA, Vol. I, p.7. Mr. Lies made numerous admissions of a fairly wide range of problems with the windows themselves as well as the manner in which they were installed. While he consistently objected to certain water testing that was performed at pressures that he felt should not have been used beyond six months from installation, he consistently had to admit that a significant number of the windows were still experiencing water intrusion under normal weather conditions and at lesser testing pressures that coincided with performance ratings that were required by the Architect, which did not have any stated temporal constraints. (See detailed discussion below.) While Superior points out the more salient details of his testimony below, it invites the Court's attention to his entire deposition transcript.

The major conclusion that Mr. Lies makes in regards to the windows is that the hardware that Weather Shield incorporated into the operative casement windows was not robust enough to handle the extremely heavy weight of the sashes. From his own personal investigation by contacting a Weather Shield representative, Jason Heir, and the manufacturer of the operator mechanism, he found that Weather Shield simply used the same standard window sash and hardware assembly for their lower grade, non-impact rated windows for the instant product, which is a much heavier window with impact rated glass. *See* Deposition of Kenneth Lies, AIA. Vol. I, p. 56- 59. This was confirmed by Mr. Hier in deposition. See Deposition of Jason Heier, p. 13- 16. The manufacturer of the operator mechanisms, Truth Hardware, informed him that the as-built hardware that was incorporated into the windows was not recommended for the size and weight of the sashes, and instead they would have recommended a dual-armed roto operator. *See* Deposition of Kenneth Lies, AIA. Vol. I, p.56-59. The manufacturer's literature for the particular as- built device limited its use to 50 pounds. From his calculations, Lies estimated weight of the as-built windows to range between 80 to 85 pounds. *Id.* p. 61. He witnessed direct conditions in the field indicating that the as-built hardware was failing to perform as it would be

expected, for instance sashes sagging to such a degree that it exceeded the ability to be corrected via adjustment screws in the hinges. The sagging caused the weather stripping that was supposed to provide the window's weather seal to not function as is should. His repair protocol was specifically directed at correcting this issue by upgrading the operator and the hinges. *See Id*, p. 62, l. 17 though p. 65, l. 2.

Mr. Lies also admitted the existence of a substantial number of installation defects, such as improperly installed mull caps, which he admitted contribute to water penetration. *Id*, p. 67. When confronted with Christine Quigley's aforementioned report (Exhibit 5) listing numerous items of installation deficiencies, he repeatedly had to stipulate that these conditions were improper. *Id.* Vol. II, pp. 201- 213. Lies admits that under the applicable building code, the windows at the subject property should remain watertight- without leaks or water penetration- under normal climatic conditions, and that the failure of the windows to perform as such would be an unacceptable condition under the code. Deposition of Kenneth Lies, AIA, Vol. II, p.223. Line 21 through p. 226, line 8. He agreed that a test protocol can be used to attempt to replicate normal climatic conditions, and that an ASTM E1105 test method would be the method that he would use. *Id.* Vol. II, p. 226, l.25 through p.227, l. 17. (As described earlier in the Stafford Consulting report authored by Christine Quigley's report, the E1105 method was used by almost every prior testing entity.) He admitted that the highest wind pressure applied during Stafford's testing (5.29 to 5.55 pounds per square foot- psf) was only approximately forty-five miles per hour, and that this is a condition that would occur, "without question" in Charleston in severe thunderstorm conditions. *Id.*, Vol. II, p. 231, l.25 through p. 232, l. 12. He admitted that the combination of this wind and water pressure would fall within normal climate conditions in Charleston. *Id*, Vol. II, p. 232, l.19 through p 233, l. 7. As to fixed unit windows, Lies admitted that a window that experiences window glazing leaks under normal weather conditions (or

testing that replicates those conditions) even three or four years out from original construction has "something wrong with that particular window", and is not weather tight under the building code. *Id*, Vol. II, p. 238, l. 9 to p. 239, l. 14. He further admitted if an operable window is leaking three to four years out after installation under normal weather conditions, it still needs to be addressed. *Id*, p. p. 240, l. 4-7. Lies admitted that the results of window water testing conducted by Architectural Testing Inc. in December of 2009, which were performed at a lower test pressure (4psf) resulted in water intrusion for every window tested under that protocol; he further admitted that this test pressure corresponded to a DP 40 performance grade for the windows, which was specified by the Architect for the project. *Id*, Vol. II, p. 246. l. 11 to p. 247, l. 23. While he attempted to nonetheless call the windows a "high quality product", he simultaneously admits that his repair protocol calls for essentially all of the window hardware in the operative casement windows to be removed and replaced because, in his opinion, the predominate cause of documented water intrusion is the hardware and its lack of ability to achieve compression of the weather stripping around the sash. *Id*, Vol. II, p. 246. l. 11 to p. 247, l. 23.

This above testimony, in conjunction with all of the previously cited testimony and evidence, bears heavily upon Superior's decision to settle the window claims on the basis that a fact-finder could potentially conclude that there existed a such a level of systematic deficiencies in the windows themselves and their manner of installation, that likely constituted building code violations as well as a potential material breach of the requirements of the plans and specifications, that Plaintiffs could likely prevail upon at trial. Superior reserves the right to supplement the facts and law of its Memorandum and the Supplement at oral argument.

MURPHY & GRANTLAND, P.A.

Brent M. Boyd, Esquire
Christopher A. Majure, Esquire
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1210/1240
(803) 782-4140 (facsimile)
Email: bboyd@murphygrantland.com
cmajure@murphygrantland.com

Attorneys for Defendant Superior Construction Corporation

Columbia, South Carolina
July 11, 2014

10-2271

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

CONCORD AND CUMBERLAND HORIZONTAL PROPERTY REGIME,

And

THOMAS R. MATHER,

And

BETTY Y. SEGAL,

And

SIGNATURE CHARLESTON, LLC and WADE ROBINSON,

And

JAMES C. KIRKPATRICK,

And

PAUL A. BRIM,

And

FRED RAPPAPORT and JOYCE RAPPAPORT,

And

THOMAS R. DEBNAM, as TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM,

And

PAMELA L. VAUGHAN,

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC, *et al.*,

Defendants.

Civil Action No. 2010-CP-10-2271

Civil Action No. 2010-CP-10-2919

Civil Action No. 2010-CP-10-3206

Civil Action No. 2010-CP-10-3207

Civil Action No. 2010-CP-10-3208

Civil Action No. 2010-CP-10-3209

Civil Action No. 2010-CP-10-3210

Civil Action No. 2010-CP-10-9580

Civil Action No. 2010-CP-10-9767

THE MUHLER COMPANY, INC'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

FILED
2014 JUL 15 AM 11:48
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Defendant, The Muhler Company, Inc. ("Muhler" or "Defendant") respectfully submits this Memorandum of Law in support of its Motion for Partial Summary Judgment, filed October 17, 2013 ("Motion") against Superior Construction Corporation's ("Superior") and Concord and Cumberland, LLC ("C&C"). Muhler's Motion is based, in part, upon two agreements: an original subcontract between Superior and Muhler, dated May 17, 2006 ("Subcontract") (Att. A), and a later agreement, dated June 11, 2007, among Weather Shield Manufacturing, Inc. ("Weather Shield"), Muhler and Superior ("2007 Agreement") (Att. B).

Background

This is a construction defect case relating to a condominium project located at the corner of Concord and Cumberland Streets in Charleston, South Carolina ("Subject Property"). C&C was the original owner and developer of the property. Superior was the general contractor for construction of the building shell. (Subcontract, Art. 1, Att. A). Among others, C&C hired J. Davis Architects, PLLC ("JDavis") as the architect for the project, and Sutton-Kennerly Associates ("SKA") as waterproofing experts. (Andrews Dep. p. 24, lines 4-14, Att. C) (Hodge Dep. p. 37, lines 10-12, Att. D).

Superior entered into the Subcontract with Muhler to supply and install windows and doors manufactured by Weather Shield. While the Subcontract called for the installation of windows, the scope of that installation was limited to setting windows in rough openings which were prepared by Superior and/or its subcontractors. (*See* the Affidavit of Ron Sykora, Att. E) (Andrews Dep. p. 372, line 18 – 373, line 1, Att. C) (Clardy Dep. p. 436, lines 17-22, Att. F). Muhler employed two different subcontractors, In the Wind and Watts Builders, Inc., to install the windows. In the Wind also worked as

a direct subcontractor for Superior by preparing rough openings that included the installation of sill pans and bucks within the pans. (Lawson Dep. p. 25, lines 1-6, Att. G) (Id., Dep. p. 28, lines 4-8) (Clardy Dep. p. 441, lines 8-18, Att. F (Mr. Clardy clarifying that In the Wind was serving as Superior's direct subcontractor when it was installing rough openings for the windows).

Muhler did not take on any design responsibility for the project but, instead, looked to the architect for design and to the window manufacturer, Weather Shield, to provide installation instructions. Mr. Sykora, Muhler's vice president of new construction sales, stated that, "[a]s the supplier of the windows and the installer of the windows, we look to the design professional to create an installation procedure and detail and then we perform that detail procedure. That's what was done here at this project." (Sykora Sept 24, 2012 Dep. p. 53, lines 16-21, Att. I-1) (Id., p 61, lines 18-22) (Sykora May 24, 2013 Dep. p. 24, line 18 – 26, line 22, Att. I-2). Mr. Andrews, project manager with Estates Management,[1] testified that Muhler "adhered to those instructions." (Andrews Dep. p. 375, line 18 – 376, line 3, Att. C).

At some point during a mock-up of a wall, it became apparent that the proposed method for installing the windows did not conform to Weather Shield's installation instructions. The main problems involved Window Shield's requirement that the window be installed against the buck, and an issue with the pans. (Lawson Dep. p. 18, line 22 – 19, line 25, Att. G). In meetings where these problems were discussed, Brad Lawson, Muhler's production manager, confirmed that Muhler served as "the referee between Superior, JDavis and Sutton & Kennerly," to "make sure that Weather Shield's installation documents were complied with .... So we were there to get these parties to

[1] Estates Management provided project management for C&C on the Subject Property.

agree to how they wanted to put it in, as long as it complied with Weather Shield's documents." (Id., p. 66, line 15 – 67, line 5).

Mr. Lawson testified that, "the design that Sutton-Kennerly and Estates and Superior came up with, I didn't have confidence in it that it was going to be waterproof." Although Muhler voiced its objection, it used the installation design provided to it because, "at that point, they're the experts, that's their building, this is how they wanted it put in." (Lawson Dep. p. 184, lines 4-13, Att. G) (Trial Exh. 356, Att. H). Mr. Sykora explained that Muhler "just, [was] being instructed how to put windows and doors in. Certainly ... this particular installation with the bucks sitting in a pan and attached as they were in a pan was something we hadn't seen before, but we're not design professionals. We're not waterproofing professionals. So we wouldn't be interjecting what we felt to be a proper waterproofing method." (Sykora Sept 24, 2012 Dep. p. 135, lines 10-18, Att. I-1). Mr. Chip Clardy, Superior's president during construction of the Subject Property, confirmed that Superior simply was "told how to" install the windows in the bucks that were sitting in the pans. (Clardy Dep. p. 672, line 8 – 674, line 7, Att. F (agreeing that "Superior was told by the architect we're going to use a pan and we're going to put two bucks in the pan and then we're going to put the window – attach the window to those bucks that are in the pan").

After twenty-five windows were installed, objections were raised by C&C and/or the architect, and Muhler was asked to remove those windows and reinstall them following a different protocol. Mr. Clardy testified that the procedure for installing windows from that point forward came from either C&C and/or the architect, and also agreed that any problems with the design of how the windows were to be installed was

the responsibility of C&C and/or the architect. (Clardy Dep. p. 677, line 3 – 678, line 15, Att. F) (Sykora Sept 24, 2012 Dep. p. 53, line 16 – 54, line 18, Att. I-1).

Sometime in 2007, the Subject Property began to experience water intrusion issues, including but not limited to leaking at the windows and doors. Weather Shield, Superior and Muhler entered into the 2007 Agreement, under which C&C is identified as a third party beneficiary, to address the issues of leaking windows. The 2007 Agreement required, among other things, that Superior satisfy any outstanding balances due to Muhler related to the subcontract. (2007 Agreement, Section 10, Att. B). Superior has not complied with that provision of the contract. (*See* Affidavit of Tali Vereen, Att. J).

The individual units in the Subject Property were completely sold out before construction was finished. (Hodge Dep. p. 60, lines 8-10, Att. D). Control over the Subject Property was transferred from C&C to the unit owners in March 2008. (Receipt & General Release, p. 2, Att. K).

Ken Lies was brought on site in late 2008 to develop a "remedy [for] concerns that were being expressed regarding the windows." (Lies Dep. p. 9, line 12 – 10, line 19, Att. L). He developed what later became known as the Ken Lies repair protocol, (Att. M), which was circulated to all the parties and then applied to three windows in 2009. (Lies Dep. p. 47, lines 1-11, Att. L). With some adjustments, the windows produced generally passing results. (Id., p. 47, line 12 – 49, line 21). The Ken Lies repair protocol did not require removing the windows from their openings. (Id., p. 132, lines 24-25).

In February 2009, Myles Glick was engaged by the Plaintiffs "to find the causes of the water intrusion into the exterior skin of the building and ultimately into the units." (Glick Dep. p. 25, lines 1-3, Att. N). Significantly, Mr. Glick testified that he was

engaged to examine the Subject Property and provide an opinion as to the problems with leaking windows. However, on his first trip to the Subject Property, he immediately noticed that there was no flashing and called Plaintiffs' counsel and told him, "I think you got more problems than you do just trying to keep water out of these windows. I think you got some other problems. So I saw it when I got out of my car." (Id., p. 112, lines 6-17) (Id., p. 552, lines 4-14) (Id., p. 665, lines 1-25). Ultimately, Mr. Glick testified that there were problems associated with almost every "trade that touched the building." (Id., p. 734, lines 2-13).

In 2010, the Plaintiffs began filing lawsuits against Superior and C&C, along with numerous other defendants.[2] The Plaintiffs complained about specific issues with various components of the Subject Property, including: 1) the Stucco system, 2) Windows, 3) Wall Sheathing, 4) Brick, 5) Balconies, 6) Roof, and 7) Miscellaneous. (Amended Complaint, ¶ 49, Att. O). The Amended Complaint alleged numerous causes of action against Superior and C&C that had nothing to do with the windows and/or Muhler's work under the Subcontract. More importantly, a number of the Plaintiffs' complaints that were related to windows or leaking are directly attributable to failures or negligence on the part of C&C, SKA, JDavis, Superior and/or other subcontractors.

C&C filed an Answer which contained a third-party complaint against Muhler. (Answer of Concord & Cumberland, LLC and Crossclaims against Superior Construction Corporation; Weather Shield Mfg., Inc. and J. Davis Architects, PLLC and Third-Party Complaint against The Muhler Company, Inc., et al., filed June 11, 2010 ("C&C Third-

[2] The complaints were later amended to add parties and other allegations and claims. For purposes of completeness, Muhler refers herein to the Amended Complaint of Plaintiff Concord and Cumberland Horizontal Property Regime, filed June 1, 2012 ("Amended Complaint"), Att. O), for substantive allegations by the Plaintiffs.

Party Complaint"), Att. P). Among other allegations, claims and cross-claims, C&C's First Cause of Action alleged that it was entitled to equitable indemnity from Muhler, as well as from other third-party defendants. Its Fourth Cause of Action alleged C&C was entitled to contractual indemnity from Muhler. And its Sixth Cause of Action alleged C&C was entitled to contribution from Muhler.

Superior also filed an Answer which contained a third-party complaint naming Muhler. (Superior Construction Corporation's Answer, Cross Claims, and Third Party Complaint, filed May 27, 2010 ("Superior's Third Party Complaint"), Att. Q). Superior's First Cause of Action alleged that it was entitled to full contractual indemnity from Muhler, among others. Superior's Second Cause of Action alleged that it was entitled to equitable indemnity from Muhler.

STANDARD FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c), SCRCP, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 557, 671 S.E.2d 79, 84 (Ct. App. 2008). Once the party moving for summary judgment meets the initial burden of showing it is entitled to summary judgment as a matter of law, the opposing party must then present specific facts showing genuine issues for trial. Gauld, 380 S.C. at 558-559, 671 S.E.2d at 85.

ARGUMENTS

I. **Neither the Subcontract nor the 2007 Agreement provides indemnity to Superior or C&C for their own wrong-doing.**

Although under South Carolina law parties can agree to indemnify each other for various types of damages or losses, neither of the agreements at issue here indemnify either Superior or C&C for their own negligence. In South Carolina, "a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in **clear and unequivocal terms**." Laurens Emerg. Med. Spec. v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) (emphasis added); *see also* Murray v. The Texas Co., 172 S.C. 399, 402, 174 S.E. 231, 232 (1934 (finding "broad and comprehensive" language was insufficient to prove the contract relieved a party from its own negligence). Indemnification for one's own negligence is "not favored in the law," and because "[l]iability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary ... there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation, and no inference from words of general import can establish it." 41 Am. Jur. 2d Indemnity 16.

Other states are in accord. "Indemnification agreements seeking to indemnify a party for losses resulting from that party's own negligent acts are not favored in the law." Braegelmann v. Horizon Dev. Co., 371 N.W.2d 644, 646 (Minn. Ct. App. 1985). As a consequence, an intent to indemnify a party from the consequences of its own negligence must be explicit and be "specifically stated in the four corners of the document." Cabo Constr., Inc. v. R. S. Clark Constr., Inc., 227 S.W.3d 314, 317 (Tex. App. 2007). In fact, "if parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and

unequivocal language. No inference from words of general import can establish such indemnification." Greer v. City of Philadelphia, 795 A.2d 376 (Pa. 2002), *quoting* Perry v. Payne, 66 A. 553 (Pa. 1907) ("there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation"); *see also* Nusbaum v. Kansas City, 100 S.W.3d 101, 106 (Mo. 2003) ("an indemnification contract 'will not be construed so as to indemnify one against loss or damage resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms'"); East-Harding, Inc. v. Horace A. Piazza & Assoc., 91 S.W.3d 547, 551 (Ark. Ct. App. 2002) (a "subcontractor's intention to obligate itself to indemnify a prime contractor for the prime contractor's own negligence must be expressed in clear and unequivocal terms and to the extent that no other meaning can be ascribed"); Hagerman Constr. Corp. v. Long Elec. Co., 741 N.E.2d 390, 392 (Ind. Ct. App. 2000) (because indemnification clauses indemnifying a party for its own negligence are disfavored as "a harsh burden that [an indemnifying] party would not lightly accept," any such provision must "stated in clear and unequivocal terms"); Dillard v. Shaughnessy, Fickel & Scott Architects, Inc., 884 S.W.2d 722, 724 (Mo. Ct. App. 1994) (applying Kansas law) (under general contract construction, indemnification clauses do not indemnify for "damages caused by the indemnitee's own negligence unless the agreement specifically states").

Because courts require clear and unequivocal language in order to find an agreement to indemnify a party for its own negligence, "indemnification contracts claimed to contain these provisions are construed more strictly than other contracts." Maxim Tech., Inc. v. City of Dubuque, 690 N.W.2d 896, 901 (Iowa 2005); *see also*

Laurens Emerg. Med. Spec., 355 S.C. at 111, 584 S.E.2d at 378-379 (applying "the rule requiring strict construction of a contract containing an indemnity provision purporting to relieve an indemnitee from the consequences of its own negligence"); *see also* McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005) (contract provisions "that seek to exculpate a party from liability for the party's own negligence are not favored by the law," and are strictly construed because "such provisions tend to induce a want of care").

A. The Subcontract does not obligate Muhler to indemnify either Superior or C&C for their own wrong-doing.

There are two contractual indemnity provisions at issue in this case. The first is contained in the initial Subcontract between Superior and Muhler. (Subcontract, Att. A). This is the form clause for AGC Document No. 600, Subcontract for Building Construction, August 1984 by the Associated General Contractors of America. Article 12.1 of the Subcontract provides:

> 12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, and Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, **arising out of or resulting from the performance of the Subcontractor's Work** provided that
>
> > (a) any such claim, damage, loss, or expenses is attributable to ... injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, **to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor** or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, **regardless of whether it is caused in part by a party indemnified hereunder**.

> (b) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Article 12.

(Subcontract, ¶ 12.1, Att. A) (emphasis added). Courts uniformly interpret this language as **not** providing indemnification for the indemnitee's own negligence. *See, e.g.*, Braegelmann, 371 N.W.2d at 646-647 (interpreting same operative language as not providing indemnification to the general contractor for its own negligence); Mautz v. J.P. Patti Co., 688 A.2d 1088, 1092-1093 (N.J. Super. Ct. App. Div. 1997 (finding virtually identical language did not indemnify indemnitee for its own negligence but instead provided indemnification "only to the extent the [indemnitor's] negligence contributed to the loss"); Cabo Constr., 227 S.W.3d at 317-318 (finding same language did not expressly state that the subcontractor would indemnify the contractor for the contractor's own negligence); Brown v. Boyer-Washington Blvd Assoc., 856 P.2d 352, 355 (Utah 1993) (limiting similar indemnification language to damages caused in whole or in part by acts of the subcontractor); MT Builders, LLC v. Fisher Roofing Inc., 197 P.3d 758, 765 (Ariz. Ct. App. 2008) (explaining that identical indemnification language created "a comparative fault or negligence arrangement whereby the indemnitor's liability is limited 'to the extent' it and its supervisees were at fault"); Frank v. MSI Constr. Mgrs., Inc., 527 N.W.2d 79, 81 (Mich. Ct. App. 1995) (construing practically identical language to mean the subcontractor is liable to the general contractor only "to the extent of its own negligence but is not required to indemnify" the general contractor for the general contractor's own negligence); Glendale Constr. Servs., Inc. v. Accurate Air Syst., Inc., 902 S.W.2d 536, 539 (Tex. Ct. App. 1995) (holding that nearly identical language does not indemnify the indemnitee for its own negligence); Hagerman, 741 N.E.2d at 393-394

(similar language in AIA standard construction form contract does not "clearly and unequivocally" provide coverage for indemnitee's own negligence).

As the Missouri Supreme Court explained in a case containing language similar to Article 12.1 of the Subcontract, the "phrase 'to the extent caused' expresses an intention to limit the indemnitor's liability to the portion of fault attributed to the indemnitor .... The preferred construction of the indemnification provision at issue, one that provides a reasonable meaning to each phrase of the provision, requires nothing more than that [the indemnitor] indemnify [the indemnitee] for [the indemnitor's] negligence even if [the indemnitee] participates in part in [the indemnitor's] negligent conduct. To hold otherwise would make the intended expression to limit liability to the acts of indemnitor meaningless." Nusbaum, 100 S.W.3d at 106-107. Courts have routinely held that the language "to the extent" in this indemnification clause means that the indemnifying party is liable to the indemnitee "to the extent of its own negligence but is not required to indemnify [the indemnitee] for [the indemnitee's] negligence." Frank, 527 N.W.2d at 81.[3] This Court should reach the same conclusion here.

B. The 2007 Agreement does not obligate Muhler to indemnify Superior or C&C for their own wrong-doing.

Even though the 2007 Agreement contains somewhat broader indemnification language than the Subcontract, it does not state clearly and explicitly that Muhler agrees to indemnify either Superior or C&C for their own negligence and/or wrong-doing. Instead, Section 11 of that Agreement provides:

> 11. In the event either Superior or Concord and Cumberland, LLC, are sued hereafter by or on behalf of any subsequent owner, alleging that one

[3] In Hagerman, the Indiana court explained that the "phrase 'to the fullest extent permitted by law' is a preservation clause that preserves [the indemnitee's] rights under the law to the extent that [the indemnitor] and/or its sub-subcontrators, etc. are negligent." 741 N.E.2d at 394.

> or more of the windows and/or doors-do not comply with the original and amended Contract Documents, or are defectively installed, **Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations** and will pay **all damages (including reasonable attorneys' fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration,** liability incurred by either or both as consequence including, but not limited to, costs and attorneys' fees, any remedial costs of expert witnesses, cost of arbitration and all other damages incurred.

(2007 Agreement, Section 11, Att. B) (emphasis added).

First, to the extent this provision purports to indemnify Superior or C&C "unconditionally," it is unconscionably broad. *See* Fisher v. Stevens, 355 S.C. 290, 296, 584 S.E.2d 149, 152 (Ct. App. 2003) (holding that an overly broad indemnification provision "offend[s] notions of public policy"). Although Fisher involved a so-called exculpatory contract, or waiver, the reasoning applies equally here where the phrase "unconditionally" is as objectionably broad, if not broader, as the phrase at issue there, which released "'any person in any restricted area" from liability." Id.[4]

Second, Section 11 of the 2007 Agreement does not clearly, explicitly or unequivocally state that Muhler is agreeing to indemnify either Superior or C&C for their own negligence. Although "formulaic language expressly stating that 'X indemnifies Y for Y's own negligence' is not mandatory," the "agreement **must speak to the negligence of the indemnitee.**" Snohomish County Pub. Transp. Benefit Area Corp. v FirstGroup America, Inc., 271 P.3d 850, 854 (Wash. 2012) (emphasis added). Here, as was the case in Snohomish County, the indemnity provision "does not tell a court 'clearly

[4] In addition, Section 32-2-10 provides, in pertinent part, that "a promisee or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building ... purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of ... property damage proximately caused by or resulting from the sole negligence of the promise, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable." S.C. Code Ann. § 32-2-10 (2013).

and unequivocally' that the parties considered the effect of the negligence of the indemnitee and intended to indemnify for the indemnitee's own negligence." 271 P.3d at 862. Indemnity provisions promising to indemnify "from and against any and all claims," or where the indemnitor assumed "all responsibility for claims asserted by any person whatever," are "general terms" that are "insufficiently clear and unequivocal," to provide indemnification for the indemnitee's own negligence. Cox Cable Corp. v. Gulf Power Co., 501 So.2d 627, 629 (Fla. 1992). The use of the term "unconditionally" similarly does not express any intent to indemnify Superior for its own negligence.

Two Texas cases provide examples of indemnification agreements that evidence an express intent to indemnify an indemnitee for its own negligence. *See* Enserch Corp. v. Parker, 794 S.W.2d 2 (Tex. 1990) and Atlantic Richfield Co. v. Petroleum Personnel, Inc., 768 S.W.2d 724 (Tex. 1989). In Enserch, the indemnification clause provided that J.W. "Bill" Christie, Inc., assumed "entire responsibility and liability for any claim or actions based on or arising out of injuries ... sustained or alleged to have been sustained in connection with" Christie's performance of the contract "**regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of [Enserch]**, [Enserch's] representative, or the employees, agents, invitees, or licensees thereof. [Christie] further agrees to indemnify and hold harmless [Enserch] ... in respect of any such matters ..." 794 S.W.2d at 6-7 (emphasis added). In Atlantic Richfield, the Contractor agreed "to hold harmless and unconditionally indemnify the Company against and for all liability, cost, expenses, claims and damages which [the Company] may at any time suffer or sustain or become liable for by reason of any accidents, damages or injuries ... in any matter arising from the work performed hereunder, *including but not limited to*

any negligent act or omission of [the Company], its officers, agents or employees ..." 768 S.W.2d at 724 (emphasis in original). The Court held that the italicized language was sufficient to give the indemnitor notice that he was agreeing to indemnify the Company for its own negligence. Id., at 726. The Texas Court did **not** find significant or rely in any way on the inclusion of the word "unconditionally" in its analysis of whether the indemnity provision covered the indemnitee for its own negligence.

The use of the term "unconditionally" could mean many things[5] but does not, on its face, indicate Muhler ever intended to indemnify Superior or C&C for their own negligence. In fact, indemnity agreements are strictly construed against the party seeking to be indemnified. *See* Federal Pac. Elec. v. Carolina Prod. Enterprise, 298 S.C. 23, 28-29, 378 S.E.2d 56, 58-59 (Ct. App. 1989); *see also* East-Harding, 91 S.W.3d at 551 (same); Frank, 527 N.W.2d at 81 (construing "the contract most strictly against the party who is the indemnitee"). As noted above, indemnification agreements purporting to indemnify an indemnitee for its own negligence are even more strictly construed. Maxim Tech., 690 N.W.2d at 901; McCune, 364 S.C. at 248, 612 S.E.2d at 465. Applying this construction principle to the 2007 Agreement inevitably results in the conclusion that Section 11 does not cover Superior or C&C for their own negligence.

Third, the plain language of the 2007 Agreement provides that Muhler will indemnify Superior or C&C for "all damages (including reasonable attorneys' fees) incurred by either or both ... as determined by a court of competent jurisdiction or award of arbitration." (2007 Agreement, Section 11, Att. B). This language clearly and

[5] For instance, the parties' intent may have been that Muhler would indemnify Superior or C&C for the acts of Weather Shield and/or In the Wind and/or Watts Builders, regardless of whether Muhler was also negligent. Or, the parties may have intended that Muhler would indemnify Superior or C&C regardless of whether Muhler was made a party to the suit.

unambiguously limits damages payable under that provision, including attorneys' fees, to those determined by a court or arbitrator. *See* MT Builders, 197 P.3d at 763 (recognizing that some indemnification clauses limit or restrict losses to those incurred by an award or judgment). Under Section 11, the term "damages" specifically is modified by the phrase "as determined by a court of competent jurisdiction or award of arbitration." Here, there has been no court determination of either Superior's or Muhler's liability, which Mr. Clardy conceded, (Clardy Dep. p. 739, lines 9-16, Att. F), or of C&C's liability. Therefore, no obligation to indemnify either Superior or C&C has arisen in this case.

This Court should hold, as a matter of law, that neither the Subcontract nor the 2007 Agreement indemnifies Superior or C&C for their own negligence.

C. The 2007 Agreement fails for lack of consideration and impossibility.

Even if the 2007 Agreement were deemed to provide indemnification for Superior's or C&C's own negligence, which Muhler strenuously denies, that Agreement fails for lack of consideration and impossibility. As to lack of consideration, Section 10 of the 2007 Agreement provides that:

> In exchange for the payment by Superior of all amounts due Muhler in accordance with the Subcontract Agreement and in accordance with the terms of the Memorandum of Understanding executed by Superior and Muhler on June 7, 2007, Muhler agrees that it will complete the installation of all uninstalled products and accessories promptly upon execution of this Agreement ..."

(2007 Agreement, Section 10, Att. B). The referenced Memorandum of Understanding, dated June 7, 2007 specifically states that "Superior will deliver a check to Muhler for $120,745.00 immediately upon receipt of" referenced performance bonds. (Att. R).[6] The

[6] In fact, Mr. Andrews characterized the 2007 Agreement among Superior, Weather Shield and Muhler as a "payment agreement." (Andrews Dep. p. 297, lines 4-8, Att. C) (*see also* Affidavit of Todd R. Meyer, Esq., dated May 7, 2014, ¶¶ 8, 15, Att. S (explaining that one of the purposes

performance bond was delivered by Muhler but Superior has never made the promised payment. (*See* Affidavit of Tali Vereen, Att. J). As Muhler was never paid pursuant to this promise, the 2007 Agreement lacks consideration.

It is important to note in this respect that Mr. Sykora explained that Superior failed to timely pay Muhler even before "any problems with the windows and doors and we were induced to get into this agreement so that we would get paid for the work that we had already done." (Sykora Sept 24, 2012 Dep. p. 164, lines 15-19, Att. I-1). Superior "was withholding payment prior to any window tests. They weren't paying us. They weren't performing their portion of their contract. They then – once the water tests came up, they used that as an excuse not to pay us any more money, but they were in default ... way before the tests." (Id., p. 167, lines 7-15). Mr. Clardy confirmed. (Clardy Dep. p. 478, line 3 – 479, line 17, Att. F (explaining that in January of 2007, Muhler had not been paid and Mr. Clardy did not know of a reason why Muhler was not paid at that time)) (Id., p. 480, lines 19-24).[7]

Furthermore, actions and positions taken by Superior and/or C&C made Muhler's performance under the 2007 Agreement impossible. Muhler agreed "to remedy any defects in the installation of the windows." (June 2007 Agreement, Section 5, Att. B; *see also* Section 9 (Muhler agreeing "that in the event of any future window or door failure or defect in installation, that Weather Shield will repair or replace any defective window or door, and Muhler will repair any other component of the building damaged in the process

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of the 2007 Agreement was to address "Superior's failure to pay Muhler for amounts due pursuant to its construction subcontract," and that Superior's promise to pay amounts due "was a crucial component of the deal")).

[7] Muhler also was never paid for the 25 windows it was instructed to remove and reinstall so that the bucking configuration could be altered. (Sykora Sept 24, 2012 Dep. p. 122, lines 2-13, Att. I-1).

of repairing or replacing such window or door installation")). Even though Mr. Lies developed a protocol for repairing the windows that proved to be successful, (Att. M (Protocol)) (Lies Dep. p. 262, lines 22-25, Att. L),[8] Muhler was not allowed to execute that repair protocol. Thus, Muhler was placed in a position that it could not resolve this issue. *See* Payne v. Melton, 67 S.C. 233, 45 S.E. 154 (1903).

This court should hold that neither Superior nor C&C are entitled to indemnification under the 2007 Agreement because of lack of consideration and impossibility.

II. Superior's and C&C's equitable indemnity claims fail as a matter of law because neither party can prove they have "clean hands."

Although both Superior and C&C allege that they are entitled to equitable indemnity from Muhler, (C&C Third-Party Complaint, ¶¶ 99-100, Att. P) (Superior's Third Party Complaint, ¶ 105, Att. Q), neither Superior nor C&C can prove that they did not contribute to the failure of the windows and doors at the Subject Property. Therefore, neither Superior nor C&C has clean hands, which is a prerequisite for establishing entitlement to equitable indemnity. "Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second part is not. [citation omitted] If the second party is also at fault, he comes to court without equity and has no right to indemnity. **The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault** and the indemnifying party is the one at fault." Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 63,

[8] The only leak was the result of an area where "the sealant didn't quite cure." Mr. Lies explained that they had to go ahead and test it without the sealant cured because they "were on a time crunch. The owner wanted us out of there ... the owner, Dr. Mather I think his name was, was very anxious to have us done and out of there." (Lies Dep. p. 262, line 14 – 264, line 11, Att. L).

518 S.E.2d 301, 307 (Ct. App. 1999) (emphasis added); *see also* Otis Elevator, Inc. v. Hardin Constr. Co., 316 S.C. 292, 295, 450 S.E.2d 41, 43 (1994) (equitable indemnity is permissible where an "innocent indemnitee ... has been sued by a third party"); Griffin v. Van Norman, 302 S.C. 520, 527, 397 S.E.2d 378, 382 (Ct. App. 1990) (the party claiming equitable indemnity must be "totally innocent of wrongdoing" and free "from any fault").

As noted above and explained in more detail below, C&C hired both the architect, JDavis, and the waterproofing expert, SKA. Actions by Superior, JDavis and SKA contributed to the water intrusion issues, and are responsible for damage caused to the windows and doors themselves.

A. Superior and C&C contributed to the Plaintiffs' alleged damages, both in general and specifically with respect to the windows and doors.

Mr. Glick reviewed Paragraph 49 of the Amended Complaint, which tracks closely with the issues raised in his expert reports, and opined that each one was the result of design deficiencies, contract administration[9] and/or construction. (Glick Dep. p. 671, line 2 – 680, line 9, Att. N). In his most recent deposition, Mr. Glick opined that the architect and general contractor missed numerous opportunities to see and correct issues with the Subject Property, including the windows. "Those are contractual obligations and the contractor didn't do things right and that's well documented and the architect didn't catch things that were wrong and that's documented because we wouldn't be here today. If no one violated the standard of care, we wouldn't be here today." (Glick Dep. p. 682,

[9] For his part, Mr. Clardy blamed the architect for failures in contract administration "when the windows were at issue ... quite frankly, they just disappeared from the job ... I don't recall ... there being any architect appearance on the jobsite to assist in working out the problems, making sure that we were, in fact, meeting their intent of the plans and specifications." (Clardy Dep. p. 589, line 10 – p. 590, line 4, Att. F).

line 22 – 683, line 22, Att. N). For example, installation of the Weather Shield windows into a barrier system, as opposed to a drainable system, was not only a violation of the Weather Shield installation instructions, but also a violation of code. (Id., p. 688, line 20 – 689, line 16). Mr. L.G. "Skip" Lewis, Superior's forensic expert, was in agreement, opining that "the biggest criticism" he had of the building design drawings was that they "basically combine elements of drainage systems in barrier systems," which was not done in "a competent manner," which ran "the risk of encapturing unintended drainage or water within ... the cladding system." (Lewis Dep. p. 289, line 6 – 290, line 14, Att. V).

There is overwhelming evidence and testimony that Superior failed miserably in its role as General Contractor for the Subject Property. Mr. Glick was highly critical of Superior's management of the construction of the Subject Property: "I say this not lightly but ... I don't think there was any management or supervision because of what's out there .... I'm not sure but, I mean, the stucco problems and the brick problems, that's Construction 101." (Glick Dep. p. 738, line 14 – 739, Att. N). Mr. Sykora agreed that Superior did not provide adequate supervision on the project: "the superintendents not keeping the various other subcontractors well supervised ... extension cords coming through windows and doors, and windows and doors being left open. On other projects that I've been on, typically at the end of the day, there's somebody at the contractor level that would go through the building, close everything up for the night, if anything had been left open. Most projects today – or over the last few years – that I've been involved in typically don't allow windows and doors to be open." (Sykora May 24, 2013 Dep. p. 77, lines 5-14, Att. I-2).

Mr. Andrews testified that there were concerns about Superior being able to adequately staff the Project. "There was issues that came up during the construction that [Superior] just didn't have the right manpower to bring in the resources as they fell behind, or didn't seem to. I'm not sure why they made the decisions to do what they did." (Andrews Dep. p. 31, line 23 – 32, line 8, Att. C). The minimal number of change orders in the Project was "atypical. It's a picture into the lack of resources to get things organized." (Id., p. 73, lines 2-7). Mr. Andrews testified that, other than Superior's supervisor, Johnny Barfield, "[e]verybody else was either a subcontractor's employee or a temporary labor force that they hired to buy carpentry work from, labor to clean up the project, various tasks that they tried to tackle completely with temporary labor." (Id., p. 331, lines 3-11). Vince Hood, a consultant hired by the developer (Estates Management) to investigate construction problems at the Subject Property, echoed these criticisms, indicating that the project was understaffed: "There were no craftsmen or carpenters that were employed by Superior," and "no foremen to assist [Superior's] superintended on site..." (Hood Dep. p. 26, line 22 – 28, line 11, Att. T) (Id. p. 37, line 23 – 38, line 14 (citing a lack of skilled labor/carpenters, on the project)).

Mr. Hood explained that the problems with Superior's management of the project went deeper than Superior's staffing problems:

> Q: Tell me how they go deeper.
>
> A: Well, when you have work that needs to be done and subcontracts have not been written. When you have material – important material that needs to be delivered, you don't know what the delivery dates are and you don't even have copies of the submittals that would have been approved by the architects or engineers. You don't have copies of those on site, you don't know when the material's coming or whether it's even been ordered. Subcontracts for certain installations that were not written or, if they were, the superintendent on site did

not – was not aware of who it was. Just numerous problems and flow of information problems.

Q: If you had to grade Superior's performance for Concord & Cumberland, what grade would you give them?

A: It would be, at best, a very poor grade. If you want to call it a D, D minus. Very little support from the home office, which you would expect. Apparently a cash flow problem since ... a lot of subcontractors are not being paid on time and walking off the jobsite. A lack of planning. And the project manager was overwhelmed with the other projects and really didn't pay much attention to this project.

(Hood Dep. p. 39, line 9 – 40, line 13, Att. T). Another problem Mr. Hood identified was "that not all of the subcontractors had current plans on site." (Id., p. 69, lines 5-10).

Superior's failures as General Contractor directly contributed to water intrusion problems. For example, Mr. Andrews testified that, when they examined a balcony that had been installed improperly, they "found that the waterproofing system that Superior had put in, that they had poked a hole in the waterproofing membrane as it was being required to bridge over a void ... that one hole, which was a persistent leak." (Andrews Dep. p. 143, line 17 – 144, line 2, Att. C). When asked about Superior's response afterwards, Mr. Andrews indicated that Superior admitted "the quality of the workmanship was extremely poor and negligent." (Id., p. 283, line 16 – 284, line 13).

B. Actions taken by Superior, C&C, and/or their direct subcontractors (other than Muhler) affected both the installation and performance of the windows.

Mr. Lies was critical of the design the architect used to incorporate the windows into the building envelope, saying he did not believe "it was completely thought out. So I do have criticism of the design in that respect ... and let me be specific on that. I don't think there was a good plan ... of what the final detailing was going to be prior to ... Muhler and their subs getting out there to start installing windows. I think it was kind of

made up on the spot in the preconstruction meeting." (Lies Dep. p. 147, line 23 – 148, line 10, Att. L). Mr. Lies noted that the pans under the bucks were not back sealed, which allowed water to percolate in, and there was "too big a gap between the back of the pan and anything you could reliably seal against." In addition there was no positive slope to the pans, "[s]o you have a water collection device that you put into your design to collect incidental water, but it has nowhere to go." (Id., p. 149, lines 1-22). Mr. Lies also opined that "[t]here should have been some instruction on how to attach the buck, what size screws, what spacing, how to attach that buck to the opening." (Id., p. 161, line 15 – 162, line 11). Superior's Chip Clardy asserted that "there were significant design defects in the plans that were given to it for Concord & Cumberland," that related to "the design of the window installation," as well as to the exterior cladding. (Clardy Dep. p. 671, line 18 – 672, line 5, Att. F).[10]

In fact, in defense of his own company, Mr. Clardy testified that the problems lay not so much with Superior's failure to coordinate the work properly but, instead, pointed the finger at the architect and developer:

> Majority I think on this project was in a failure of the project to be designed correctly and the contract documents to be complete and clearly show how the project was to be properly constructed .... That's the design issue .... I think that performance wound up being significantly integrated to the design problem to the point that it did have a significant ripple-down effect .... I pretty much agree that it is a step-down process. If the owner and architect don't provide adequate documentation to the contractor, the contractor doesn't provide adequate documentation to the subcontractor, then it's going to be exactly what we got here.
>
> (Clardy Dep. p. 722, line 12 – 723, line 14, Att. F).

[10] Theresa Hodge, the 30(b)(6) designee for C&C, confirmed that the architect came up with the sealant detail to resolve the problem that arose when they realized that Weather Shield's installation instructions said that pans were not to be used with the doors. (Hodge Dep. p. 66, line 8 – 67, line 11, Att. D).

Mr. Andrews recalled that the window installation was delayed because Superior did not have the rough openings, the bucks, ready in time. (Andrews Dep. p. 274, lines 20-25, Att. C). Sequencing the subcontractors was the general contractor's responsibility and Mr. Andrews testified that "Superior did a very, very, very poor job of getting the subcontractors sequenced in, the right materials and the right equipment, the right products in at the right time." (Id., p. 281, line 11 – 282, line 3). As a result, some windows were installed in the brick without their fins. (Id., p. 282, lines 5-22).

Mr. Lawson testified that Superior used temp labor, which he described as "very incompetent," (Lawson Dep. p. 174, line 20 – 175, line 21, Att. G), to install the bucks. "We wouldn't install the window until the buck was corrected, so we were seeing poor workmanship, and we would have to make them correct it sometimes two or three times before we would install the window." (Id., p. 183, lines 2-6). Mr. Sykora explained that Muhler advised Superior when they encountered bucks that were not square. (Sykora May 24, 2013 Dep. p. 50, line 14 – 51, line 12, Att. I-2).

Mr. Lawson testified that Muhler installed the windows square and plumb and indicated that events that occurred after installation may have caused windows to become unsquared, unplumbed and/or unleveled. (Lawson Dep. p. 103, line 15 – 104, line 10, Att. G). Mr. Sykora testified similarly. (Sykora May 24, 2013 Dep. p. 51, line 13 – 52, line 25, Att. I-2 (testifying that only one window was slightly out of square but it was adjusted to within the accepted tolerance)). Mr. Glick agreed that it was possible that the windows were installed plumb but having wood bucks sitting in pans that were constantly wet would warp the wood and cause the window to "go out of plumb and square." (Glick Dep. p. 754, lines 3-19, Att. N). Mr. Lies added that the use of pressure-treated lumber

for the bucks may have contributed to the problem "because that's not a real stable – dimensionally stable wood," (Lies Dep. p. 70, line 20 – 71, line 6, Att. L), concluding that it was "a bad idea to use Womanized or pressured-treated lumber, because that stuff is never straight. It curls and warps as it dries out." (Id., p. 163, lines 1-5). Even Ms. Quigley, a senior associate with Stafford Engineering, admitted that, although she criticized the windows for being out of plumb, (Quigley Dep. p. 182, lines 14-16, Att. U), she could not state that the windows had not been installed plumb and square. (Id., p. 413, lines 6-9). Nor could Mr. Lewis state that the windows had not been plumb and square when installed. (Lewis Dep. 348, lines 13-22, Att. V).

Mr. Glick explained that the leaking around the windows is the result, in part, of the design and location of the pans. (Glick Dep. p. 728, line 7 – 729, line 7, Att. N) (Id., p. 731, lines 6-24). When asked about the architectural detail for the pans underneath the windows, Mr. Glick stated, "[h]ow they're used in the details, in other words, a pan – there's nothing wrong with a pan but how it's detailed, that's a problem and then how it's built is even worse." (Id., p. 727, lines 2-5). Superior was responsible for installing the pans under the windows. (Hodge Dep. p. 148, line 23 – 149, line 7, Att. D). Mr. Andrews testified to problems with getting Superior to install the pans properly. (Andrews Dep. p. 168, lines 1-25, Att. C) (*see also* Trial Exh. 356, Att. H (although the pans were at the site and each was labeled "for the opening that it fits ... Superior is using any pan that comes close and hammering it into the opening. Many pans are being damaged ...")). Significantly, in order to correct the pan issue, the windows would have to be removed and replaced even if there was absolutely nothing wrong with the

windows. (Glick Dep. p. 732, line 3 – 734, line 1, Att. N) (Clardy Dep. p. 670, lines 12-18, Att. F) (concurring).

Mr. Lies testified that, during the testing process, they observed water penetration between the window and the buck, "[q]uite often," and attributed that "[p]ossibly due to the waterproofing." (Lies Dep. p. 315, line 25 – 316, line 9, Att. L). JDavis, SKA, and/or other entities other than Muhler were responsible for waterproofing. (*See* Sykora May 24, 2013 Dep. p. 25, line 24 – 26, line 22, Att. I-2) (Id., p. 97, lines 5-17) (Id., p. 119, lines 9-11).

Mr. Andrews also explained that the subcontractor for the stucco exterior was provided the window details because that subcontractor would have "installation responsibility towards any subsequent flashings that are integral with the stucco system to help remove water ... from inside the wall cavity to the outside face of the stucco." (Andrews Dep. p. 59, line 12 – 60, line 8, Att. C). Mr. Andrews testified as to the importance of the windows being flashed properly so that they could drain. (Id., p. 43, lines 1-7). It was Mr. Andrews' understanding that Superior and/or its stucco subcontractor "would be installing window head and sill flashing ... [p]er the JDavis details and/or the manufacturer's stucco typical details." (Id., 79, lines 6-10). It is widely agreed that the lack of proper flashing and/or weep holes contributed to the water intrusion problems at the Subject Property. (Id., p. 43, lines 1-7) (Id., p. 59, line 12 – 60, line 8) (Glick Preliminary Report, dated Dec 15, 2009, pp. 11-12, Att. W) (Glick Supplemental Report #1, dated March 11, 2010, p. 7, Att. X) (Glick Dep. p. 92, line 19 – 93, line 7, Att. N) (Quigley Dep. p. 388, line 15 – 389, line 10, Att. U) (Lewis Dep., p 37, line 16 – 38, line 16, Att. V (noting the significance of the rough opening flashing

"particularly given the design of the wall systems, especially the stucco wall systems by the prime design professional ... the exterior cladding and its seal with the perimeter of the window frame is, in my mind, a very important barrier to water intrusion from the exterior of the building to the space between your cladding and your sheathing")) (Id., p. 147, lines 22-25 (through-wall flashing "is a critical element")).

C. Superior was responsible for other contractors who damaged the windows and doors after they were installed and Muhler had left the Subject Project.

Both Mr. Glick and Mr. Lewis testified that it was Superior's responsibility to ensure that other subcontractors did not damage the windows once Muhler left the Subject Property. (Glick Dep. p. 756, line 14 – 757, line 8, Att. N) (Lewis Dep. 278, lines 3-18, Att. V). Superior's Mr. Clardy agreed. (Clardy Dep. p. 338, lines 6-13, Att. F). However, Mr. Sykora testified that "there were a number of ... different trades that came onto the project after [Muhler] completed [its] work, and there was quite a bit of damage done by various trades to the windows and doors." (Sykora May 24, 2013 Dep. p. 15, line 21 – 16, line 7, Att. I-2) (Id., p. 182, lines 6-15). Mr. Andrews recalled "seeing some scaffolding/walk boards being placed inside of a window that was already installed so that people could come and go some. That was not really a good thing." (Andrews Dep. p. 184, lines 4-8, Att. C). "There were extension cords left ... run through windows, around doors, the windows being open so long, and when they were doing the stucco work, there was quite a bit of stucco that fell on to the hardware, fell on to the lock mechanism that's on the sash ... And when you went to close the windows, they would grind closed because of all of that masonry material that fell into the hinges, into the hardware. ... [Muhler] had to replace weather stripping, as well, because the

weather stripping got torn up during construction by other trades." (Sykora May 24, 2013 Dep. p. 17, line 14 – 18, line 2, Att. I-2) (Id., p. 71, line 6 – 73, line 11).

Mr. Clardy admitted that the windows were left open during construction and that materials were "delivered through opened windows." (Clardy Dep. p. 571, lines 7-12, Att. F). He explained the windows were left open, in part, because of cost concerns. (Id., p. 684, line 25 – 685, line 3). Ms. Quigley acknowledged that people using the windows "as a means of ingress and egress during the construction phase," could have caused the windows to sag. (Quigley Dep. p. 328, line 8 – 329, line 4, Att. U). In addition, Ms. Quigley admitted that it was possible that the leaking she observed on the one door that she tested could have been the result of damage caused by construction workers at the site after the door had been installed. (Id., p. 194, line 11 – 195, line 11). Mr. Lies explained that, "leaving [the casement windows] open fully to pass materials through or for ventilation ... really does put a toll and weight on the hardware that you wouldn't normally see in everyday operating conditions." (Lies Dep. p. 57, lines 16-21, Att. L).

Mr. Andrews also testified that Superior "didn't do a good job" of protecting the windows from other subcontractors. Windows were left open to allow the interior workers to have ventilation and, in addition, windows were open during a "strong storm." (Andrews Dep. p. 214, line 20 – 218, line 18, Att. C) (Id., p. 287, line 25 – 288, line 4). In fact, Superior employees reported that windows had been damaged when they were left open during a wind event. (Id., p. 287, lines 8-15). Mr. Lawson recalled that "a lot of the sash had been left open during construction and sagged and had been damaged during construction, which wouldn't allow it to contact the weather stripping properly ... I have pictures of every window, just about, in the building, standing open in rainstorms

..." (Lawson Dep. p. 49, lines 13-21, Att. G) (Id., p. 80, lines 17-23). Mr. Lies testified that if the windows were left open during a rain and the interior wood had not been finished or painted, and that wood "gets wet ... you would lose the bond of the sealant, glazing sealant ..." (Lies Dep. p. 296, lines 6-11, Att. L).

When he examined the windows, Mr. Lies observed:

> a lot of leaves [of] weather stripping that was damaged, that was broken off at corners where the whole side of the leaf was broken off and taken out. There was areas where it was missing. There was areas where – or there were windows – and not just one or two – that had all kinds of debris in the sills ... I remember seeing mortar dust, I remember seeing drywall compound on the weather stripping. I remember seeing all kinds of abuse ... and then I measure some of these units or tried to open them up and I can see that the operators have been damaged, where they're rotating inside as you crank them open and the seal's been gone. I saw sashes that are basically scraping as you open and close them.

(Id., p. 119, line 6 – 120, line 3). Mr. Lewis agreed that these issues could have caused the windows to fail the tests. (Lewis Dep. p 105, line 9 – 106, line 7, Att. V).

Mr. Lies testified that water that came in over the window sash could have been caused by abuse or misuse of the windows. (Lies Dep. p. 317, lines 15-19, Att. L) (Id., p. 64, lines 8-18). Ms. Quigley acknowledged that "leaving windows open in a high-speed wind event," could have caused the windows to sag. (Quigley Dep. p. 328, line 8 – 329, line 4, Att. U). Mr. Lewis agreed, (Lewis Dep. p. 265, lines 4-6, Att. V), and Mr. Lies concurred that he saw conditions that might correlate to damage caused by windows being left open in high winds. (Lies Dep. p. 297, line 16 – 298, line 14, Att. L).

D. There were numerous sources of leaks and water intrusion into the Subject Property attributable to work for which Superior and/or C&C were responsible.

Mr. Glick pointed to numerous causes of water intrusion at the Subject Property that either had nothing to do with the windows, or were not caused by Muhler's window

installation. (*See* Glick Preliminary Report, Att. W))Glick Supplemental Report #1, Att. X) (Glick Supplemental Report #3, dated Feb. 4, 2012, Att. Y)). Although Mr. Hood testified that "the windows themselves were leaking," he clarified that the leaking he observed was "[n]ot around the edges, which would indicate an installation problem." (Hood Dep. p. 84, lines 1-5, Att. T).

In his reports, Mr. Glick identified numerous construction defects, including but not limited to the following:

Stucco System

1. Lack of Weep holes at window heads
2. Lack of through wall Flashing (TWF) at window heads resulting in water intrusion to the studs and deterioration of sheathing
3. Lack of a Functional Water Management System
4. Lack of proper slope at EIFS horizontal trim
5. System thickness varies
6. Lack of proper sealant joints at stucco and window intersections
7. Installation methods do not follow building code and ASTM requirements C 926 & C 1063. Therefore, Stucco System is in violation of the building code.

Windows

1. Water test failures
2. Lack of proper spacing for effective sealant joints with adjacent dissimilar materials
3. Negative slope of pan flashing
4. Negative slope of exterior sill at tower (precast) window
5. Lack of a window mullion cap at unit #304. All windows should be checked.
6. Lack of nailing fins.
7. Lack of fasteners. Weathershield shall confirm that this installation is an approved method.

Wall Sheathing

1. Lack of proper installation around window openings.
2. High moisture content resulting from water intrusion and therefore, deteriorating densglass gold sheathing.
3. Lack of proper fasteners and fasteners not secured properly.

Brick

1. Lack of functioning weep holes with TWF at brick sills and heads
2. Lack of proper gap for sealant joints at window intersections with brick
3. Lack of proper slope at brick sills.

Miscellaneous

1. Flashing on top of window sill nailing fin (hole #9)
2. Lack of end dams in TWF at brick sill flashing
3. Lack of proper weep holes at brick sills
4. Lack of a drip detail allowing water to roll under the balcony onto the soffit
5. Lack of proper sealant at rail post penetrations into the tile balconies
6. Lack of weeps at brick and stucco walls at the first floor cornice (stone) intersection.
7. Lack of proper flashing at floor/wall intersections and lack of drip lip at all balconies

(Glick Preliminary Report, pp. 11-12, Att. W) (Glick Supplemental Report #1, p. 7, Att. X). The vast majority of these issues are unrelated to the performance of the windows or their installation.

With respect to "weeps and other areas of concerns, such as flashing," Mr. Glick concluded that the architectural drawings did not provide sufficient detail for the builder to know how to install these features. "If the contractor did not ask for clarification and built it without any other documentation, the builder would be responsible for the design at the end of the day." (Glick Dep. p. 76, line 4 – 77, line 10, Att. N) (Id. p. 79, lines 4-11) (Id., p. 104, lines 3-19) (Id., p. 228, lines 4-9) (Id., p. 435, lines 10-14). Mr. Glick pointed to the lack of through-wall flashing and weeps at the windows as violations of both the applicable building codes and the architect's design. (Id., p. 92, line 19 – 93, line 7). Mr. Lewis concurred that the lack of weeps was "the key element." (Lewis Dep. 290, lines 11-14, Att. V). Mr. Glick said, "just look at the soffits where the water's staining. That means water is getting through intersections, which it could be the front intersection at the brick of stucco. Could be the wall. Any number of sources." (Glick Dep. p. 244, lines 9-14, Att. N). He observed "water intrusion at crown moulding and water coming down the plane of the wall itself," (id., p. 249, lines 17-19), water "coming

in way above the window ... probably at a cornice line ..." (Id., p. 251, lines 17-18). Mr. Glick observed "massive water intrusion" from the balcony decks. (Id., p. 197, line 21 – 198, line 9).

When asked whether the various defects he observed were the "result of a design defect or construction defect or both," Mr. Glick responded that he thought it was construction. (Glick Dep. p. 276, lines 10-13, Att. N). He confirmed that the construction deficiencies he observed, including the lack of through-wall flashing, "exist[ed] everywhere." (Id., p. 332, line 22 – 333, line 3).

Mr. Glick identified instances where water was coming in at the windows because they were "not flashed properly." (Glick Dep. p. 281, lines 1-11, Att. N). Mr. Glick observed bucks that were soaked because, once water got in, water just sat in the pans because "there's a negative slope on that flashing sitting on the buck." Mr. Glick opined that water was present because either the window was leaking "or the joint – and/or the joint at the sill window" allowed water to enter. (Id., p. 303, line 12 – 304, line 25). Water was coming into the units under the doors on the patios or balconies because of negative slope of the balconies, not necessarily because of any defect in the doors. (Id., p. 714, line 4 – 715, line 25).

Mr. Andrews confirmed that pipes leaked, water could get behind the stucco system, and some balconies were angled to allow water to flow into a unit. (Andrews Dep. p. 343, line 13 – 346, line 14, Att. C). Theresa Hodge with Estates Management made a site visit on October 26, 2007 where she documented leaks in various units, a number of which were not window leaks. (Hodge Dep. p. 152, line 12 – 156, line 14, Att. D) (*see also* Id. p. 172, lines 16-21 ("We had one issue where the gas line going

through the wall was installed – it wasn't balanced, so the water was coming into the unit instead of going out. I mean, there were various different reasons that were given for water intrusion")).

III. C&C's contribution claims fail as a matter of law.

In its Third-Party Complaint, C&C alleges it is entitled to contribution from Muhler, as well as from other third-party defendants. (C&C Third-Party Complaint, ¶ 116, Att. P). However, as a matter of law, C&C is not entitled to contribution because it cannot prove that the settlement it entered into with the Plaintiffs contained a release that included Muhler.

Under the common law, there was no right to contribution among tortfeasors. Therefore, any right to contribution arises solely under the South Carolina Contribution Among Tortfeasors Act ("Act"), S.C. Code Ann. §§ 15-38-10 to -70. Cowden Enter., Inc. v. East Coast Millwork Distrib., 363 S.C. 540, 543, 611 S.E.2d 259, 260 (Ct. App. 2005). Section 15-38-20(D) provides, in pertinent part that "[a] tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury ... is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable." S.C. Code Ann. § 15-38-20(D). Because the Act is in derogation of the common law, its provisions are strictly construed. G&P Trucking v. Parks Auto Sales Serv. & Salvage, Inc., 357 S.C. 82, 87, 591 S.E.2d 42, 44 (Ct. App. 2003). The party claiming contribution must prove facts entitling it to contribution. Id. Specifically, the party seeking contribution must prove that it "paid more than [its] pro rata share of the common liability," Vermeer Carolina's, 336 S.C. at 68, 518 S.E.2d at 309, and that

"extinguishment of the defending joint tortfeasor's liability ... resulted directly from the settlement itself." G&P Trucking, 357 S.C. at 88, 591 S.E.2d at 45. Here, C&C cannot prove either fact. Therefore, this Court should hold that C&C's claim for contribution fails as a matter of law.

CONCLUSION

For the reasons stated herein, this Court should grant Muhler's Motion for Partial Summary Judgment, and hold, as a matter of law, that: 1) neither the Subcontract nor the 2007 Agreement indemnifies Superior or C&C for their own wrongdoing, and that the 2007 Agreement fails for lack of consideration and impossibility; 2) that neither Superior nor C&C is entitled to equitable indemnification because neither can prove it has "clean hands"; and 3) that C&C is not entitled to contribution.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC

Peter Gunnar Nistad
Post Office Box 650007
735 Johnnie Dodds Blvd, Suite 200 (29464)
Mount Pleasant, South Carolina 29465
(843) 576-2900

ATTORNEYS FOR DEFENDANT,
THE MUHLER COMPANY, INC.

July 14, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

CONCORD AND CUMBERLAND HORIZONTAL PROPERTY REGIME,

And

THOMAS R. MATHER,

And

BETTY Y. SEGAL,

And

SIGNATURE CHARLESTON, LLC and WADE ROBINSON,

And

JAMES C. KIRKPATRICK,

And

PAUL A. BRIM,

And

FRED RAPPAPORT and JOYCE RAPPAPORT,

And

THOMAS R. DEBNAM, as TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM,

And

PAMELA L. VAUGHAN,

Plaintiffs,

vs.

Civil Action No. 2010-CP-10-2271

Civil Action No. 2010-CP-10-2919

Civil Action No. 2010-CP-10-3206

Civil Action No. 2010-CP-10-3207

Civil Action No. 2010-CP-10-3208

Civil Action No. 2010-CP-10-3209

Civil Action No. 2010-CP-10-3210

Civil Action No. 2010-CP-10-9580

Civil Action No. 2010-CP-10-9767

MUHLER'S AMENDED NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

CONCORD & CUMBERLAND, LLC, *et al.*,

Defendants.

TO: CHRIS MAJURE, ESQUIRE AND HENRY BROWN, ESQUIRE:

Please take notice that the Defendant The Muhler Company, Inc. will be move before The Honorable Clifton Newman at a time and date set by Judge Newman for an Order that grants Partial Summary Judgment to Defendant Muhler on all cross-claims alleged against Muhler by Defendant Superior Construction Corporation and Defendant Concord & Cumberland, LLC. This Motion is based upon Rule 56 of the South Carolina Rules of Civil Procedures. The grounds for this motion are that: 1) neither the Subcontract nor the 2007 Agreement indemnifies Superior or C&C for their own wrongdoing, and that the 2007 Agreement fails for lack of consideration and impossibility; 2) that neither Superior nor C&C is entitled to equitable indemnification because neither can prove it has "clean hands"; and 3) that C&C is not entitled to contribution because it failed to extinguish Muhler's exposure to Plaintiffs. Defendant Muhler reserves the right to submit a Memorandum of Law in support of the Motion for Partial Summary Judgment along with exhibits.

MCANGUS GOUDELOCK & COURIE, L.L.C.

Peter Gunnar Nistad
Post Office Box 650007
735 Johnnie Dodds Blvd, Suite 200 (29464)
Mt. Pleasant, South Carolina 29465
(843) 576-2900

ATTORNEYS FOR DEFENDANT THE MUHLER COMPANY, INC.

July 14, 2014

Attachment A

SUPERIOR CONSTRUCTION CORPORATION

RECEIVED
JUN 13 2007

GENERAL CONTRACTOR

SUBCONTRACT FOR CONSTRUCTION

WITH

MUHLER

FOR ALL

WINDOWS, ENTRY DOORS, PATIO DOORS, &
DOOR AND WINDOW TRIM

Concord & Cumberland
Charleston, SC 29401

Project No. 06-MBD-017
Subcontract Number: 06MBD017-S14 509
Subcontract Amount: $723,355.68
Cost Code: 08-501

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

SUBCONTRACT FOR BUILDING CONSTRUCTION

TABLE OF ARTICLES

This Agreement has important legal and insurance consequences. Consultation with an attorney and insurance consultant is encouraged with respect to its completion or modification and particularly when used with other than AIA A201 General Conditions of the Contract for Construction, August 1975 edition.

AGC DOCUMENT NO. 600 SUBCONTRACT FOR BUILDING CONSTRUCTION August 1984
Associated General Contractors of America

TABLE OF CONTENTS

SUBCONTRACT FOR BUILDING CONSTRUCTION

ARTICLE 1

AGREEMENT

This Agreement made this 17th day of May, 2006, and effective the 17th day of May, 2006, by and between Superior Construction Corporation hereinafter called the Contractor and Mubler, hereinafter called the subcontractor, to perform part of the Work on the following Project:

PROJECT:	Concord & Cumberland Charleston, SC 29401
OWNER:	Concord & Cumberland, LLC 1401 Main Street Suite 650 Columbia, SC 29204
ARCHITECT:	J Davis Architects 510 Glenwood Ave Suite 201 Raleigh, NC 27603
CONTRACTOR:	Superior Construction Corporation 3723 Suite C Forestbrook Drive Myrtle Beach, S. C. 29588
SUBCONTRACTOR:	Mubler 5565 Rivers Ave Suite 103 N. Charleston, SC 29406
CONTRACT PRICE:	$723,355.68

Contact: Dino Agosti
Phone: 843-377-4101
Fax: 843-572-9726

Notice to the parties shall be given at the above addresses

ARTICLE 2

SCOPE OF WORK

2.1 SUBCONTRACTOR'S WORK. The Contractor employs the Subcontractor as an independent contractor, to perform the work described in Article 16.The Subcontractor shall perform such work (hereinafter called the "Subcontractor's Work") under the general direction of the Contractor and in accordance with this Agreement and the Contract Documents.

2.2 CONTRACT DOCUMENTS. The Contract Documents which are binding on the Subcontractor are as set forth in Article 16.5.

Upon the Subcontractor's request the Contractor shall furnish a copy of any part of these documents.

2.3 CONFLICTS. In the event of a conflict between this Agreement and the Contract Documents, this Agreement shall govern, except as follows: in the event of a conflict between this Agreement and Exhibit "A", then Exhibit "A" shall govern.

ARTICLE 3

SCHEDULE OF WORK

3.1 TIME IS OF ESSENCE. Time is of the essence for both parties, and they mutually agree to see to the performance of their respective work and the work of their subcontractors so that the entire Project may be completed in accordance with the Contract Documents and the Schedule of Work. The Contractor shall prepare the Schedule of Work and revise such schedule as the Work progresses.

3.2 DUTY TO BE BOUND. Both the Contractor and the Subcontractor shall be bound by the Schedule of Work. The Subcontractor shall provide the Contractor with any requested scheduling information for the Subcontractor's Work. The Schedule of Work and all subsequent changes thereto shall be submitted to the Subcontractor in advance of the required performance.

3.3 SCHEDULE CHANGES. The Subcontractor recognizes that changes will be made in the Schedule of Work and agrees to comply with such changes subject to a reservation of rights arising hereunder.

3.4 PRIORITY OF WORK. The Contractor shall have the right to decide the time, order and priority in which the various portions of the Work shall be performed and all other matters relative to the timely and orderly conduct of the Subcontractor's Work.

The Subcontractor shall commence its work within 3 days of notice to proceed from the Contractor and if such work is interrupted for any reason the Subcontractor shall resume such work within two working days from the Contractor's notice to do so.

ARTICLE 4

CONTRACT PRICE

The Contractor agrees to pay to the Subcontractor for the satisfactory performance of the Subcontractor's Work the sum of Seven Hundred Twenty-Three Thousand Three Hundred Fifty-Five dollars and Sixty-Eight cents. ($723,355.68) in accordance with Article 5, subject to additions or deductions per Article 6.

ARTICLE 5

PAYMENT

5.1 GENERAL PROVISIONS

5.1.1 SCHEDULE OF VALUES. The Subcontractor shall provide a schedule of values satisfactory to the Contractor and the Owner no more than fifteen (15) days from the date of execution of this Agreement.

5.1.2 ARCHITECT VERIFICATION. Upon request the Contractor shall give the Subcontractor written authorization to obtain directly from the Architect the percentage of completion certified for the Subcontractor's Work.

5.1.3 PAYMENT USE RESTRICTION. No payment received by the Subcontractor shall be used to satisfy or secure any indebtedness other than one owed by the Subcontractor to a person furnishing labor or materials for use in performing the Subcontractor's Work.

5.1.4 PAYMENT USE VERIFICATION. The Contractor shall have the right at all times to contact the Subcontractor's subcontractors and suppliers to ensure that the same are being paid by the Subcontractor for labor or materials furnished for use in performing the Subcontractor's Work.

5.1.5 PARTIAL LIEN WAIVERS AND AFFIDAVITS. When required by the Contractor, and as a prerequisite for payment, the Subcontractor shall provide, in a form satisfactory to the Owner and the Contractor, partial lien or claim waivers and affidavits from the Subcontractor, and its sub-subcontractors and suppliers for the completed Subcontractor's Work. Such waivers may be made conditional upon payment.

5.1.6 SUBCONTRACTOR PAYMENT FAILURE. In the event the Contractor has reason to believe that labor, material or other obligations incurred in the performance of the Subcontractor's Work are not being paid, the Contractor shall give written notice of such claim or lien to the Subcontractor and may take any steps deemed necessary to insure that any progress payment shall be utilized to pay such obligations.

If upon receipt of said notice, the Subcontractor does not:

(a) supply evidence to the satisfaction of the Contractor that the monies owing to the claimant have been paid; or

(b) post a bond indemnifying the Owner, the Contractor, the Contractor's surety, if any, and the premises from such claim or lien;

then the Contractor shall have the right to retain out of any payments due or to become due to the Subcontractor a reasonable amount to protect the Contractor from any and all loss, damage or expense including attorney's fees arising out of or relating to any such claim or lien until the claim or lien has been satisfied by the Subcontractor.

5.1.7 PAYMENT NOT ACCEPTANCE. Payment to the Subcontractor is specifically agreed not to constitute or imply acceptance by the Contractor or the Owner of any portion of the Subcontractor's Work.

5.2 PROGRESS PAYMENTS

5.2.1 APPLICATION. The Subcontractor's progress payment application for work performed in the preceding payment period shall be submitted to the Contractor per the terms of this Agreement and specifically Articles 5.1.1, 5.2.2, 5.2.3, and 5.2.4 for approval of the Contractor and N/A

The Contractor shall forward, without delay, the approved value to the Owner for payment.

5.2.2 RETAINAGE/SECURITY. The rate of retainage shall not exceed the percentage retained from the Contractor's payment by the Owner for the Subcontractor's Work provided the Subcontractor furnishes a bond or other security to the satisfaction of the Contractor.

If the Subcontractor has furnished such bond or security, its work is satisfactory and the Contract Documents provide for reduction of retainage at a specified percentage of completion, the Subcontractor's retainage shall also be reduced when the Subcontractor's Work has attained the same percentage of completion and the Contractor's retainage for the Subcontractor's Work has been so reduced by the Owner.

However, if the Subcontractor does not provide such bond or security, the rate of retainage shall be 10%.

5.2.3 TIME OF APPLICATION. The Subcontractor shall submit progress payment applications to the Contractor no later than the 15th day of each month for work performed up to and including the 20th day of each month indicating work completed and, to the extent allowed under Article 5.2.4, materials suitably stored during the preceding payment period.

** 5.2.4 STORED MATERIALS. Unless otherwise provided in the Contract Documents, and if approved in advance by the Owner, applications for payment may include materials and equipment not incorporated in the Subcontractor's Work but delivered and suitably stored at the site or at some other location agreed upon in writing. Approval of payment application for such stored items on or off the site shall be conditioned upon submission by the Subcontractor of bills of sale and applicable insurance or such other procedures satisfactory to the Owner and Contractor to establish the Owner's title to such materials and equipment or otherwise protect the Owner's and Contractor's interests therein, including transportation to the site.

5.2.5 TIME OF PAYMENT. Progress payments to the Subcontractor for satisfactory performance of the Subcontractor's Work shall be made no later than seven (7) days after receipt by the Contractor of payment from the Owner for such Subcontractor's Work.

5.2.6 PAYMENT DELAY. If for any reason not the fault of the Subcontractor, the Subcontractor does not receive a progress payment from the Contractor within seven (7) days after the date such payment is due, as defined in Article 5.2.5, then the Subcontractor, upon giving an additional seven (7) days written notice to the Contractor, and without prejudice to and in addition to any other legal remedies, may stop work until payment of the full amount owing to the Subcontractor has been received. To the extent obtained by the Contractor under the Contract Documents, the contract price shall be increased by the amount of the Subcontractor's reasonable costs of shutdown, delay, and start-up, which shall be effected by appropriate Change Order.

If the Subcontractor's Work has been stopped for thirty (30) days because the Subcontractor has not received progress payments as required hereunder, the Subcontractor may terminate this Agreement upon giving the Contractor an additional seven (7) days written notice.

5.3 FINAL PAYMENT

5.3.1 APPLICATION. Upon acceptance of the Subcontractor's Work by the Owner, the Contractor, and if necessary, the Architect, and upon the Subcontractor furnishing evidence of fulfillment of the Subcontractor's obligations in accordance with the Contract Documents and Article 5.3.2, the Contractor shall forward the Subcontractor's application for final payment without delay.

5.3.2 REQUIREMENTS. Before the Contractor shall be required to forward the Subcontractor's application for final payment to the Owner, the Subcontractor shall submit to the Contractor:

(a)an affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Subcontractor's Work for which the Owner or his property or the Contractor or the Contractor's surety might in any way be liable, have been paid or otherwise satisfied;
(b)consent of surety to final payment, if required;
(c)satisfaction of required closeout procedures; and
(d)other data if required by the Contractor or Owner, such as receipts, releases, and waivers of liens to the extent and in such form as may be designated by the Contractor or Owner.

Final payment shall constitute a waiver of all claims by the Subcontractor relating to the Subcontractor's Work, but shall in no way relieve the Subcontractor of liability for the obligations assumed under Article 9.10 hereof, or for fault, or defective work appearing after final payment.

5.3.3 TIME OF PAYMENT. Final payment of the balance due of the contract price shall be made to the Subcontractor

** THE MEILER COMPANY, INC. HEREIN REQUESTS WRITTEN APPROVAL TO INCLUDE ALL STORED MATERIALS IN IT'S PAYMENT APPLICATIONS, WHENEVER APPLICABLE.

(a) upon receipt of the Owner's waiver of all claims related to the Subcontractor's Work except for unsettled liens, unknown defective work, and noncompliance with the Contract Documents or warranties; and

(b) within seven (7) days after receipt by the Contractor of final payment from the Owner for such Subcontractor's Work.

5.3.4 **FINAL PAYMENT DELAY.** If the Owner or its designated agent does not issue a Certificate for Final Payment or the Contractor does not receive such payment for any cause which is not the fault of the Subcontractor, the Contractor shall promptly inform the Subcontractor in writing. The Contractor shall also diligently pursue, with the assistance of the Subcontractor, the prompt release by the Owner of the final payment due for the Subcontractor's Work. At the Subcontractor's request and joint expense, to the extent agreed upon in writing, the Contractor shall institute all reasonable legal remedies to mitigate the damages and pursue full payment of the Subcontractor's application for final payment including interest thereon.

5.4 **LATE PAYMENT INTEREST.** To the extent obtained by the Contractor under the Contract Documents, progress payments or final payment due and unpaid under this Agreement shall bear interest from the date payment is due at the rate provided in the Contract Documents, or, in the absence thereof, at the legal rate prevailing at the place of the Project.

ARTICLE 6

CHANGES, CLAIMS AND DELAYS

6.1 **CHANGES.** When the Contractor so orders in writing, the Subcontractor, without nullifying this Agreement, shall make any and all changes in the Work, which are within the general scope of this Agreement.

Adjustments in the contract price or contract time, if any, resulting from such changes shall be set forth in a Subcontract Change Order pursuant to the Contract Documents.

No such adjustment shall be made for any such changes performed by the Subcontractor that have not been so ordered by the Contractor.

6.2 **CLAIMS RELATING TO OWNER.** The Subcontractor agrees to make all claims for which the Owner is or may be liable in the manner provided in the Contract Documents for like claims by the Contractor upon the Owner.

Notice of such claims shall be given by the Subcontractor to the Contractor within one (1) week prior to the beginning of the Subcontractor's Work or the event for which such claim is to be made, or immediately upon the Subcontractor's first knowledge of the event, whichever shall first occur, otherwise, such claims shall be deemed waived.

The Contractor agrees to permit the Subcontractor to prosecute said claim, in the name of the Contractor, for the use and benefit of the Subcontractor in the manner provided in the Contract Documents for like claims by the Contractor upon the Owner.

6.3 **CLAIMS RELATING TO CONTRACTOR.** The Subcontractor shall give the Contractor written notice of all claims not included in Article 6.2 within five (5) days of the beginning of the event for which claim is made; otherwise, such claims shall be deemed waived.

All unresolved claims, disputes and other matters in question between the Contractor and the Subcontractor not relating to claims included in Article 6.2 shall be resolved in the manner provided in Article 14 herein.

6.4 **DELAY.** If the progress of the Subcontractor's Work is substantially delayed without the fault or responsibility of the Subcontractor, then the time for the Subcontractor's Work shall be extended by Change Order to the extent obtained by the Contractor under the Contract Documents and the Schedule of Work shall be revised accordingly.

The Contractor shall not be liable to the Subcontractor for any damages or additional compensation as a consequence of delays caused by any person not a party to this Agreement unless the Contractor has first recovered the same on behalf of the Subcontractor from said person, it being understood and agreed by the Subcontractor that, apart from recovery from said person, the Subcontractor's sole and exclusive remedy for delay shall be an extension in the time for performance of the Subcontractor's Work.

6.5 **LIQUIDATED DAMAGES.** If the Contract Documents provide for liquidated or other damages for delay beyond the completion date set forth in the Contract Documents, and are so assessed, then the Contractor may assess same against the Subcontractor in proportion to the Subcontractor's share of the responsibility for such delay. However the amount of such assessment shall not exceed the amount assessed against the Contractor.

ARTICLE 7

CONTRACTOR'S OBLIGATIONS

7.1 **OBLIGATIONS DERIVATIVE.** The Contractor binds itself to the Subcontractor under this Agreement in the same manner as the Owner is bound to the Contractor under the Contract Documents.

7.2 **AUTHORIZED REPRESENTATIVE.** The Contractor shall designate one or more persons who shall be the Contractor's authorized representative(s) a) on-site and b)off-site. Such authorized representative(s) shall be the only person(s) the Subcontractor shall look to for

instructions, orders and/or directions, except in an emergency.

7.3 STORAGE ALLOCATION. The Contractor shall allocate adequate storage areas, if available, for the Subcontractor's materials and equipment during the course of the Subcontractor's Work.

7.4 TIMELY COMMUNICATIONS. The Contractor shall transmit, with reasonable promptness, all submittals, transmittals, and written approvals relating to the Subcontractor's Work.

7.5 NON-CONTRACTED SERVICES. The Contractor agrees, except as otherwise provided in this Agreement, that no claim for non-contracted construction services rendered or materials furnished shall be valid unless the Contractor provides the Subcontractor notice:

(a) prior to furnishing of the services or materials, except in an emergency affecting the safety of persons or property;

(b) in writing of such claim within three days of first furnishing such services or materials; and

(c) the written charges for such services or materials no later than the fifteenth (15th) day of the calendar month following that in which the claim originated.

ARTICLE 8

SUBCONTRACTOR'S OBLIGATIONS

8.1 OBLIGATIONS DERIVATIVE. The Subcontractor binds itself to the Contractor under this Agreement in the same manner as the Contractor is bound to the Owner under the Contract Documents.

8.2 RESPONSIBILITIES. The Subcontractor shall furnish all of the labor, materials, equipment, and services, including, but not limited to, competent supervision, shop drawings, samples, tools, and scaffolding as are necessary for the proper performance of the Subcontractor's Work.

The Subcontractor shall provide a list of proposed sub-subcontractors, and suppliers, be responsible for taking field dimensions, providing tests, ordering of materials and all other actions as required to meet the Schedule of Work.

8.3 TEMPORARY SERVICES. The Subcontractor shall furnish all temporary services and/or facilities necessary to perform its work, except as provided in Article 16. Said article also identifies those common temporary services (if any) which are to be furnished by this subcontractor.

8.4 COORDINATION. The Subcontractor shall:

(a) cooperate with the Contractor and all others whose work may interfere with the Subcontractor's Work;

(b) specifically note and immediately advise the Contractor of any such interference with the Subcontractor's Work; and

(c) participate in the preparation of coordination drawings and work schedules in areas of congestion.

8.5 AUTHORIZED REPRESENTATIVE. The Subcontractor shall designate one or more persons who shall be the authorized Subcontractor's representative(s) a) on-site and b) off-site. Such authorized representative(s) shall be the only person(s) to whom the Contractor shall issue instructions, orders or directions, except in an emergency.

8.6 PROVISION FOR INSPECTION. The Subcontractor shall notify the Contractor when portions of the Subcontractor's Work are ready for inspection. The Subcontractor shall at all times furnish the Contractor and its representatives adequate facilities for inspecting materials at the site or any place where materials under this Agreement may be in the course of preparation, process, manufacture or treatment.

The Subcontractor shall furnish to the Contractor in such detail and as often as required, full reports of the progress of the Subcontractor's Work irrespective of the location of such work.

8.7 SAFETY AND CLEANUP. The Subcontractor shall follow the Contractor's clean-up and safety directions; and

(a) at all times keep the building and premises free of unsafe conditions resulting from the Subcontractor's Work; and

(b) broom clean each work area prior to discontinuing work in the same.

If the Subcontractor fails to immediately commence compliance with such safety duties or commence cleanup duties within 24 hours after receipt from the Contractor of written notice of noncompliance, the Contractor may implement such safety or cleanup measures without further notice and deduct the cost thereof from any amounts due or to become due the Subcontractor.

8.8 PROTECTION OF THE WORK. The Subcontractor shall take necessary precautions to properly protect the Subcontractor's Work and the work of others from damage caused by the Subcontractor's operations. Should the Subcontractor cause damage to the Work or property of the Owner, the Contractor or others, the Subcontractor shall promptly remedy such damage to the satisfaction of the Contractor, or the Contractor may so remedy and deduct the cost thereof from any amounts due or to become due the Subcontractor.

8.9 PERMITS, FEES AND LICENSES. The Subcontractor shall give adequate notices to authorities pertaining

to the Subcontractor's Work and secure and pay for all permits, fees, licenses, assessments, inspections and taxes necessary to complete the Subcontractor's Work in accordance with the Contract Documents.

To the extent obtained by the Contractor under the Contract Documents, the Subcontractor shall be compensated for additional costs resulting from laws, ordinances, rules, regulations and taxes enacted after the date of the Agreement.

8.10 **ASSIGNMENT.** The Subcontractor shall not assign this Agreement nor its proceeds nor subcontract the whole nor any part of the Subcontractor's Work without prior written approval of the Contractor which shall not be unreasonably withheld. See Article 16.4 for sub subcontractors and suppliers previously approved by the Contractor.

8.11 **NON-CONTRACTED SERVICES.** The Subcontractor agrees, except as otherwise provided in this Agreement, that no claim for non-contracted construction services rendered or materials furnished shall be valid unless the Subcontractor provides the Contractor notice:

(a) prior to furnishing of the services or materials, except in an emergency affecting the safety of persons or property;

(b) in writing of such claim within three days of first furnishing such services or materials; and

(c) the written charge for such services or materials to the contractor no later than the tenth day (10th) of the calendar month following that in which the claim originated.

ARTICLE 9

SUBCONTRACT PROVISIONS

9.1 **LAYOUT RESPONSIBILITY AND LEVELS.** The Contractor shall establish principal axis lines of the building and site whereupon the Subcontractor shall lay out and be strictly responsible for the accuracy of the Subcontractor's Work and for any loss or damage to the Contractor or others by reason of the Subcontractor's failure to set out or perform its work correctly. The Subcontractor shall exercise prudence so that actual final conditions and details shall result in perfect alignment of finish surfaces.

9.2 **WORKMANSHIP.** Every part of the Subcontractor's Work shall be executed in strict accordance with the Contract Documents in the most sound, workmanlike, and substantial manner. All workmanship shall be of the best of its several kinds, and all materials used in the Subcontractor's Work shall be furnished in ample quantities to facilitate the proper and expeditious execution of the work, and shall be new except such materials as may be expressly provided in the Contract Documents to be otherwise.

9.3 **MATERIALS FURNISHED BY OTHERS.** In the event the scope of the Subcontractor's Work includes installation of materials or equipment furnished by others, it shall be the responsibility of the Subcontractor to examine the items so provided and thereupon handle, store and install the items with such skill and care as to ensure a satisfactory and proper installation. Loss or damage due to acts of the Subcontractor shall be deducted from any amounts due or to become due the Subcontractor.

9.4 **SUBSTITUTIONS.** No substitutions shall be made in the Subcontractor's Work unless permitted in the Contract Documents and only then upon the Subcontractor first receiving all approvals required under the Contract Documents for substitutions. The Subcontractor shall indemnify the Contractor for any increased costs incurred by the Contractor as a result of such substitutions, whether or not the Subcontractor has obtained approval thereof.

9.5 **USE OF CONTRACTOR'S EQUIPMENT.** The Subcontractor, its agents, employees, subcontractors or suppliers shall not use the Contractor's equipment without the express written permission of the Contractor's designated representative.

If the Subcontractor or any of its agents, employees, suppliers or lower tier subcontractors utilize any machinery, equipment, tools, scaffolding, hoists, lifts or similar items owned, leased, or under the control of the Contractor, the Subcontractor shall be liable to the Contractor as provided in Article 12 for any loss or damage (including personal injury or death) which may arise from such use, except where such loss or damage shall be found to have been due solely to the negligence of the Contractor's employees operating such equipment.

9.6 **CONTRACT BOND REVIEW.** The Contractor's Payment Bond for the Project, if any, may be reviewed and copied by the Subcontractor.

9.7 **OWNER ABILITY TO PAY.** The Subcontractor shall have the right to receive from the Contractor information relative to the Owner's financial ability to pay for the Work.

9.8 **PRIVITY.** Until final completion of the Project, the Subcontractor agrees not to perform any work directly for the Owner or any tenants thereof, or deal directly with the Owner's representatives in connection with the Project, unless otherwise directed in writing by the Contractor. All work for this Project performed by the Subcontractor shall be processed and handled exclusively by the Contractor.

9.9 **SUBCONTRACT BOND.** If a Performance and Payment Bond is not required of the Subcontractor under

Article 16, then within the duration of this Agreement, the Contractor may require such bonds and the Subcontractor shall provide same.

Said bonds shall be in the full amount of this Agreement in a form and by a surety satisfactory to the Contractor.

The Subcontractor shall be reimbursed without retainage for cost of same simultaneously with the first progress payment hereunder.

The reimbursement amount for the bonds shall not exceed the manual rate for such subcontractor work. Retainage reduction provisions of Article 5.2.2 shall not apply when bonds are furnished under the terms of this Article.

In the event the Subcontractor shall fail to promptly provide such requested bonds, the Contractor may terminate this Agreement and re-let the work to another Subcontractor and all Contractor costs and expenses incurred thereby shall be paid by the Subcontractor.

9.10 **WARRANTY.** The Subcontractor warrants its work against all deficiencies and defects in materials and/or workmanship and as called for in the Contract Documents.

The Subcontractor agrees to satisfy such warranty obligations which appear within the guarantee or warranty period established in the Contract Documents without cost to the Owner or the Contractor.

If no guarantee or warranty is required of the Contractor in the Contract Documents, then the Subcontractor shall guarantee or warranty its work as described above for the period of one year from the date(s) of substantial completion of all or a designated portion of the Subcontractor's Work or acceptance or use by the Contractor or Owner of designated equipment, whichever is sooner.
The Subcontractor further agrees to execute any special guarantees or warranties that shall be required for the Subcontractor's Work prior to final payment.

ARTICLE 10

RECOURSE BY CONTRACTOR 10.1

FAILURE OF PERFORMANCE

10.1.1 **NOTICE TO CURE.** If the Subcontractor refuses or fails to supply enough properly skilled workers, proper materials, or maintain the Schedule of Work, or it fails to make prompt payment for its workers, sub-subcontractors or suppliers, disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a material breach of a provision of this Agreement, and fails within three (3) working days after receipt of written notice to commence and continue satisfactory correction of such default with diligence and promptness, then the Contractor, without prejudice to any rights or remedies, shall have the right to any or all of the following remedies:

(a) supply such number of workers and quantity of materials, equipment and other facilities as the Contractor deems necessary for the completion of the Subcontractor's Work, or any part thereof which the Subcontractor has failed to complete or perform after the aforesaid notice, and charge the cost thereof to the Subcontractor, who shall be liable for the payment of same including reasonable overhead, profit and attorney's fees;

(b) contract with one or more additional contractors to perform such part of the Subcontractor's Work as the Contractor shall determine will provide the most expeditious completion of the total Work and charge the cost thereof to the Subcontractor;

(c) withhold payment of any monies due the Subcontractor pending corrective action to the extent required by and to the satisfaction of the Contractor and Owner – Concord & Cumberland, LLC; and

(d) in the event of an emergency affecting the safety of persons or property, the Contractor may proceed as above without notice.

10.1.2 **TERMINATION BY CONTRACTOR.** If the Subcontractor fails to commence and satisfactorily continue correction of a default within three (3) working days after receipt by the Subcontractor of the notice issued under Article 10.1.1, then the Contractor may, in lieu of or in addition to Article 10. 1. 1, issue a second written notice, by certified mail, to the Subcontractor and its surety, if any. Such notice shall state that if the Subcontractor fails to commence and continue correction of a default within seven (7) working days after receipt by the Subcontractor of the notice, the Contractor may terminate this Agreement and use any materials, implements, equipment, appliances or tools furnished by or belonging to the Subcontractor to complete the Subcontractor's Work. The Contractor also may furnish those materials, equipment and/or employ such workers or Subcontractors as the Contractor deems necessary to maintain the orderly progress of the Work.
All of the costs incurred by the Contractor in so performing the Subcontractor's Work, including reasonable overhead, profit and attorney's fees, shall be deducted from any monies due or to become due the Subcontractor. The Subcontractor shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the subcontract price.

10.1.3 **USE OF SUBCONTRACTOR'S EQUIPMENT.** If the Contractor performs work under this Article or sublets such work to be so performed, the Contractor and/or the persons to whom work has been sublet shall have the right to take and use any materials, implements,

ARTICLE 11

LABOR RELATIONS

(Insert here any conditions, obligations or requirements relative to labor relations and their effect on the project. Legal counsel is recommended.)

ARTICLE 12

INDEMNIFICATION

12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor (including its affiliates, parents and sub sidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the per formance of the Subcontractor's Work provided that

(a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

(b) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Article 12.

12.2 NO LIMITATION UPON LIABILITY. In any and all claims against the Owner, the Architect, the Contractor (including its affiliates, parents and subsidiaries) and other contractors or subcontractors, or any of their agents or employees, by any employee of the Subcontractor, anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, the indemnification obligation under this Article 12 shall not be limited in anyway by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under worker's or workmen's compensation acts, disability benefit acts or other employee benefit acts.

12.3 ARCHITECT EXCLUSION. The obligations of the Subcontractor under this Article 12 shall not extend to the liability of the Architect, its agents or employees, arising out of (a) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (b) the giving of or the failure to give directions or instructions by the Architect, its agents or employees provided such giving or failure to give is the primary cause of the injury or damage.

12.4 COMPLIANCE WITH LAWS. The Subcontractor agrees to be bound by, and at its own cost, comply with all federal, state and local laws, ordinances and regulations (hereinafter collectively referred to as "laws") applicable to the Subcontractor's Work including, but not limited to, equal employment opportunity, minority business enterprise, women's business enterprise, disadvantaged business enterprise, safety and all other laws with which the Contractor must comply according to the Contract Documents.

The Subcontractor shall be liable to the Contractor and the Owner for all loss, cost and expense attributable to any acts of commission or omission by the Subcontractor, its employees and agents resulting from the failure to comply therewith, including, but not limited to, any fines, penalties or corrective measures.

12.5 PATENTS. Except as otherwise provided by the Contract Documents, the Subcontractor shall pay all royalties and license fees which may be due on the inclusion of any patented materials in the Subcontractor's Work. The Subcontractor shall defend all suits for claims for infringement of any patent rights arising out of the Subcontractor's Work, which may be brought against the Contractor or Owner, and shall be liable to the Contractor and Owner for all loss, including all costs, expenses, and attorney's fees.

ARTICLE 13

INSURANCE

13.1 SUBCONTRACTOR'S INSURANCE. Prior to start of the Subcontractor's Work, the Subcontractor shall procure for the Subcontractor's Work and maintain in force Worker's Compensation Insurance, Employer's Liability Insurance, Comprehensive General Liability Insurance and all insurance required of the Contractor under the Contract Documents.

The Contractor, shall be named as additional insured's on each of these policies except for Worker's Compensation. This insurance shall include contractual liability insurance covering the Subcontractor's obligations under Article 12.

13.2 **MINIMUM LIMITS OF LIABILITY.** The Subcontractor's Comprehensive General and Automobile Liability Insurance, as required by Article 13.1, shall be written with limits of liability not less than the following:

A. Comprehensive General Liability including completed operations

1. Bodily Injury	$1,000,000.00	Each Occurrence
	$2,000,000.00	Aggregate
2. Property Damage	$1,000,000.00	Each Occurrence
	$2,000,000.00	Aggregate

B. Comprehensive Automobile Liability

1. Bodily Injury	$500,000.00	Each Person
	$500,000.00	Each Occurrence
2. Property Damage	$1,000,000.00	Each Occurrence

13.3 **NUMBER OF POLICIES.** Comprehensive General Liability Insurance and other liability insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an Excess or Umbrella Liability Policy.

13.4 **CANCELLATION, RENEWAL OR MODIFICATION.** The Subcontractor shall maintain in effect all insurance coverage required under this Agreement at the Subcontractor's sole expense and with insurance companies acceptable to the Contractor.

All insurance policies shall contain a provision that the coverages afforded thereunder shall not be cancelled or not renewed, nor restrictive modifications added, until at least thirty (30) days prior written notice has been given to the Contractor unless otherwise specifically required in the Contract Documents.

Certificates of Insurance, or certified copies of policies acceptable to the Contractor shall be filed with the Contractor prior to the commencement of the Subcontractor's Work.

In the event the Subcontractor fails to obtain or maintain any insurance coverage required under this Agreement, the Contractor may purchase such coverage and charge the expense thereof to the Subcontractor, or terminate this Agreement.

13.5 **WAIVER OF RIGHTS.** The Contractor and Subcontractor waive all rights against each other and the Owner, the Architect, separate contractors, and all other subcontractors for loss or damage to the extent covered by Builder's Risk or any other property or equipment insurance, except such rights as they may have to the proceeds of such insurance; provided, however, that such waiver shall not extend to the acts of the Architect listed in Article 12.3.

Upon written request of the Subcontractor, the Contractor shall provide the Subcontractor with a copy of the Builder's Risk policy of insurance or any other property or equipment insurance in force for the Project and procured by the Contractor. The Subcontractor shall satisfy itself as to the existence and extent of such insurance prior to commencement of the Subcontractor's Work.

If the Owner or Contractor have not purchased Builder's Risk insurance for the full insurable value of the Subcontractor's Work less a reasonable deductible, then Subcontractor may procure such insurance as will protect the interests of the Subcontractor, its subcontractors and their subcontractors in the Work, and, by appropriate Subcontract Change Order, the cost of such additional insurance shall be reimbursed to the Subcontractor.

If not covered under the Builder's Risk policy of insurance or any other property or equipment insurance required by the Contract Documents, the Subcontractor shall procure and maintain at the Subcontractor's own expense property and equipment insurance for portions of the Subcontractor's Work stored off the site or in transit, when such portions of the Subcontractor's Work are to be included in an application for payment under Article 5.

13.6 **ENDORSEMENT.** If the policies of insurance referred to in this Article require an endorsement to provide for continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed.

ARTICLE 14

ARBITRATION

14.1 **AGREEMENT TO ARBITRATE.** All claims, disputes and matters in question arising out of, or relating to, this Agreement or the breach thereof, except for claims which have been waived by the making or acceptance of final payment, and the claims described in Article 14.7, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then *in* effect unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law.

14.2 **NOTICE OF DEMAND.** Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration

Association. The demand for arbitration shall be made within a reasonable time after written notice of the claim, dispute or other matter in question has been given, and in no event shall it be made after the date of final acceptance of the Work by the Owner or when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations, whichever shall first occur. The location of the arbitration proceedings shall be the city of the Contractor's headquarters or Charlotte, North Carolina.

14.3 AWARD. The award rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

14.4 WORK CONTINUATION AND PAYMENT. Unless otherwise agreed in writing, the Subcontractor shall carry on the Work and maintain the Schedule of Work pending arbitration, and, if so, the Contractor shall continue to make payments in accordance with this Agreement.

14.5 NO LIMITATION OF RIGHTS OR REMEDIES. Nothing in this Article shall limit any rights or remedies not expressly waived by the Subcontractor which the Subcontractor may have under lien laws or payment bonds.

14.6 SAME ARBITRATORS. To the extent not prohibited by their contracts with others, the claims and disputes of the Owner, Contractor, Subcontractor and other subcontractors involving a common question of fact or law shall be heard by the same arbitrator(s) in a single proceeding.

14.7 EXCEPTIONS. This agreement to arbitrate shall not apply to any claim:

a) of contribution or indemnity asserted by one party to this Agreement against the other party and arising out of an action brought in a state or federal court or in arbitration by a person who is under no obligation to arbitrate the subject matter of such action with either of the parties hereto; or does not consent to such arbitration; or

b) asserted by the Subcontractor against the Contractor if the Contractor asserts said claim, either in whole or part, against the Owner and the contract between the Contractor and Owner does not provide for binding arbitration, or does so provide but the two arbitration proceedings are not consolidated, or the Contractor and Owner have not subsequently agreed to arbitrate said claim, in either case of which the parties hereto shall so notify each other either before or after demand for arbitration is made.

In any dispute arising over the application of this Article 14.7, the question of arbitrability shall be decided by the appropriate court and not by arbitration.

ARTICLE 15

CONTRACT INTERPRETATION

15.1 INCONSISTENCIES AND OMISSIONS. Should inconsistencies or omissions appear in the Contract Documents, it shall be the duty of the Subcontractor to so notify the Contractor in writing within three (3) working days of the Subcontractor's discovery thereof. Upon receipt of said notice, the Contractor shall instruct the Subcontractor as to the measures to be taken and the Subcontractor shall comply with the Contractor's instructions.

15.2 LAW AND EFFECT. This Agreement shall be governed by the law of the state of South Carolina.

15.3 SEVERABILITY AND WAIVER. The partial or complete invalidity of any one or more provisions of this Agreement shall not affect the validity or continuing force and effect of any other provision. The failure of either party hereto to insist, in any one or more instances, upon the performance of any of the terms, covenants or conditions of this Agreement, or to exercise any right herein, shall not be construed as a waiver or relinquishment of such term, covenant, condition or right as respects further performance.

15.4 ATTORNEY'S FEES. Should either party employ an attorney to institute suit or demand arbitration to enforce any of the provisions hereof, to protect its interest in any matter arising under this Agreement, or to collect damages for the breach of the Agreement or to recover on a surety bond given by a party under this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees, costs, charges, and expenses expended or incurred therein.

15.5 TITLES. The titles given to the Articles of this Agreement are for ease of reference only and shall not be relied upon or cited for any other purpose.

15.6 ENTIRE AGREEMENT. This Agreement is solely for the benefit of the signatories hereto and represents the entire and integrated agreement between the parties hereto and supercedes all prior negotiations, representations, or agreements, either written or oral.

ARTICLE 16

SPECIAL PROVISIONS

16.1 PRECEDENCE. It is understood the work to be performed under this Agreement, including the terms and conditions thereof, is as described in Articles 1 thru 16 herein together with the following Special Provisions, which are intended to complement same. However, in the event of any inconsistency, these Special Provisions shall govern.

16.2 SCOPE OF WORK. All work necessary or incidental; work subcontractor shall supply all labor, material, and equipment required for the following: *installation of all window, entry doors, patio doors, and door and window trim, and all related work required by the contract Documents and related code to be performed on this Project shall be furnished by this Subcontractor,* All work to be performed according to complete Architectural and Engineer Plans for the lump sum price of Seven Hundred and Twenty-Three Thousand, Three Hundred Fifty-Five dollars and Sixty-Eight cents. ($723,355.68)
including specifically, but expressly in no manner limited to:
(See Exhibit A for requirements).

Work for the Project in strict accordance with the Contract Documents and as more particularly, though not exclusively, specified in: Exhibit "A" attached hereto and incorporated herein by reference.
with the following additions or deletions:_____

16.3 COMMON TEMPORARY SERVICES. The following "Project" common temporary services and/or facilities are for use of all project personnel and shall be furnished as herein below noted:

By this subcontractor;

By others;

16.4 OTHER SPECIAL PROVISIONS. (Insert here any special provisions required by this subcontract.)

16.5 CONTRACT DOCUMENTS. (List applicable contract documents including specifications, drawings, addenda, modifications and exercised alternates. Identify with general description, sheet numbers and latest date including revisions.)

See Exhibit "A", Scope of Work, attached hereto and incorporated herein by reference, as well as "Exhibit "B", a listing of all Plan Sheets, Dates and Revision Dates. Also included is a sample of Application For Progress Payment, attached hereto and incorporated herein by reference.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement under seal, the day and year first above written.

Muhler
Subcontractor
By: _____
Glen Agood

Superior Construction Corporation
Contractor
By: _____
Carlton S. Clardy
President/CEO

Project No. 06-MBD-017
Subcontract Number: 06MBD017-~~214~~ 507
Cost Code: 08-501

EXHIBIT "A"

TO SUBCONTRACT FOR BUILDING CONSTRUCTION
Concord & Cumberland
Charleston, SC 29401

Muhler
5935 Rivers Ave Suite 103
N. Charleston, SC 29406
Contact: Chas Agosti
Tel:843-377-4101 Fax: 843-572-9726

I. SCOPE OF WORK

Subcontractor shall provide all materials and perform all work necessary to complete all work for the following portions of the Project:

It is the intent of this Subcontract that all labor and materials for all "windows, entry doors, patio doors, and door & window trim" and all related work required by the Contract Documents and related codes to be performed on this Project shall be furnished by this Subcontractor, including specifically, but expressly in no manner limited to:

A. All permits, licenses, and fees associated this Scope of Work, complete, and all related work.
B. The Subcontractor shall furnish the supervision, labor, forklift, equipment, and tools, required to furnish and install all windows and doors for a complete operable system and all related work, including, but not limited to the following
C. The subcontractor will supply and install sill pans at all windows and patio doors
D. The Subcontractor will supply and install all patio swing entry doors.
E. The Subcontractor will supply and install all sidelights required at all doors.
F. The Subcontractor will supply and install all windows as drawn.
G. The Subcontractor will supply all fasteners, caulk, sealant, flashing, and peel & stick necessary to complete work. All fasteners to be galvanized or stainless steel.
H. The Subcontractor will install all windows and doors at manufacturer's specifications and recommendations.
I. The Subcontractor will provide installation procedure for review and approval by architect before installation.
J. The Subcontractor will provide rough openings for all doors and windows. These openings are to be verified before installation.
K. All Subcontractors will clean their work areas daily. All trash is to be placed in the dumpsters provided by the General Contractor.
L. This Subcontractor will provide written warranties to architect for approval prior to start of work.
M. The Subcontractor will caulk all doors and windows to trim. The caulk is to be approved by the architect prior to installation.

EXHIBIT "A" TO SUBCONTRACT
Subcontractor Initial: _____

N. Supply and intall windows for mock-up panel.
O. Provide payment and performance bond.
P. This is a "Lump Sum" Subcontract for Seven Hundred and Twenty-Three Thousand, Three Hundred Fifty-Five dollars and Sixty-Eight cents. ($723,355.68) **The Subcontractor shall provide a detailed schedule of values satisfactory to the Contractor no more than fifteen (15) days from the execution of this Subcontract, in any even at least 15 days prior to submitting the first Application of Progress Payment, time being of the essence.**

OTHER SPECIAL PROVISIONS

Any deviations from the Contract Documents versus the actual "As-Built" conditions must be immediately noted and initialed on the working copy of the "As-Built" Drawings in the Contractor's office trailer and, in any event, at least weekly. FAILURE TO KEEP THE DEVIATIONS NOTED ON THE WORKING "AS-BUILT" DRAWINGS WILL BE GROUNDS FOR THE WITHHOLDING OF PAY REQUESTS TO THE OWNER AND THE WITHHOLDING OF ALL MONIES OTHERWISE DUE TO THE SUBCONTRACTOR. Upon Completion of all work, the Subcontractor shall promptly provide the Contractor with a detailed and accurate final set of "As-Built" Drawings of the work, that in all ways comply with the requirements of the Contract Documents.

Any request for Change Orders must be submitted to the Contractor within the pay period that the work is performed. There will be no exceptions.

All submittals including, but not limited to, Shop Drawings, technical data sheets, samples, etc., shall be delivered to the Contractor within ten (10) calendar days after the execution of this Subcontract.

At the completion of the work, the Subcontractor shall furnish the Contractor an affidavit stating that it has paid all sales and use taxes in connection with the Project and that it assumes full responsibility for any unpaid taxes.

This Section II of Exhibit "A" is provided by Superior Construction Corporation, as Contractor, to all Subcontractors in order to clarify Project specifics. It does not take the place of the Subcontract Agreement. This Exhibit is to be incorporated with the Subcontract Agreement.

Please read this Exhibit fully, sign where indicated and initial each page.

The Project consists of the construction of Concord & Cumberland Condominiums, by JDavis Architects, PLLC, as listed in Exhibit "B" of this Contract.

It is understood that these buildings are designed as post-tensioned concrete frame buildings. All slab, column, wall, etc., penetrations must be sized and located on shop drawings and approved by the architect and structural engineer before building frame construction. Every effort is to be made to eliminate any penetrations after concrete slabs are poured. Correction or addition of any penetrations will be the responsibility of the frame contractor, and at the expense of the respective subcontractor.

All Subcontractors **MUST** Submit:

A. An original Certificate of Insurance.
B. A copy of your City Building License.
C. Your Federal Tax Identification Number.
D. An original signed Subcontract for our files, with an original of this Exhibit "A" also signed.
E. An original W-9 Form for our files.
F. Other items that may be requested by our Office Manager.
G. **If not included as part of Exhibit "A", then a proposed Draw Schedule must be submitted at least two (2) weeks prior to the first Draw Request being submitted, be reviewed by the Project Manager and be fully approved by Superior Construction Corporation prior to the first Draw Request being submitted.**
H. Company Work Safety Plan to Construction Site Office

BEFORE Work commences, it is **YOUR** responsibility to provide the Contractor with the above documentation. **Absolutely no draws will be released until we have all of this information in hand.**

It is understood that all Subcontractors will meet all local and State codes including, but not limited to, all fire stopping and blocking necessary for their Scope of Work. By no means are you to vary from the Specifications and Plans without written approval.

Partial Payments will be made monthly to Subcontractors. In order for these payments to be made in a timely manner, we require the following from our Subcontractors.

All Draw Requests will be in accordance with the prior approved Draw Schedule and will be equal to ninety percent (90%) of Work and materials completed by the twentieth (20th) of each month, with ten percent (10%) of the Draw to be held as retainage. All Draw Requests must be submitted in triplicate on Superior Construction's "APPLICATION FOR PROGRESS PAYMENT". You will be given these forms to copy for your use. It will be the Subcontractors responsibility to insure that their Draw Requests reach the Contractor's Office (Myrtle Beach, SC) on time so as not to delay payment. You may do so by mailing these Draw Requests directly to the Contractor's Office at Post Office Box 50730 Myrtle Beach, South Carolina 29588, or by hand delivery to the Office at 3723-C Forestbrook Road, Myrtle Beach, South Carolina 29588. **Draw Requests must be received in the Division Office by the fifteenth (15th) day of each**

month in order to process that Draw for the current billing cycle. All draw requests must be filled out completely, in triplicate, signed by an official of the company, notarized and sealed. Also, a copy of the **Approved Draw Schedule** (with values highlighted) and an original signed and notarized Lien Waiver must accompany each Draw. **If not included in Exhibit "A", then a proposed Draw Schedule must be submitted at least two (2) weeks prior to the first Draw Request being submitted, be reviewed by the Project Manager and be fully approved by the Contractor prior to the first Draw Request being submitted. The Owner will not pay for any stored material; therefore, the General Contractor will only pay for materials in place.**

It is anticipated that payment should be received from the Owner in a manner so as to enable the Contractor to pay Subcontractors by the 20th day of the month following the date of the Draw. However, as set forth in the Subcontract, this is strictly a "Pay When Paid" Project.

Before Final Retainage is paid, the Contractor must receive a fully executed and notarized Final Release of Lien in order to release Final Payment. Final retainage will be released upon final acceptance of the construction which is exhibited by the release of all monies, including final retainage by the Owner.

Submittals, shop drawings and samples must be in the Project Manager's hands on or before **the tenth (10th) day following execution of the Subcontract,** with six (6) copies. If the Project Manager has not received the original and all six copies by that date, it could result in a hold on your Draw Request.

Change Orders must be submitted in writing to the Project Manager and approved by the Project Manager in writing before Work commences. Should the Work proceed without the Project Manager's written approval, it will be considered unapproved and could possibly result in the Work not being paid for. **Only the Project Manager has the authority to approve Change Orders, not our Superintendent.**

Superior Construction will not be responsible in any way for collecting backcharges between Subcontractors. If an agreement cannot be reached, the Project Manager will meet with concerned parties for negotiations; however, Superior Construction will not be responsible for payment. All Subcontractors will be expected to protect each other's Work and materials. Each Subcontractor is responsible for his/her own work until accepted by the Owner.

Our work week is Monday through Friday. Each Subcontractor is expected to have a Superintendent on the Project at all times while work is being performed. If you are not on schedule, overtime is expected. We suggest this be done on Saturday. It is the Subcontractor's responsibility to meet with the Project Superintendent to review Work Schedules. The Subcontractor shall be responsible for having a Field Supervisor at each of the Contractor's Weekly On-Site Progress Meetings. Work on site will begin at 7:00 a.m. All Employees, Subcontractors and Suppliers will use the designated construction entrance. NO construction traffic will be permitted to use the alternative entrances.

EXHIBIT "A" TO SUBCONTRACT
Subcontractor Initial: _____

Each Subcontractor will be responsible for its own clean-up. Each Subcontractor shall at all times do all things necessary or desirable to keep the premises of the Project clean. Specifically, but in no manner limiting the requirements of the Contract Documents, each Subcontractor shall, at its own expense, (a) keep the premises of the Project at all times free from waste materials, packaging and other debris accumulated in connection with the Work, by collecting and removing such debris from the Project site on a daily basis; (b) at the completion of the Work in each area, sweep and otherwise make the Work and its immediate vicinity "broom-clean"; (c) remove all of its tools, equipment, scaffolds, temporary structures and surplus materials as directed by the Contractor and at the completion of the Work; and (d) at final inspection clean and prepare the Work for acceptance by the Owner. If a Subcontractor fails to immediately, and without additional notice from the Contractor, comply with all clean-up requirements of the Contract Documents, the Contractor, at its option, without notice to Subcontractor, may implement such clean-up and safety measures as it may in its sole opinion deem necessary, and the cost and expense of same shall be charged to Subcontractor, and the Contractor may deduct same from any amounts due or to become due Subcontractor. If the Contractor elects to place dumpsters on site, the Subcontractor may deposit non-hazardous trash and debris from this Project in it.

In order to help ensure the safety of all workers on the Project, to promote prompt, efficient and expedient performance of all work on the Project and to facilitate communications and cooperation between the Subcontractor and the Contractor, as well as communication and coordination between the Subcontractor and other subcontractors, the Subcontractor expressly agrees to provide a properly skilled, qualified and competent individual, who can speak fluent English as well as fluently communicate with all of the Subcontractor's workmen, on a continuous basis to fully and properly supervise all of the Subcontractor's workmen.

As this is a privately purchased Condominium Project, the Subcontractor acknowledges and expressly agrees to take all necessary or desireable actions and additional efforts to ensure and maintain a safe and clean Project site at all times. The Subcontractor expressly understands that the Work is being performed on an active site with 24-hour, seven days a week on-going business operation. The Subcontractors will take every necessary or desireable precaution to protect Concord & Cumberland and it's employees and guests.

The Subcontractor will be responsible, prior to starting Work, to check with Contractor's Project Superintendent on storage areas and designated parking.

All Subcontractors will be strictly responsible for meeting and abiding by all OSHA safety requirements and will indemnify and hold harmless the Contractor for all loss, cost and expense, including, but not limited to, all fines arising out of or associated with the Subcontractor's employees, agents, subcontractors, etc. and/or the work being performed by the Subcontractor. All employees of Subcontractor are required to wear hardhats, steel toed shoes, and long pants.

EXHIBIT "A" TO SUBCONTRACT
Subcontractor Initial:

It is specifically agreed that a primary objective of the pre-contract negotiations between the Subcontractor and the Contractor was to thoroughly review the Construction Drawings, Specifications and other Contract Documents and initiate whatever changes or corrections were necessary to achieve a set of documents which would satisfactorily serve a "No Change Order" Subcontract Agreement. It is further understood and agreed that the Subcontractor is well experienced in the construction of multi-family projects similar in scope and nature to this Project and, as such, has included in its price all materials, labor, supervision, craftsmanship, services, equipment, warranties and incidentals which will be required to provide a first class product in the most sound, workmanlike and substantial manner possible, which fully meets or exceeds the intent of the Construction Documents. Without limiting other requirements of the Subcontract, the Subcontractor also agrees that he is fully responsible for meeting all applicable Code requirements as interpreted by the Building Inspection Department of the City of Charleston and the South Carolina State Building Codes, including, but not limited to, fire stopping, construction ways and means, fastenings, attachments, materials, etc., or any other Code requirements of these two Departments. It is the intent and essence of this Agreement that, with the exception of unforeseen site conditions and/or Owner initiated product changes, all other construction, complete, and all related Work which is required, necessary and desirable will be provided by the Subcontractor.

The Contract Drawings and Specifications are as follows:

SEE EXHIBIT "B" ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE.

I hereby accept the Subcontract for Building Construction, subject to the conditions included in this Exhibit "A".

Project Name: Concord & Cumberland

Company Name: Muhler

Authorized Agent: ~~Chas Arosti~~

Signature: _____

Date: 11/3/02

Project No. 006-MBD-017 09
Subcontract Number: 06MBD017-S44
Cost Code: 08-501

Please return both the executed Subcontract and this EXHIBIT "A", along with the information requested herein, to the attention of:

Larry Taylor, Division Manager
Superior Construction Corporation
3723 Forestbrook Drive-Suite C
Myrtle Beach, South Carolina 29588

Telephone Number: (843) 236-0660 FAX Number: (843) 236-1601

PLEASE SIGN THE SUBCONTRACT AND THIS EXHIBIT "A", INITIAL ALL PAGES OF THE SUBCONTRACT AND EXHIBIT "A", and "B", AND RETURN TO SUPERIOR CONSTRUCTION CORPORATION AS SOON AS POSSIBLE.

$62,457

EXHIBIT "A" TO SUBCONTRACT
Subcontractor Initial: _____

Attachment B

AGREEMENT

This Agreement is entered into this the ____ day of June ____, 2007, by and between WEATHER SHIELD MFG., INC. ("Weathershield"), THE MUHLER COMPANY, INC. ("Muhler") and SUPERIOR CONSTRUCTION CORPORATION ("Superior").

WHEREAS, Weathershield has manufactured windows and doors that were supplied to The Muhler Company, Inc., which Muhler subsequently supplied to the Owner and installed, as a subcontractor to Superior on a construction project known as the Concord and Cumberland Condominiums at Concord and Cumberland Streets in Charleston, South Carolina (the "Project"). The Owner of the Project is Concord and Cumberland, LLC (the "Owner");

WHEREAS, during the construction process, testing was performed on certain windows and doors manufactured by Weathershield. The results of the tests indicated that some of the windows tested failed AAMA 502-2, Voluntary Specification for Field Testing of Windows and Sliding Glass Doors, Test Method B;

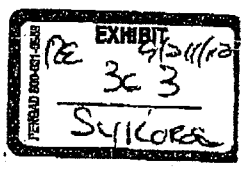
WHEREAS, Weathershield has represented to Superior that it has now inspected certain window and door units at the Project;

WHEREAS, Muhler and Weathershield have each continually represented that it is able and willing to perform remedial work on all windows and doors on the Project so that the windows are in compliance with Weathershield's applicable warranties;

WHEREAS, Weathershield and Muhler have represented to Superior that the remedial work they will undertake to the windows and doors shall bring the windows and doors in compliance the applicable warranty of Weathershield and in new condition;

WHEREAS, Muhler, Weathershield and Superior agree to resolve any product non-compliance issues upon the following terms and conditions:

1. That any and all testing conducted on the windows and doors to date, the resolution of the issues raised by the testing and completion of the remedial work by Muhler and/or Weathershield, nor this Agreement has amended or affected any party's contractual rights and responsibilities except to the extent specifically stated in this Agreement.



1

Superior-C&C 11406

2. Neither Superior nor the Owner of the Project has released or waived any right arising under the applicable warranties and law of the state of South Carolina regarding Muhler, Weathershield or the Weathershield products installed or to be installed on the Project.

3. Muhler and Weathershield agree that the facts discovered during the window testing do not create a claim, or state any facts that would have included any right or obligation under any applicable statute of limitations. Any or all applicable statutes of limitation shall not begin to run until the Certificate of Substantial Completion is issued for the Project or discovery of problems with the windows and doors, whichever occurs last. In the event of any future claim regarding the windows or doors by any person or entity, Muhler and Weathershield waive the right to assert that these events accrued any obligation under any statute of limitations. Any issue related to the accrual and expiration of the statute of limitations shall be decided without reference to the facts and inferences discussed herein.

4. Muhler and Weathershield agree that the Owner is third-party beneficiary of this Agreement and shall be treated in the same manner with the same benefits that Superior has under this Agreement.

5. Weathershield agrees to test two (2) additional sets of windows to ensure there are no defects in material, workmanship, or design and certify the same to Superior, the Owner. Weathershield will pay for any failed test, and Superior will pay for any test that is successful. Pursuant to the terms and condition of the applicable Weathershield warranty, Weathershield furthermore agrees to remedy any defects in the design, manufacture, and workmanship of any Weathershield product installed or to be installed at the Project. Pursuant to the terms of the Subcontract Agreement, Muhler agrees to remedy any defects in the installation of the windows. This remedial work is guaranteed by Weathershield and Muhler not to materially alter the cosmetic appearance of the products. Muhler agrees that the Owner and Architect have to approve the cosmetic appearance of the windows, which shall not be unreasonably withheld. Muhler

and Weathershield agree and represent that all remediation activities and work can and will be completed in a manner that does not delay the installation of the exterior veneer of the structure and will not necessitate the removal of any exterior or interior veneer or finishes.

6. Muhler and Weathershield shall and do warrant and represent that the tested windows and doors have been replaced with compliant windows and doors, or satisfactorily remedied in place, such that the windows and doors installed or to be installed are in new condition. Muhler and Weathershield also warrant and represent that all windows and doors installed, singly and/or in combination, or to be installed have been evaluated in relation to the test results, and are represented and warranted to be free of any defects in accordance with the terms and conditions of Weathershield's applicable representations and warranties.

7. Muhler warrants and represents that all windows and door units installed or to be installed conform to the shop drawings and the Contract Documents.

8. Weathershield represent and warrant that the windows and doors supplied to the Project meet the design pressure ratings set forth in those certain engineering drawings prepared by Weathershield, dated April 3, 2006, and Superior, the Owner, and the Architect acknowledges were accepted such engineering drawings.

9. Muhler and Weathershield agree that in the event of any future window or door failure or defect in installation, that Weathershield will repair or replace any defective window or door, and Muhler will repair any other component of the building damaged in the process of repairing or replacing such window or door installation. Muhler's obligation to make such repairs shall for the time set forth in the Subcontract Agreement, but in no event shall Muhler be obligated to make repairs to the installation more than eight (8) years after substantial completion of the Project.

10. In exchange for the payment by Superior of all amounts due Muhler in accordance with the Subcontract Agreement and in accordance with the terms of the Memorandum of Understanding executed by Superior and Muhler on June 7, 2007. Muhler agrees that it will complete the installation of all uninstalled products and accessories promptly upon execution of this Agreement to allow for the timely installation of the exterior veneer, mechanical rough-ins and interior finishes pursuant to the current Construction Schedule.

11. In the event either Superior or Concord and Cumberland, LLC, are sued hereafter by or on behalf of any subsequent owner, alleging that one or more of the windows and/or doors do not comply with the original and amended Contract Documents, or are defectively installed, Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations and will pay all damages (including reasonable attorneys' fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration. liability incurred by either or both as consequence including, but not limited to, costs and attorneys' fees, any remedial costs of expert witnesses, cost of arbitration and all other damages incurred.

12. In the event either Superior or Concord and Cumberland, LLC, are sued hereafter by or on behalf of any subsequent owner, alleging that one or more of the windows and/or doors are defective and/or do not comply with the warranties and representations made herein, Weathershield, agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations and will pay all damages (including reasonable attorneys' fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration.

13. Muhler and Weathershield state that in return for this Agreement, it accepts as sufficient consideration, the decision by Superior not to pursue litigation against Muhler and Weathershield with respect to the discovered window and door defects.

14. Weathershield furthermore agrees that the warranty applicable to the windows and doors installed in the Project shall be for a period of twenty (20) years from the date of substantial completion of the Project, as opposed to the date of original purchase, and shall cover for the full twenty (20) years any products or parts determined to contain defects in material or workmanship transferable to subsequent owners.

15. Weathersldield furthermore agrees that should it be determined that any of the windows or doors or installation contain defects in material or workmanship, that it will replace the units in accordance with this Agreement. Weathershield further agrees that any replacement parts will match the original or be the closest equivalent thereto. Weathershield furthermore confirms that the general provisions of the warranty are altered to include this document as an additional warranty. Should there be any dispute or inconsistencies between the applicable warranty and this Agreement, the language of this Agreement shall prevail. The parties acknowledge that this Agreement is intended to expand the warranty and in no way will be interpreted to limit it. Weathershield furthermore warrants these products are merchantable.

16. Except with respect to glass, paint, and hardware replacement parts or components, Weathershield agrees that it will provide replacement for any parts or products at one hundred (100%) percent of the listed price for the parts or products for a minimum of eight (8) years from the date of substantial completion. Weathershield also agrees that should there be the necessity for any replacement or repair of their product, that they shall bear any and all shipping costs.

17. Muhler and Weathershield state and acknowledge that this Agreement shall not act as a bar of Superior or Owner's right to demand arbitration in accordance with Paragraph 24 for any delay costs they have incurred related to the performance failures and installation of the windows and doors, if negotiations should fail.

18. Muhler and Weathershield agree to promptly negotiate or mediate any claim or dispute with Superior or the Owner relating to any delay costs incurred by the Owner or Superior, including, but not limited to, additional financing costs or extended general conditions costs incurred as a result of the windows and doors supplied by Weathershield for the Project and the installation undertaken by Muhler.

19. This Agreement shall be confidential and not disclosed by any party other than to the parties' legal and accounting professionals and respective sureties, except as required by law, although it may be filed in the circuit court proceeding in the event either party seeks the enforcement thereof.

20. The prevailing party in any enforcement action shall be entitled to recover their attorney's fees and costs incurred in the enforcement action.

21. The PARTIES agree that they have executed this Agreement on their own knowledge and their own investigation of the facts, and that this Agreement is not executed in reliance upon any statement of any person connected with, representing or represented by any of the entities hereby released.

22. The PARTIES declare that they have carefully read this Agreement, that they have been fully advised in connection with this Agreement by legal counsel of their own choice, that this Agreement has been fully explained to them prior to its execution and that they understand its terms and legal effect, and they sign this Agreement of their own free act.

23. The PARTIES have each had the opportunity to participate in the drafting of this Agreement, which is the result of negotiations among the PARTIES. It is, therefore, specifically agreed that, in the event of any dispute with respect to the proper interpretation of any term of this Agreement, no one party shall be deemed to be the drafter.

24. The PARTIES agree that this Agreement contains the Entire Agreement between the PARTIES and the terms hereof are contractual in nature and not merely recitals and shall not be modified or amended except by written instruments signed by all the PARTIES or their representatives.

25. The PARTIES each acknowledge that the payment specified herein is not an admission of liability, but only a payment to resolve a dispute.

26. This Agreement shall be governed by the laws of the State of South Carolina in its interpretation and enforcement. Any and all claims or disputes arising out of or related to this Agreement shall be resolved by arbitration administered by the American Arbitration Association under the Construction Industry Rules of Arbitration. It is acknowledged that this Agreement is the product of mutual negotiation and it shall not hereafter be interpreted or enforced more strictly against any party hereto.

27. This Agreement may be executed in counterparts; facsimile signatures shall be as binding as an original.

SUPERIOR CONSTRUCTION CORPORATION

By: _____
Title: President/C.E.O.
Date: June 7, 2007

WEATHER SHIELD MFG., INC.

By: _____
Title: _____
Date: _____

THE MUHLER COMPANY, INC.

By: _____
Title: CFO
Date: 6/11/07

State of North Carolina

County of Union

I, the undersigned Notary Public, hereby certify that Carlton S. Clardy, Jr. personally appeared before me and acknowledged that he is the President/C.E.O. of **Superior Construction Corporation**, and that by authority duly given that he executed the foregoing document on behalf of and as the act in deed of Superior Construction Corporation

Witness by hand and notarial seal, this the 7th day of June, 2007.

Martha P. Henson
Notary Public

My commission expires:

10/27/09

[NOTARY SEAL]

State of _____

County of _____

I, the undersigned Notary Public, hereby certify that _____ personally appeared before me and acknowledged that he is the _____ of **Weathershield Manufacturing, Inc.**, and that by authority duly given that he executed the foregoing document on behalf of and as the act in deed of Weathershield Manufacturing, Inc.

Witness by hand and notarial seal, this the _____ day of June, 2007.

_____
Notary Public

My commission expires:

_____

[NOTARY SEAL]

South
State of North Carolina

County of Charleston

I, the undersigned Notary Public, hereby certify that Bud Hudson personally appeared before me and acknowledged that he is the CFO of The Muhler Company, Inc., and that by authority duly given that he executed the foregoing document on behalf of and as the act in deed of The Muhler Company, Inc.

South
State of North Carolina

County of Charleston

Witness by hand and notarial seal, this the 4th day of June, 2007.

Susan Spence
Notary Public

My commission expires:

My Commission Expires
April 26th 2014

[NOTARY SEAL]

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Superior-C&C 11414

Attachment C

In The Matter of:

CONCORD AND CUMBERLAND HORIZONTAL PROPERTY REGIME, ETAL.

vs.

CONCORD & CUMBERLAND, LLC, ETAL.

RICHARD ANDREWS

September 9, 2013

MERRILL LAD
1325 G Street NW, Suite 200, Washington, DC
Phone: 800.292.4789 Fax:202.861.3425

a better word --

(Telephonic interruption)

BY MS. TYNDALL:

Was Superior tapped to build the Concord and Cumberland project before JDavis was asked to design the Concord and Cumberland project, if you know?

A. I don't know that answer. I would say not because they had to have some design to come to a price that Bob would agree upon. So I would think that JDavis was involved fairly early on.

Q. And do you know what led to JDavis' involvement or being asked to design the Concord and Cumberland project?

A. I imagine there was a fee proposal. I don't know. I really don't recall exactly. It was a collaboration at that time with Jimmy Schmitt, Walker Schmitt Architects.

Q. Jimmy Walker?

A. Jimmy Walker, Schmitt Walker. Because he had access to the Charleston board of architectural review to get a design through. It was a very high-profile project that the mayor had some voice in, from what I understood, I think, as I recall. So getting through BAR and being able to give Jeff Davis' office the "Here's your renderings that you're going to now make

town. So you could certainly see -- any day that I was out of the office, you could see that in a reimbursement. Now, when I went to Charleston, I might go out to two jobs at one time on one trip.

Q. Do you know whether Superior -- I assume Superior did not have to bid the Concord and Cumberland job; correct?

A. They did not have to bid that job. I believe that their budget met Bob's expectations and needs and he wanted to go forward with it.

Q. Was there any concern, to the best of your recollection, about Superior being able to handle two jobs that were, I guess, moving forward around the same time frame?

A. No concern at that time. They had done a very good job in Clemson on the condominium development up there. That was run from their Charlotte office. Evidently, Charleston geographically fell into their Myrtle Beach office responsibilities. And so the work that we did with them in Charleston was handled by their Myrtle Beach office.

Q. I think you said no concern at that time that there ever could become a concern, as you recall, and regarding Superior's ability to adequately staff the

project because of its work on other jobs?

A. Because of their work as a company overall, which is beyond the work that they were just doing for Estates, certainly. There was issues that came up during the construction that they just didn't have the right manpower to bring in the resources as they fell behind, or didn't seem to. I'm not sure why they made the decisions to do what they did.

Q. Can you kind of give me an example of what you mean of how they fell behind and what --

A. Well, on Concord and Cumberland the contract, which was executed at the end of February of '06 -- and it was an eight-month contract -- they were still building the garage structure easily six months later. And so they only had -- it became evident that they did not have a plan in place when they got started for a lay-down yard. The building literally took up nearly every square inch of property that was part of that parcel of land, and typically, if you have a Downtown Charleston project, you need to have a lay-down area where you can sort out your materials and bring them on site as you need them just so they don't get in your way. And I took several photographs. I haven't seen them lately, but where I took pictures from the existing garage down to the

You need to understand that residential windows used in applications of extreme weather conditions such as around Charleston Harbor, it requires that the windows be installed properly, flashed properly, that they can drain -- window pans were built -- we always talked about belt and suspenders details to make them function properly. And so, therefore, we came up with the idea that getting Sutton-Kennerly involved at the front end of a project rather than the back end was a proactive and prudent use of their talent.

Q. So your understanding is that Sutton-Kennerly would actually provide details that the architect would then try and incorporate into the finished plans; correct?

A. And that's what happened at 33 Calhoun. Laurant and the engineers at Sutton-Kennerly worked hand in hand until both Laurant and Jeff Davis could agree that this is the best way to go and -- or Sutton-Kennerly could sign off on it or tell us that they've come to an impasse and either -- you know, we can't -- never did we want to take JDavis off being the architect of record, the designer of record.

Q. But I guess as best as JDavis could, Estates would want JDavis and also Superior to incorporate Sutton-Kennerly's recommendations into the design

A. Kirk Dillon has a construction company called Dillon construction, and they are a stucco plaster trade contractor. Their reputation is that they're one of the best in South Carolina, if not the southeast, and maybe further. And Kirk Dillon is who Estates desired to have involved in the project if the project could afford their work. I think we actually have a clause in the contract, I think I recall, that Dillon was to be -- that the owner could have the option of bringing him in as a trade contractor for Superior to use.

Q. Why was it important to Estates that Mr. Dillon be copied on window details, if you know?

A. Well, it was the intent for them to be involved in the stucco production on the job site, and so having them involved early on to get their eyes on the details seemed to be prudent.

Q. Why would a stucco contractor, though, need to look at window details if you know?

A. Well, to see how he's going to do the stucco work over the windows, over the window perimeters and window sills and all that goes along with those two products coming together.

Q. Does the stucco contractor typically have responsibility for flashing at windows?

A. No, not design responsibility, but installation responsibility towards any subsequent flashings that are integral with the stucco system to help remove water from outside -- from inside the wall cavity to the outside face of the stucco.

Q. And that's the installation responsibility of that subcontractor, the stucco subcontractor?

A. The installation responsibility, yes.

MS. TYNDALL: Okay. I'm going to hand you a document that's been previously marked as Exhibit 540, which is a copy of Superior's contract.

(Previously marked Exhibit 540.)

BY MS. TYNDALL:

Q. Are you generally familiar with Superior's contract?

A. Generally. I've not looked at it in a long time.

Q. You are welcome to read every page of it, but you don't have to. I'm not going to be quizzing you on the contract terms or anything.

A. Sure.

Q. I know you said the contract was in place when your involvement started to ramp up on the Concord and Cumberland project.

MR. BROWN: Objection. This looks like a

BY MS. TYNDALL:

Q. Sure. You said that there were very few change order requests and that they were late in the game. Was that something that was atypical based on your experience?

A. That's atypical. It's a picture into the lack of resources to get things organized.

Q. Okay. Can you explain that a little further, please.

A. There's just not enough hours in a day for one person to take on the tasks that they were trying to handle and to keep the project organized. That's the kind of -- typically, you want to have a change order from an owner before -- if it's an owner generated change order, one that the owner is responsible for before you go and obligate yourself to a trade contractor. That would be good business practices.

(Telephonic interruption.)

THE WITNESS: So that would be good practices, to keep your paperwork in order, methodically getting the documents that you -- in order, change orders, contract and on down the line.

MS. TYNDALL: Okay. I'm going to hand you two documents that have been previously marked as

You did not have an opportunity to review this description of Wallcraft's work, I guess, before it was submitted to Wallcraft; right?

A. No, I was not part of their contract discussions.

Q. Was it your understanding, though, that Superior and its stucco subcontractor, Wallcraft, would be installing window head and sill flashing?

A. Per the JDavis details and/or the manufacturer's stucco typical details.

Q. Okay. All right. I think you can put those aside. All right. Now, we're going to go back to kind of talking about windows.

A. Okay.

(Pause in proceedings.)

THE WITNESS: Oh. I understand now a little bit more. The original contract was for work on the original garage and fill-in panels at the existing parking garage where we blocked off the back of that wall. So that's why the $3,000, the change order was to bring the stucco on our building into play.

MS. TYNDALL: Got you. Okay.

Let me show you an exhibit that was marked as Exhibit 488. Take a few minutes, and tell me if you recognize that.

design defect. Would you, in that case, view that as a situation, albeit it retroactively, in which a defect in design caused a delay in a project?

MS. TYNDALL: Objection. Form.

THE WITNESS: I'm going to answer that with one in particular case of what actually happened to Concord and Cumberland. Concord and Cumberland has two upper-level balconies that are internal to the main facade, and one of them had a very persistent leak. So persistent that it was impacting our ability to -- I'm trying to bring in someone to look at the thing. We ended up just finding Metro Waterproofing working on the city garage behind our building. They had crews available, found out they did $60 million worth of waterproofing a year, and they came in to supplement Superior's crews.

And while we uncovered the balcony that had been finished, found that the waterproofing system that Superior had put in, that they had poked a hole in the waterproofing membrane as it was being required to bridge over a void, and where that void should have been filled in underneath the metal studs and the sheathing so that it would have given the waterproofing a nice coping to the cant to go up and turn up the wall, and found a hole about that big in

it (indicating). Which that one hole, which was a persistent leak, until you uncovered the whole deck, then we finally found it, and Johnny Barfield said, "Gosh, we just don't have nothing to do with you, Richard."

And I said, "No, we do not have nothing" because the construction was poor and details weren't followed and care wasn't taken. And so that's -- that was an error in the installation. Your questions keep going back to design defects, and I think I've answered that part.

BY MR. MAJURE:

Q. Well, let's just take the example you've given to us. Let's just say that instead of a hole being found, let's just say that the plans didn't call for a proper transition there, and it was built as it was speced. I mean would you look at that as a situation where retroactively you figured out the defect and design had caused a delay in the delivery of the project?

A. I could see where a design defect could delay a job. That's, I'm sure, happened somewhere else many times. But right here on this one I see -- in that case that I mentioned, it was not taking care to make sure that the membrane was installed properly, that

tell you this, that Jeff Miller and I collectively met with Johnny and Wally and their window guy and went through ourselves, the installation procedure. We left Concord and Cumberland and went to 21 George to deal with some issues over there and came back a couple of hours later, and our instructions were not followed and we had to then re-explain the installation procedure, and it was very frustrating to Jeff Miller. If you've had any of his intake on the project and the information, that he became -- and he was extremely upset that they couldn't understand what he was conveying to them to do.

Q. Okay. Let me just stop you right there. What is, then, the "procedure" that you just referred to?

A. Just how to get a pan installed so water drops would stay in the pan and then be flushed out of the building as opposed to being allowed behind the pan.

Q. Okay. But then that was rectified, though, in the course of construction though; right?

A. This was before any windows had actually been installed, and then we go -- then you go away for a week and come back and 25 windows are installed, and yet again, the pans are in the wrong way. Maybe a

A. I remember --

Q. I'm not talking about rough opening. I'm talking about an opening with a window in it.

A. Oh, I know. I'm going to say I think I recall seeing some scaffolding/walk boards being placed inside of a window that was already installed so that people could come and go some. That was not really a good thing. I don't think I recall a whole lot of other, you know, episodes like that, but that tended to be where the building had those cutouts so you could -- so something would be between the two. So it might have been some scaffolding to do the stucco work.

Q. Okay. How many instances of this condition do you think you observed?

A. Three or four. Not a lot.

Q. Do you believe that you've seen pretty much all of the window testing reports that have been generated relative to this property?

A. I think Architectural Testing kept some of their reports to their client when Weather Shield paid for them to be there or Muhler or Superior. I don't know who paid for them to be there, but the test that the owner paid for they had copies of. I have not seen it recently. It would be very helpful to go back

and I took an opportunity to join him and his construction company and thought that that was -- so I took my family on vacation and came back home and handed in my resignation. There was no other reason than that. I enjoyed working at Estates.

Q. Talking about job site conditions, you said you saw a plank or walk boards from scaffolding through a window?

A. I believe I recall that.

Q. Okay. Did you tell anybody not to do that?

A. I'm sure I conveyed that to Johnny Barfield, that I don't think that was a prudent thing to do. I think one of the workers that was on the scaffolding was Hispanic, and so there was a little bit of a communication issue there. But just, you know, my recollection of that was I suggested to somebody that they might want to do something to protect the window sills because they're too delicate for that kind of -- the window bottoms, not window sills.

Q. Right. What protection did anybody install to protect the windows after they had been installed from damage by other trades who came later?

A. Well, like the mason may have, on the inside of the window up against the studs, they may have taken some blocking to give themselves a support that

was tied to the framing of the building to be able to go through an opening while they were doing certain of their work. I recall a little bit of that, not wholesale. Most everybody tried to keep -- I think, to protect the windows, but that's a contract -- you know. Superior was working on their end to be sure they were closed up at night so that there was not an opportunity for a storm to come through in the middle of the night and do the damage that it did that one time.

I say, "middle of the night." I think it happened in the evening. I don't know. But, overall, I think they did a fair job of trying to -- you know, like the stucco guy would put plastic over the windows to keep the stucco from -- as they're troweling it on from getting it on the window surfaces. Everybody knows that the sand in the stucco can scratch glass. So you don't want that to happen.

Q. Okay. But, nonetheless, it did happen. You had lots of scratched glass out there that had to be replaced?

A. I mean I guess. I can only imagine that they maybe had some. I've seen all kinds of problems on job sites where someone is cutting metal studs, and I think it happened on the top unit on the fourth floor

where somebody was cutting something in metal and the hot metal sparks hit the glass and embedded themselves into the glass.

Q. So it burned the glass, and that had to be replaced?

A. Yeah.

Q. But from day to day, I mean there wasn't -- I've seen job sites where they wrapped the window openings. They've put cardboard down and wrapped those at locations and prevented people from -- in fact, they don't even leave the cranks on the hardware, the cranks. They put those on last so people won't open and close the windows; right?

A. And I think they took most of the cranks off somewhere in here. And I may be confusing projects because you can only imagine, when you go through different projects. But the windows were allowed to open and -- most of them were allowed to be opened and closed, or at least the doors propped open. It allowed a little bit of air to blow through the building for the interior work to not suffocate.

Q. Yeah. Because there wasn't anything set up to otherwise -- before the HVAC was turned on, there wasn't anything set up to facilitate air flow?

A. I don't remember there being anything.

Q. Okay. And so even if it would have been raining outside, they had incentive to leave the windows open; correct?

A. I believe some rain was -- I think some of the windows did experience being open when it rained.

Q. Okay. Do you know how frequently that occurred?

A. I do not.

Q. But there wasn't any plastic or anything that was supposed to stay permanently wrapped to protect these windows?

A. I don't recall anybody doing that kind of a system. I've seen people use a blue sticky plastic over windows and on certain job sites. You know, there's different products that are out there if you want to spend the money.

Q. But you didn't spend the money on this project?

A. I'm the owner's rep. I'm not the builder.

Q. Sure. But I would think, as the owner, you're watching what the builder is doing to the windows in your building, weren't you?

A. But I absolutely cannot tell the builder what to do, you know, how to do it.

Q. Okay. So if the builder is destroying your

building, you don't tell him to stop?

A. Well, we won't pay him.

Q. Okay. You just let him do it and then don't pay him?

A. No, that doesn't make good sense.

Q. No.

A. And I'm not saying it in that vein. What I am saying is that most people -- I found Superior most of the way made an effort to protect the products that got put into the building. There's certain places you can see that they didn't do a very good job of that.

Q. So what methods did they have in place to protect the windows?

A. I don't think they had a specific system other than Johnny and his crew of men, to keep the windows closed at night. I don't think that they had any other special -- they did not spend any other additional monies to go and protect the windows.

And there was a document that we marked. It was -- it's the one that -- is it 726? Exhibit 726. It's the standard what Ms. Hodge called Estates standard -- oh. I just had it here.

Q. Standard contract spec?

MR. MAJURE: It's 15 after 5:00. I just want to let you know. I know what it's like to be in

In The Matter Of:

CONCORD AND CUMBERLAND HORIZONTAL PROPERTY REGIME, et al.

v.

CONCORD & CUMBERLAND, LLC, et al.

RICHARD ANDREWS - Vol. 2

September 10, 2013

MERRILL LAD
1325 G Street NW, Suite 200, Washington, DC
Phone: 800.292.4789 Fax:202.861.3425

gap right there that would tell you how many months behind they were already, and there's not many opportunities to make up that time, that I see as a construction person, in the framing of the building.

But had they gone to multiple shifts and spent an exorbitant amount of overtime money, could they have brought it back in on time, I don't know. I mean that's a very complicated question.

BY MS. VARNADO:

Q. In the framing process and the preparation of the window openings, do you have any recollection about the staffing levels and the speed with which Superior accomplished that portion of the task?

A. The framing --

MR. BELCHER: Objection to form.

THE WITNESS: The metal framing phase of the project and the window installation, once it was started, seemed to flow fairly well.

BY MS. VARNADO:

Q. Okay. Do you recall frustration on the part of the initial window installer because he got there to put in windows and the bucks weren't ready?

A. I do recall the bucks not staying ahead of him, and whoever Superior had hired to put the bucks in was not keeping up with that individual.

time that that became noticed. I don't know what sequence they went in, but when it became apparent and became an issue that we presented Superior that they had to do something different with their sprinkler piping, they went back and got the sprinkler contractor to come back and make the modifications to their installation.

Q. Okay. And the proper sequencing of trades on the work site, that is the responsibility of the general contractor; correct?

A. It's the responsibility of the general contractor to get the trades in at the right time. I don't know that there's a relationship between the windows and the sprinkler system contractors.

Q. Right. But I'm just saying overall, in terms of the project administration, it's not the sub's job to know when to show up. It's the general contractor's job to efficiently and effectively get their subs coordinated on time and in the right order?

A. That's correct. I'll agree with that.

Q. Would you also agree that Superior did an abysmal job of that responsibility on this project?

MR. BELCHER: Object to the form.

MR. NISTAD: Objection. Form.

THE WITNESS: Superior did a very, very, very

poor job of getting the subcontractors sequenced in, the right materials and the right equipment, the right products in at the right time.

BY MS. VARNADO:

Q. You had testified about the windows installed in the brick without their fins. Do you recall the reason why that took place? Because you said that the siding didn't go on before -- the veneer didn't go on before the windows went in, but obviously, that's not 100 percent true.

A. I'm trying to recall why that came up, but either they were missing some windows from the original order or some windows became damaged and had to be replaced. But there was a need on Superior's part to let the mason and the stucco trade contractors go ahead and finish and that they would come back and install these handful of windows, maybe a stack of three or four, after the fact -- or after the veneer went on.

Q. Okay.

A. I recall that being somewhere in the middle of the building.

Q. Okay. But you don't recall why?

A. Which ones? Oh, why? I don't recall exactly why. I do not recall exactly why.

Q. Okay. And do you know what installation details or installation instructions were used in that situation?

A. Wally Baughn told me that he had installation instructions from Weather Shield to do this. I took him at his word that he knew what he was doing. I questioned their -- and I think there's a document to that point, that they needed to be sure that they followed the instructions, but I still questioned whether that could be accomplished.

Q. Okay. And did they ever provide you any verification?

A. I don't recall that they did.

Q. You just trusted Wally Baughn?

A. Unfortunately.

Q. I think yesterday you quoted him as saying it was ironed out. Does that -- or was that just terminology you might have used yesterday? Is that a direct quote that you recall?

A. That would be a generalization.

Q. Okay. Likewise, you said something when we were talking about yesterday, the hole in the waterproof membrane at the balcony, that Wally said something, "We don't have nothing"?

A. Well, that was actually, I said, Johnny

Barfield, the superintendent said that.

Q. All right. And was that a direct quote?

A. That's pretty close to a direct quote.

Q. And what did you take that to mean?

A. That the quality of the workmanship was extremely poor and negligent.

Q. Okay. Are you saying, "We don't have nothing" meaning "We don't have any excuse for that"? Is that what you're saying?

A. We don't have a leg to stand on. We don't have any reason to show you why that is like it is, and we're embarrassed that it's -- that it was covered up.

Q. Okay. So that it was --

A. That's what I could read into his comment.

Q. All right. Essentially, he was taking responsibility after seeing the exposed condition?

A. Exactly.

MR. MAJURE: Objection.

BY MS. VARNADO:

Q. Just to finish out my sentence, he was taking responsibility for the hole in the membrane and covering up the hole with the waterproof membrane or the defective condition that was causing the leak on the balcony?

Shield?

A. He was a Muhler employee. He was not part of Weather Shield. I'm comfortable saying that.

Q. So if somebody had put that in a note or something, that would be a mistake?

A. Correct. Muhler sold more than Weather Shield windows.

Q. Right. Okay. You talked about the windows left open during a wind event. Then -- who reported that incident to you?

A. I would have to say Johnny Barfield. Maybe Wally Baughn, but somebody with Superior reported that they had had some damage to some windows during an event and it caused some damage to some hardware. So I think they were looking for replacement hardware.

Q. Okay. Were they asking that -- were they accepting responsibility to pay for the damaged hardware, or were they asking Weather Shield to replace it for free?

A. I don't know what their next step was after that.

Q. Okay. And was that documented anywhere that you're aware of?

A. I don't recall it being documented as such. There was a strong storm that did create a lot of

leaks. There was some speculation that some of the leaks were due to the windows that had been left open, and then there was that other issue with some damage being caused. So there's a pretty good set of pictures from immediately after that storm, but it was mostly looking at leaks and not particularly at damaged hardware. So I don't think -- there may be a list of leaks but not a list of hardware.

Q. Okay. And do you know -- do you recall when in the project process that was?

A. I'm going to speculate that it was in May, maybe June -- somewhere in the summer of '07.

Q. Okay. And what makes you call up that time period?

A. Only to say that because the windows installation had gone on and when a summer squall probably came up in the Charleston Harbor.

Q. Okay.

A. It's pure speculation. But I think there's some documents in the file, though, towards that regard.

Q. What kind of documents?

A. Like the photographs I mentioned about the number of leaks because I believe we came -- "we" being Teresa Hodge and myself, visited the job site

the summer of 2007 between -- with Weather Shield and Muhler and Superior? Do you know anything about that agreement?

A. I do remember there being a payment agreement that it was -- some letters that got transferred back and forth, and evidently payment happened so that Muhler would get back on the job site. I remember a little bit about that but not a lot of specifics.

Q. Okay. Have you ever seen this agreement I'm talking about requiring tests to be passed before and warranty -- additional warranties to be issued, that type of thing?

A. I recall seeing some document like that.

Q. Okay. Were you involved in the negotiation of that document?

A. Very limited if I was. Maybe consulted for at least a little bit about that we need to be sure that the windows meet the project requirements --

Q. Okay.

A. -- and that Muhler agreed that they would provide windows that met the project requirements.

Q. Okay. Anything else?

A. Not a lot more than that.

Q. Okay. Do you have an opinion as to whether or not the windows supplied by Muhler and manufactured

Q. Okay. Are you saying that he had inadequately staffed the project?

A. Well, they had -- understand, Superior did not have any of their own employed carpenters or laborers or tradesmen of any kind. Johnny Barfield, as I understand it, was the only on site employee of Superior Construction. Everybody else was either a subcontractor's employee or a temporary labor force that they hired to buy carpentry work from, labor to clean up the project, various tasks that they tried to tackle completely with temporary labor.

Q. All right. So the temporary labor was hired by Superior on the project to cover items that Superior was responsible for, not a sub?

A. Yes. That they had not subbed out that work to someone else.

Q. Okay. And so this 65 men, were these 65 temp workers or was it 65 men total for all trades?

A. I would assume that's his report on the total number of men on the job site that day, all trades and/or temporary folks included. There's no actual validity that I know of to report that 65 men were on the job site the day before. That was Johnny's report.

Q. Okay. All right. So I guess they're

(Deposition Exhibit 731 was marked for identification.)

MS. VARNADO: I skipped numbers.

MR. BROWN: Okay. I thought I had written down the wrong number.

MS. VARNADO: No.

(The witness reviewed Exhibit 731.)

THE WITNESS: Okay.

BY MS. VARNADO:

Q. So we've got an October 8, 2007 transmittal memo from you to Robbie Robinson of Superior; correct?

A. That's correct.

Q. And here you're talking about building leaks at the Concord and Cumberland project.

A. Right.

Q. And it appears you've got issues with pipes leaking?

A. Some pipes that were leaking, penetrations are around the pipes where they might be going through a floor, and the actual banding of the joints. Possibly there was a variety of leaks, whether they be the outside or inside of the building.

Q. Okay. You had issues with bubbling of the stucco finish?

A. There's some stucco finish that's directly

underneath the stone steps at the lower part of the building, and if rain water -- because it's a system by itself -- would come off of the stone step and come around, you know, follow along with water tension, I guess, but right there was where the start of the stucco system, the plaster system was, and then because of that joint right there, the water could get behind that finish, which was essentially a painted type of a finish, and then push the paint off of the substrate that it was attached to.

Q. Okay. So you were trying to find a solution in terms of a weeping solution for that?

A. Exactly. Some way to protect that joint up underneath all the steps so that the water would quit getting behind the stucco and possibly even putting a drip on the steps so that the water was forced to drop down to the ground as opposed to running on top of that little joint.

Q. And attached to this is your October 6, 2007 E-mail to Robbie Robinson and Joe Murphy; correct?

A. Right.

Q. And you're talking, again, about water leaks and -- causing damage to some of the installed wood products at the project?

A. Right.

Q. Unit 102, the leak was -- you were saying that you had a leaking pipe in the unit?

A. Back near the back of the unit. So I'm not sure what the source of that leak was, but it would have been closer to the corridor of the building as opposed to out on the outer face of the building.

Q. Not associated with any window or door?

A. I would assume it's not given that I mentioned it was near the back of the condominium unit.

Q. Okay. Unit 103, "a leak extending moisture into the corridor under the wood base." Do you know -- or have a recollection of what was the issue with that?

A. I don't at this time.

Q. Okay. This is Unit 402. You've got "water coming in around the balcony door assembly," and the tile finish was high with respect to the door. Do you know what was going on there?

A. There's a chance that that was one of those balconies where Superior raised the mud bed of the balcony surface in order to allow positive drainage on the unit to a floor drain, and that in doing so, he brought the tile surface up into -- in some cases actually over the top of the threshold of the door.

Q. All right.

A. Or at least in that little, small gap of area that maybe the -- an interface of it or not. You'd have to look and see.

Q. So rendering your pans ineffective?

A. The pan underneath there would be forced to drain back into that. 402 should have had the Schluter System underneath it so it potentially could have gotten into the Schluter drainage map.

Q. Okay. But somehow --

A. But it could have been blocked off too.

Q. And then water getting forced back into the unit?

A. Potentially.

Q. Okay. The "Foyer off Cumberland Street ceiling has water damage in near the leading edge near the stone water table." Do you have an understanding of what was the issue there?

A. There are some windows and such above that foyer. I don't know exactly what the source of the water was. It's very hard to determine at times, but it's likely from a window source there.

Q. Okay. Do you know for certain?

A. I do not know for certain.

Q. Drain pipe 402 side terrace, was that

instructions; correct?

A. I don't recall him referring me to the written instructions, but I made good, clear comments about his instructions on that day that we weren't -- that we, as the design and the installation by Superior and their work prior to Muhler installing the windows -- I think there's that final attachment -- not being per the Weather Shield installation instructions.

I also testified that Brad conducted a demonstration meeting discussion at the mock-up panel. There was some discussions between Chas Agosti and Jeff Miller from Sutton-Kennerly subsequent to that, as a part of that meeting and towards the end of that meeting, but then Brad was the main fellow from Muhler that I got that information from about the Tyvek being tied into the outside of the window fins.

Q. And it's your understanding that the Tyvek being tied into the pan is not part of Muhler's scope of installation; correct?

A. That's correct. That would be before Muhler came in to put in the windows.

Q. The task of prepping the rough openings and installing the pans was in Superior's scope of work?

A. That was in their scope of work. I don't

know who they gave it to.

Q. Okay. The mock-up you just mentioned, you're referring to the BAR mock-up that was just a faux wall?

A. Yes. A faux wall that they wanted to be able to compare what they approved against the actual building in place at the time you completed the skin of the --

Q. And was there a window in a stucco wall in that mock-up?

A. There was.

Q. Okay. Was that window recessed?

A. I do not think it actually had -- it had a little bit of a recess, but it didn't have a perimeter trim, if you will. But if I recall, it was recessed some. I don't know how many inches.

Q. Okay.

MR. BROWN: There's a picture of it in here, if you want.

BY MR. NISTAD:

Q. Even after that first full mock-up, there was another meeting to discuss the window installation procedures?

A. That's correct. See, right here (indicating).

again, date stamped August 30, 2006.

Q. Okay. Now, it's your understanding that Muhler was the supplier of windows; correct?

A. I understood they were the subcontractor to Superior to furnish and install the windows.

Q. So they were a supplier of windows?

A. They would have been the source that Superior bought the windows from.

Q. And then they were an installer of windows, but that window installation scope was limited to some extent and certainly did not include the preparation of the rough opening?

A. I understood that Superior broke that up and gave the perimeter of the window installation the bucks, the Tyvek work to someone else. I don't know who that individual was. Well, that's right. I don't know who that individual is.

Q. Would you agree that Muhler didn't undertake any activities to become the designer of the building; correct?

A. I understand that they did not. I agree with your statement.

Q. They tried to confirm how the installation would take place; is that correct?

A. They tried to incorporate the manufacturer's

installation instructions of the windows that were requested to be provided, and to my knowledge, they adhered to those instructions.

Q. And so they're passing on information trying to confirm the process to the general contractor and the owner and the architect; is that correct?

A. They were trying -- this particular one, to try to show, demonstrate what Weather Shield's requirements were so everybody understood those requirements so then details from the architect could then be done to bring that into specific details people could follow.

Q. Okay. But they're not taking the design role. They're asking for clarification or approval from the design team? Basically, I'm referring to Exhibit 352.

A. Sure. I mean he was demonstrating what Weather Shield was going to require and then Sutton-Kennerly was -- and was asked to provide some peer review assistance. Jeff Davis' outfit was the designer of record, and they were to incorporate the details accordingly that they could agree upon that this was the appropriate way to build a building and be weathertight.

Q. So Muhler is seeking approval, whether

Attachment D

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

CONCORD AND CUMBERLAND HORIZONTAL PROPERTY REGIME,	CASE NO. 2010-CP-10-2271
and	
THOMAS R. MATHER,	CASE NO. 2010-CP-10-2919
and	
BETTY Y. SEGAL,	CASE NO. 2010-CP-10-3206
and	
SIGNATURE CHARLESTON, LLC and WADE ROBINSON,	CASE NO. 2010-CP-10-3207
and	
JAMES C. KIRKPATRICK,	CASE NO. 2010-CP-10-3208
and	
PAUL A. BRIM,	CASE NO. 2010-CP-10-3209
and	
FRED RAPPAPORT and JOYCE RAPPAPORT,	CASE NO. 2010-CP-10-3210
and	
THOMAS R. DEBNAM, AS TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM,	CASE NO. 2010-CP-10-9580
and	
PAMELA L. VAUGHN, Plaintiffs,	CASE NO. 2010-CP-10-9767
vs.	
CONCORD & CUMBERLAND, LLC; et al., Defendants.	

DEPOSITION OF: MARIANNA TERESA HODGE - VOLUME I
DATE: September 26, 2012

A. WILLIAM ROBERTS, JR., & ASSOCIATES
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recall any conversations prior to construction about hiring a waterproofing consultant?

A. I think that we're asking the architects here if they think it's necessary or if they would like a waterproofing consultant.

Obviously Sutton-Kennerly had done some work on this job as a consultant and we have used them on other projects, so I'm sure that's why it was brought up.

Q. And on this particular project, who hired Sutton and Kennerly?

A. Concord & Cumberland, LLC.

Q. And did they serve as a waterproofing consultant on this job, on Concord & Cumberland?

A. They were a consultant, more of just an observer, to make comments and recommendations.

Q. And they were a consultant of the owner, of Concord & Cumberland, LLC, correct --

A. Correct.

Q. -- not a sub-consultant of the architect or anything like that?

Okay. As a result of this e-mail or any other communications or correspondence, do you know if the architect hired a waterproofing consultant?

A. It's a construction update. We tried to keep our homeowners and purchasers updated, I think, on a monthly basis with a letter.

Q. Is this something that you would send to all of the owners at Concord & Cumberland updating them on the status of construction?

A. It is. It's a blanket letter.

Q. And was this project completely sold out before it was finished?

A. I believe so.

Q. And were these letters -- you said it was a blanket letter. Was it the same letter that went to all of the owners each time, as far as you know?

A. The same form, so this letter would have gone to each owner. It would have been the exact same letter. And then next one, it would be the exact same letter to each owner.

Q. That's what I meant. Thanks.

A. Yes.

Q. In the first paragraph you talk about, The contractor is working diligently towards completion of the building and has set the tentative walk/closing date from mid to late April. Is that April 2006, initially?

A. Later they did.

Q. And Chas's e-mail also said, Per the details and installation instructions I sent you on February 6th, 2006...

Do you know if he's referring to the installation instructions from Weather Shield?

A. I don't know.

Q. Okay. In any event, he indicates pans are not to be used at the doors; they are to be fastened per these instructions, as well as the windows.

Do you recall those discussions?

A. There were discussions about that, and this is early on.

Q. Right.

A. Obviously Weather Shield and Muhler and the architect all discussed ways, and what we finally ended up with was installation instructions and details; so there were discussions regarding the pans and whether or not they could be penetrated or not.

Q. And what was the end result of those discussions?

A. Regarding the windows, that it could not be penetrated.

Q. That the pans could not be penetrated?
A. Right.
Q. Okay. What about the doors? Were pans ultimately used under the doors?
A. I recall that I think it may have been a structural issue where they needed to be attached and they had to be penetrated, so they came up with a sealant detail.
Q. When you say "they," who came up with the sealant detail?
A. The architect would.
Q. All right. And is that -- do you know whether or not those details are something that the architect worked with Muhler and Weather Shield on, or is it something they came up with on their own?
A. No, it was a collaboration.
MR. FORSTER: Objection to form.
MR. NISTAD: Objection to that.
BY MR. KIRCHNER:
Q. And what involvement if any did Estates Management Company or Concord & Cumberland have in that process?
A. We were typically present and the discussions were ongoing and meetings were held.
Q. Other than being present, did you offer

A. That's correct.

Q. Is this something that you would expect -- as the owner -- something that you would expect the general contractor to discover on their own?

MR. BOYD: Object to the form.

THE WITNESS: I would have expected them to install it the way they should have.

BY MR. KIRCHNER:

Q. You as the project manager don't expect to go around the general contractor pointing out deficiencies, do you?

A. No.

Q. You're relying on the general contractor to do it correctly. Is that correct?

A. That's correct.

Q. Do you know whether the Grace -- the Vycor self-adhering membrane was installed underneath these pans in this paragraph?

A. I don't know for sure. It could be potentially what we're looking at that's black.

Q. The black?

A. I can't say for certain.

Q. Do you know who manufactured the pans?

A. I just know that Superior was

responsible for it.

Q. When you say Superior, do you mean them in general or do you mean one of their subcontractors?

A. I mean that my contract was with Superior and I don't know if they directed it or had it done themselves.

Q. That's fair enough. I just wanted to make sure I understand your answer.

When you say Superior was supposed to do it, you don't necessarily mean that they manufactured and installed the pans, but it was supposed to have been done by them or by someone under them.

A. That's correct.

Q. And, I guess, going back to the Tyvek question, do you know, in fact, if Superior self-performed that task or if that was a subcontractor?

A. I don't know that as a fact. Going back through communications, I notice that Superior was to get the openings ready with the Tyvek and the pans, and then Muhler, I believe, came subsequently to put the wood bucks in.

Q. All right. And do you know whether or

like this, like this exhibit, to any of the unit owners in general, notifying them of the window concerns?

A. No.

MR. COLE: What's the date of that one?

MR. KIRCHNER: This one is July 27th, 2007, but there's lots of them.

MR. COLE: I just wanted the date.

(HODGE EXH. 396, handwritten notes, Bates CCLLC 7232, was marked for identification.)

BY MR. KIRCHNER:

Q. Okay. 396 came from your files as well. That's CCLLC 7232. Do you recognize the handwriting on that document?

A. That's my handwriting.

Q. And tell me generally what this is.

A. It looks like a site visit where I'm documenting what I see in the units in regards to water.

Q. Okay. So is this a site visit that you personally made?

A. Yes.

Q. And so you're documenting your present impressions as you're walking through the unit?

A. What I see, yes.

Q. And it's dated October 26th, 2007. And at the top it references 202, 203, 206, 108, 107, 106, 103, 102. Do you know what that is in reference to?

A. I don't.

Q. Then under that, you've written, Leaks? Is that right? It says leaks?

A. It says leaks.

Q. It's underlined. And then you've got a list there. Why don't you tell me what those say, make sure I can read them?

A. Okay. 401, small leak to the left of the door. Tower, every corner. Back leaks from voids, question mark. Needs to be grouted. Front. Johnny's not sure.

Q. I don't mean to interrupt you. Let me just make sure I'm clear.

A. Okay.

Q. So the small leak to the left of the door, is that the balcony, the balcony door going to the -- well, let me just ask you, which door are you talking about?

A. I don't know, without -- I don't know.

Q. 401 is Betty Segal's unit; is that correct?

A. That's correct.

Q. And the tower that you referenced, is that the tower in her unit on the end of the building that goes up two stories?

A. That's correct, yes.

Q. So one of the exterior doors -- not sure which -- has a leak to the left of the door. And then it's leaking in every corner of the tower; is that accurate?

A. Possibly. It says: Tower every corner.

Q. All right. I'm sorry. What do you have next to 402?

A. 402, back left wall appears wet. Drain fixed.

Q. Which drain are you referencing there; do you know? Is it a balcony drain?

A. I assume it was a balcony drain, yes.

Q. 403?

A. No leaks.

Q. Whose unit is 403?

A. Schneider.

Q. Schneider, okay.

A. 404, very wet at front door on the floor, still wet from messed-up drains.

Q. Okay. Are those the balcony drains, do you know? Was there an issue with the balcony drains on the top floor?

A. I'm not sure, because this says front door, which I would assume is the entry door, so it could have been a roof drain.

Q. All right.

A. 301, leak was due to a stopped-up drain.

Q. Do you remember what you were referencing there?

A. Potentially the leak [sic] from the unit above.

Q. Okay.

A. I mean the drain from the unit above.

303, far left wall corner, don't know where it's coming from.

Q. Okay.

A. 306, still evidence of leaks. I think that says: First on back wall.

I'm not sure what that word is.

308 is fixed.

206, didn't see any.

203, none.

202, none.

102, far left wall.

106, being fixed. I'm not certain. It says "something" taking down to correct.

Entered -- entered in places. Taking down to correct.

107, question mark.

108, checkmark.

Q. Can that first word be exterior? Exterior something?

A. I don't know.

Q. Okay. All right. And is it fair to say that some of these leaks that you're observing in October of 2007 are not window leaks?

A. Yes.

Q. And between the Architectural Testing in April and May of 2007 and October of 2007, what if anything was done to address the window leaks?

A. In regards to the window leaks, like I said, we had -- ATI had a passed test in May. I think it was May 14th of 2007.

And during the time from April to June 11th, an agreement happened between Muhler, Weather Shield and Superior, and we were named as a third-party beneficiary to that agreement. In that agreement, they stated that they would undertake --

A. Your number is 10134.
Q. Okay.
A. Clearly you don't see any windows on that wall, so it appears to be coming from that drain.
Q. Is that a roof drain?
A. I can't say for sure.
Q. You don't know. Okay. All right.
A. So there's that. There were other issues at the time with window parts that weren't installed, windows that were left open, windows that wouldn't close.

We were assured that these were punch items that Weather Shield and Muhler were going to take care of.

We had one issue where the gas line going through the wall was installed -- it wasn't balanced, so the water was coming into the unit instead of going out. I mean, there were various different reasons that were given for water intrusion.

Q. And that's -- I guess that's sort of what I'm trying to get at, was, the reasons that were given for the sources of water intrusion, where was that coming from? Where was that

Attachment E

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

RE: Concord and Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-2271

RE: Thomas R. Mather v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-2919

RE: Betty Segal v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-3206

RE: Signature Charleston, LLC, *et al.* v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-3207

RE: James C. Kirkpatrick v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-3208

RE: Paul A. Brim v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-3209

RE: Fred Rappaport, *et al.* v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-3210

RE: Thomas R. Debnam, as Trustee of the Trust Agreement of Thomas R. Debnam v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-9580

RE: Pamela L. Vaughn v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-9767

RE: Stuart D. Reeves v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2011-CP-10-4603

RE: Mattison J. MacGillivray, *et al.* v. Concord & Cumberland, LLC, et al.
Civil Action No. 2011-CP-10-4663

AFFIDAVIT OF RON SYKORA

RON SYKORA, first being duly sworn, deposes and says as follows:

1. My name is Ron Sykora and I am the Vice President of Sales & Business Development of The Muhler Company, Inc. ("Muhler").

2. I am over the age of 18 and have personal knowledge of the statements made in this affidavit and certify it to be a true and correct statement.

3. I am familiar with the Concord & Cumberland project that is the subject matter of this lawsuit. I was personally involved in Muhler's work relating to the Concord & Cumberland project in which Muhler supplied and installed windows and doors manufactured by Weather Shield Manufacturing, Inc.

4. The scope of Muhler's contract to install windows was to install windows into rough openings that were prepared by Superior Construction and/or its subcontractors. Muhler had no contractual responsibility nor did it undertake to prepare any of the rough openings at the Concord & Cumberland project.

FURTHER, AFFIANT SAYETH NAUGHT.

Ron Sykora
Vice President of Sales & Business Development of
The Muhler Company, Inc.

SWORN TO AND SUBSCRIBED BEFORE ME

This 21st day of October, 2011.

Notary Public for South Carolina

My Commission Expires: My Commission Expires
April 26th 2014

Attachment F

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

COURT OF COMMON PLEAS

CONCORD AND CUMBERLAND HORIZONTAL PROPERTY REGIME,	CASE NO. 2010-CP-10-2271
and	
THOMAS R. MATHER,	CASE NO. 2010-CP-10-2919
and	
BETTY Y. SEGAL,	CASE NO. 2010-CP-10-3206
and	
SIGNATURE CHARLESTON, LLC and WADE ROBINSON,	CASE NO. 2010-CP-10-3207
and	
JAMES C. KIRKPATRICK,	CASE NO. 2010-CP-10-3208
and	
PAUL A. BRIM,	CASE NO. 2010-CP-10-3209
and	
FRED RAPPAPORT and JOYCE RAPPAPORT,	CASE NO. 2010-CP-10-3210
and	
THOMAS R. DEBNAM, AS TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM,	CASE NO. 2010-CP-10-9580
and	
PAMELA L. VAUGHN,	CASE NO. 2010-CP-10-9767

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC; et al.,

Defendants.

DEPOSITION OF: CARLTON S. "CHIP" CLARDY, JR., Vol. II
DATE: April 5, 2013

Q. Okay. All right. So if you will look with me now at the general notes, let's start with Note No. 3. Weather Shield is not responsible for handling or protection of Weather Shield products at the jobsite.

Who undertook responsibility for protection of the Weather Shield products at the jobsite?

A. Prior to installation, that would have been Muhler. And during installation, it would have been Muhler. After installation, for the most part it would have been Superior through the trades that are also working on the job.

Q. Okay. And what procedures or protocols were in place to protect the windows or the Weather Shield products at the jobsite after they had been installed?

A. I'm not sure of specific procedures other than continuing working with the subs not to damage the windows, not to leave them in a position to be damaged.

Q. And how did you work with the subs to do that?

A. I think it was regularly discussed at toolbox meetings, daily meetings with

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
FOR THE NINTH JUDICIAL CIRCUIT

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CONCORD AND CUMBERLAND HORIZONTAL PROPERTY REGIME, THOMAS R. MATHER, BETTY Y. SEGAL, SIGNATURE CHARLESTON, LLC, WADE ROBINSON, JAMES C. KIRKPATRICK, PAUL A. BRIM, FRED RAPPAPORT, JOYCE RAPPAPORT, THOMAS R. DEBNAM, AS TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM, STUART REEVES, MATTISON MACGILLIVRAY, TERESA E. MACGILLIVRAY, AVANT & ASSOCIATES, LLC, OAKLAND HOLDING, LLC, 304 CONCORD & CUMBERLAND, LLC, 402 CONCORD & CUMBERLAND, LLC, and PAMELA R. QUEEN, and PAMELA L. VAUGHN, Plaintiffs, vs. CONCORD & CUMBERLAND, LLC, CONCORD & CUMBERLAND MANAGER, LLC, ESTATES, INC., ESTATES MANAGEMENT COMPANY, SUPERIOR CONSTRUCTION CORPORATION, et al., Defendants.	Civil Action Number: 2010-CP-10-2271 Civil Action Number: 2010-CP-10-2919 Civil Action Number: 2010-CP-10-3206 Civil Action Number: 2010-CP-10-3207 Civil Action Number: 2010-CP-10-3208 Civil Action Number: 2010-CP-10-3209 Civil Action Number: 2010-CP-10-3210 Civil Action Number: 2010-CP-10-9580 Civil Action Number: 2011-CP-10-4603 Civil Action Number: 2011-CP-10-4663 Civil Action Number: 2011-CP-10-8549 Civil Action Number: 2011-CP-10-8550 Civil Action Number: 2011-CP-10-8551 Civil Action Number: 2011-CP-10-9585 Civil Action Number: 2010-CP-10-9767 RULE 30(b)(6) TELEPHONIC DEPOSITION OF SUPERIOR CONSTRUCTION CORPORATION VOLUME 3

of the AGC, Associated General Contractors of America, form subcontract document?

A. As modified, yes.

Q. Okay. Let me ask you this: Are you -- do you have any knowledge as to who was going to provide the rough openings and water management details at the project with the -- when I'm asking the question, between Superior and Muhler, who was supposed to do that work?

A. Again, be -- please reask. I'm not sure I exactly understand.

Q. Okay. I'll be happy to restate it.

You -- is it your understanding that Muhler was going to prepare the rough openings at the project or was that something Superior was going to do?

A. To the best of my recollection, Superior was providing the rough opening. Later, that rough opening, depending on how you define it, was subcontracted out. I think the name of the company was In The Wind, if I recall correctly, but Superior was providing the initial rough opening. Again, if I'm understanding what you're asking.

Q. You are.

And I guess one of the -- one of the

subcontractor would provide, but there's also a verification aspect. So I think there is confusion between the two documents.

Q. Okay. Does Superior have a position as to which document or which -- who should be responsible for the rough opening preparation?

A. I don't know what other communications there may have been between the two. I do know that as a practical matter on the project, Superior provided the rough rough openings, if you will, and initially were to supply the bucks to be used, but then that was subcontracted out to Muhler's subcontractor.

Q. And that -- when you say "that was subcontracted out to Muhler's subcontractor," that was a contract directly between Superior and In The Wind; is that correct?

A. Yes, sir, to the best of my understanding.

Q. And you didn't expect Muhler to be doing that work that you hired In The Wind to be doing; is that correct?

A. That is correct.

Q. Okay.

A. What we would have expected from Muhler is prior to accepting any window opening, that they

Wike or Theresa Parker, which it was about in that time we had a turnover in our controller.

Q. Are you aware of any reason in January of 2007 that Muhler would not be entitled to payment for the labor and materials it had supplied through January 25 of 2007?

A. Off the top of my head, no; but whether or not they had at that point in time complied with their terms of their subcontract -- if they were in compliance with all the terms of their subcontract, then there's no reason they shouldn't have been paid.

Q. And do you -- you said you don't know whether they were in compliance in January of 2007.

A. Well --

Q. Who would know?

A. I -- I do know they weren't in one aspect. Whether or not that was that discussion as to whether or not they were being paid or not, I am not sure.

Q. And what aspect is that?

A. I know that their subcontract required the providing of a performance bond, and at that point we had not received the performance bond. So that would have been one of the prerequisites as well.

But whether or not they had in all of their liability insurance, certifications, and that type of thing, I don't know.

Q. Who -- who at Superior -- or let me ask it to you this way: Did you know in January of 2007 whether Muhler had provided a performance bond to the project?

A. No, I didn't --

Q. Is that --

A. I do not. I do now. I know that they had not at this point. At that point in time, I can't say whether I knew or did not know.

Q. So you don't know whether that was a reason for Superior not paying Muhler or not --

A. I --

Q. -- is that correct?

A. That is correct. I do not.

Q. Okay. And are you aware of any other reason in January of 2007 as to whether Muhler was due payment or not from Superior?

A. No. No, sir, I do not. The typical pieces, if that was their first pay application or even their second, is oftentimes they don't get it in in a timely fashion, miss a cutoff, and, therefore, are going to be paid on the next payment

cycle, or they do not have some of the prerequisite documentation in, such as insurance certifications or bonding or whatever else may happen to be required as a prerequisite to payment in the subcontract.

Q. Does your subcontract say that -- that a payment and performance bond is a prerequisite to payment?

A. I would have to look at this when it depends. We don't require a sub -- a bond in every subcontract. In some subcontracts, it is; in some, it's not worded that way.

Q. Do you have a position with respect to Superior's obligation to pay Muhler?

A. I would be glad to look at the subcontract and see if I can determine that aspect.

Q. Please do.

A. (The deponent reviewed documentation.) Okay. I've looked at the subcontract. It does not appear from a quick review -- I've not reviewed the entire document, but just glancing through it as best I can quickly, it appears that the payment bond or payment and performance bond was not a prerequisite to the initial payment.

Q. Okay. Thanks.

Q. -- identify --
A. As best I recall, they were done by units.
Q. Were you asked -- I -- I don't remember, but were you asked any questions about how the windows were ordered to be either kept shut or open during construction?
A. The standing policy is that they are to be left shut. But, again, it's -- being Charleston in the summertime with the heat, there was no way to keep them shut with the airflow. So I know they were open. And I also know that some materials and such were delivered through opened windows.

So, yes, there were the standing policies the windows should stay shut, but, obviously, enforcing that is pretty close to an impossibility.
Q. What type of materials do you know were delivered through the windows?
A. I -- I don't have a specific re --

(A telephone connection was terminated at 3:43 p.m.)

THE DEPONENT: -- recollection. I think that some of the materials that were delivered that way for -- were later for upfit contractors, but not saying that a Superior drywaller or somebody of that nature wouldn't have unloaded something

and specifications by J. Davis, we would seek the damages accordingly from him as well.

Q. Okay.

A. There may be others. Those are ones that come to my mind.

Q. Okay. And I -- I'm not intending to ask you to quantify those because I think that would be probably difficult sitting in -- in the room you're sitting in.

You mentioned insufficiency of construction administration. Can you give me some examples of what Superior contends is insufficient about -- I'd like you, if you can, to give me all of the examples that you can think of where -- where J. -- where Superior contends that J. Davis was insufficient in its administration of the contract or construction.

A. You know, it would be difficult to go through and do that. I know one part that I would simply point to is at a very critical period of time in this project when the windows were at issue--and, as best I recall, that would have been in the late June, July, August, September period--that, quite frankly, they just disappeared from the job. I -- I don't recall them being --

there being any architect appearance on the jobsite to assist in working out the problems, making sure that we were, in fact, meeting their intent of the plans and specifications. That was our -- what we were attempting to do and what we were doing, but -- or to observe if any of the subcontractors, that we or they were misinterpreting or not fully complying with at that period of time. That would --

Q. Okay.

A. -- just be one -- one example.

Q. All right. Are there other examples that come to mind or similar or different --

A. Not -- not --

Q. -- are there other examples?

A. Not that quickly come to mind.

Q. Okay.

MR. COLE: Real quick, could you clarify what year you're talking about when you were just --

THE DEPONENT: That would have been 2007.

BY MS. TYNDALL:

Q. Okay. And could you, Mr. Clardy, tell me what -- what -- what is Superior's understanding of what an architect should do? I know you -- you

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CONCORD AND CUMBERLAND HORIZONTAL PROPERTY REGIME,	CASE NO. 2010-CP-10-2271
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THOMAS R. MATHER,	CASE NO. 2010-CP-10-2919
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and	
THOMAS R. DEBNAM, AS TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM,	CASE NO. 2010-CP-10-9580
and	
PAMELA L. VAUGHN,	CASE NO. 2010-CP-10-9767

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC; et al.,

VIDEOTAPED
DEPOSITION OF: CARLTON S. "CHIP" CLARDY, JR., Vol. IV
DATE: February 26, 2014

pan. You would contend that Superior is not responsible for any cost in replacing that pan.

A. Based on what you just said, yes.

Q. Okay. And so if the cost of replacing that pan includes removing all the windows, Superior wouldn't be responsible for that cost.

MS. HOLBROOK: Object to the form.

THE WITNESS: That's assuming that there was no other issue with the window, then that is correct.

BY MR. NISTAD:

Q. Okay. And if you -- is it -- if you remove the pan you have to take the window out; right?

A. Most likely. I can't, off the top of my head, think of a way you could without it. It might be possible. I'm not aware of it just right off the top of my head.

Q. And if you remove that window, are you going to have to replace it, regardless of how it performs?

A. Not necessarily, I would think. But again, it would depend on how the whole procedure was agreed to as to how they were going to be -- before any of that work would be done it would have

to be agreed to on procedures for how it was all to be handled.

And, you know, if there's a procedure that could properly remove it without having to be replaced, wonderful. If there's not, I mean, it would all be wrapped up in information above my knowledge.

Q. But if the plaintiffs have alleged, well, if you remove the windows to replace the pans you're going to void the warranties and so we don't get the benefit of what we bargained for in a brand-new window with a full warranty, then you'd have to remove and replace the windows with new windows if you're going to remove the pan; correct?

A. If it in fact voided the warranty, then I think there's a strong argument you would have to.

Q. Is it Superior's contention that there were significant design defects in the plans that were given to it for Concord & Cumberland?

MS. HOLBROOK: Objection.

THE WITNESS: Yes.

BY MR. NISTAD:

Q. Okay. And those design defects related to all exterior cladding; correct?

A. It related to the exterior cladding, yes.

Q. Okay. And it related to the design of the window installation; correct?

A. Yes.

Q. You didn't design the pan.

A. No.

Q. Superior was told by the architect we're going to use a pan and we're going to put two bucks in the pan and then we're going to put the window -- attach the window to those bucks that are in the pan.

MS. HOLBROOK: Objection.

BY MR. NISTAD:

Q. And Superior followed those instructions; is that correct?

A. I'm going to have to say to the best of my memory that sounds right. I know -- I'd have to go back and re-review. Because there was -- between the architect, Sutton-Kennerly, the owner, when I look at it, I look at all of that simply being a single entity to us.

Q. Okay.

A. And out of that entity came a directive as to how the windows were to be installed.

Q. Okay.

A. So the answer in general is yes. If you want to call it the architect, you want to call it the owner, you want to call it the owner's consultants. You know, to me they represent to us a directive to how it was to be done. I just don't recall exactly how that came to us at this point.

Q. Okay. So -- and you're familiar with this January 5th meeting where there was a memo that is -- I think everyone's figured out was written by Brad Lawson?

A. Yes. Well, I don't know who it was written by, but I recall there was a -- is that the one where there was a meeting on site and an agreement as to how the windows were to be installed?

Q. Yeah. I think we have an exhibit here if you want to look at it.

A. I recall there was a meeting and that there was a directive that came out of that meeting as to how windows were to be installed.

Q. And there's a list of people that were there, and it included someone from Superior; correct?

A. Yes.

Q. And just because Superior is present at that meeting, Superior is not taking responsibility for the design; correct?

A. That is correct. We were told how to do it at that meeting.

Q. And the same thing is true for Muhler.

A. Yes. You were told how to do it.

Q. Okay. And the same thing is true for In The Wind.

A. I have no idea about that aspect of it, but I would assume so.

Q. All right.

A. Did they have a representative there?

Q. I think they did.

A. I don't know.

Q. I think they did. And then it's your understanding that memo was passed back up to the architect; correct?

A. I have no idea now. I just don't remember where it went. I know it eventually came to us. And then as I recall, a couple weeks later it was amended or changed again.

Q. Okay. But the architect's present at that meeting.

A. As I recall, yes.

that the window installation started.

A. Yes, obviously.

Q. And we got 25 windows in.

A. Right.

Q. And someone came along and said no, we've got to rework this installation process a little bit.

A. That's as I recall.

Q. And is it the architect who directed that?

A. I don't recall who directed the removal and reinstallation right now.

Q. Okay. Did it come from Superior?

A. No.

Q. Okay. So either the owner or the architect told Superior we want you to change it.

A. Correct.

Q. Okay.

A. Yes.

Q. And so they took 25 windows out, and they started all over again from scratch.

A. Correct.

Q. Okay. And so the procedure for installing all of those windows after the 25 were removed and replaced are based upon directives from

either the architect or the owner.

MS. HOLBROOK: Objection.

THE WITNESS: Yes.

BY MR. NISTAD:

Q. Okay. And so we know at that point Superior and Muhler are operating on an installation procedure that is developed by the owner and/or the architect.

MS. HOLBROOK: Objection.

THE WITNESS: Yes.

BY MR. NISTAD:

Q. And if there's problems with that design at that point, it is the responsibility of the owner and the architect; correct?

A. Yes.

Q. You'd agree that Muhler did not manufacture the windows.

A. No. The closest they came to anything of that nature was assembly in the field.

Q. Okay. Assembling in the field would be just mulling windows together, or is there --

A. That. Attaching them together or mulling them as they installed them.

Q. And once they're installed and -- did Superior sign off on the installation?

installed?

A. I know we've had window contractors do that. I can't recall that we specifically mandated it unless we have had projects where it was specified and we've had projects where window installers have done that on their own to help protect their work.

Q. Okay.

A. But --

Q. Well, you've seen window suppliers do it on their own.

A. Yes.

Q. You've seen architects specify it.

A. Yes.

Q. It becomes your responsibility, once the window -- once the window installer finishes their work.

A. Not by the subcontract. But yes, we share in that responsibility, even though the subcontractor by contract maintains it.

Q. Even if it's not in the specifications, it's a good idea for Superior to take that effort; right?

A. It possibly could be.

Q. Okay. Any reason why it wouldn't be a

good idea to tape off the windows and make sure they're not operated by anyone?

A. Cost. And as a practical matter, this was Charleston in the middle of summer when there's no AC in the building. Trying to keep that -- windows closed was a practical impossibility. There was no airflow in the building, hot, stifling. The windows are going to be opened no matter what you do.

Q. Okay.

A. It's just -- I don't care how much tape you put on. If you went in and screwed them down they'd still be opened.

Q. Can you require subcontractors to bring their own fans or cooling units so that they don't have to open the windows?

A. Even then, if you don't have fresh air, it's kind of blowing hot air around. But yes, many did.

And by the way, from that same perspective, we acknowledged, Superior acknowledged right off the bat that to some extent Superior was responsible. That's why we also entered into a change order later with Muhler to go back at not Muhler's cost but Superior's cost and do all

were correcting.

Q. And you had a lot of subcontractors named as defendants in this.

A. There were a lot of issues on this project.

Q. A lot of different trades.

A. Lot of different trades.

Q. And at some point you have to agree that it's a big problem for the general contractor when they're not coordinating the work the right way.

A. I disagree. Majority I think on this project was in a failure of the project to be designed correctly and the contract documents to be complete and clearly show how the project was to be properly constructed.

Q. Okay. That's the design issue.

A. That's the design issue.

Q. We're talking about performance right now.

A. I think that performance wound up being significantly integrated to the design problem to the point that it did have a significant ripple-down effect.

Q. Well, in that case, is it really a

design problem that's the issue and not a performance problem?

If you don't give a subcontractor and the general contractor the proper plan, how are they supposed to build a building that performs as expected by the owner?

A. I pretty much --

MR. BELCHER: Object to the form.

THE WITNESS: Yeah. I pretty much agree that it is a step-down process. If the owner and architect don't provide adequate documentation to the contractor, the contractor doesn't provide adequate documentation to the subcontractor, then it's going to be exactly what we got here.

MR. NISTAD: I think that's all I have right now. I might have some follow-up based on some questions here, but -- and I need -- what I'm going to do is I'm going to check notes and some things because to do that now would waste time.

THE WITNESS: Okay.

MR. NISTAD: Make some progress.

MS. VARNADO: Do you want to take a break or keep going?

THE WITNESS: I'm fine.

MS. VARNADO: You're good? Okay. Can

A. I'm just trying to follow you through to be sure I do. And as I'm understanding you, the answer would be no.

Q. Okay. What part of my question is not true?

A. I don't know. It's just for me trying to track it all the way through and make sure I'm on it, and I think the answer is no.

Q. Have there been any judgments against Superior or orders by a court or an arbitrator against Superior requiring them to pay any damages to anybody in regard to the Concord & Cumberland case -- project?

MR. BELCHER: Object to the form.

THE WITNESS: As to windows, et cetera, no.

BY MS. VARNADO:

Q. Okay. And you agree that no judge or court or arbitrator has determined that Superior is responsible for damages to anyone as a result of any compliance by Weather Shield with its warranties in regards to products it supplied for the Concord & Cumberland project.

A. Again, if I'm following your answer [sic] correctly, the answer would be no.

Attachment G

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

CONCORD AND CUMBERLAND HORIZONTAL PROPERTY REGIME,	CASE NO. 2010-CP-10-2271
and	
THOMAS R. MATHER,	CASE NO. 2010-CP-10-2919
and	
BETTY Y. SEGAL,	CASE NO. 2010-CP-10-3206
and	
SIGNATURE CHARLESTON, LLC and WADE ROBINSON,	CASE NO. 2010-CP-10-3207
and	
JAMES C. KIRKPATRICK,	CASE NO. 2010-CP-10-3208
and	
PAUL A. BRIM,	CASE NO. 2010-CP-10-3209
and	
FRED RAPPAPORT and JOYCE RAPPAPORT,	CASE NO. 2010-CP-10-3210
and	
THOMAS R. DEBNAM, AS TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM,	CASE NO. 2010-CP-10-9580
and	
PAMELA L. VAUGHN, Plaintiffs,	CASE NO. 2010-CP-10-9767

vs.

CONCORD & CUMBERLAND, LLC; et al., Defendants.

TELEPHONIC
DEPOSITION OF: BRADLEY S. LAWSON

DATE: June 12, 2013

Superior had any role in designing the window installation procedure?

A. Um, like I said, the mock-up -- I think there was a gentleman by the name of Johnny Barfield, a gentleman by the name of Robert -- I was assisting him, and I don't know his last name -- and I believe Wally -- is it Baughn, I think -- were present at the mock-ups and the -- and they had input. They offered their recommendation.

Q. Do you recall at this point what specific input they gave?

A. I don't.

Q. Did you ever have any direct interaction with anyone who was a representative of Weather Shield, the product manufacturer?

A. Yes.

Q. Who did you have dealings with?

A. Phil Drake, who was their engineer. And that's the only one I can remember. I'm sure there were more.

Q. Do you recall the context or the substance of your interaction with Mr. Drake?

A. I think I spoke to Phil on numerous occasions, once the windows -- well, in the

beginning, in the mock-up, Weather Shield had specific requirements the way they wanted their window to be installed, and I believe Superior wanted to do it a different way, so I had to talk to Phil to see if that would -- if they would grant that -- and they said no -- so we had -- that's where we went back to determine a way to put it in that complied with Weather Shield's requirements.

Q. Do you recall what the outcome of those discussions was?

A. I remember the nail fin in the window had to be against the buck. It could not have a moisture resistant barrier underneath the nail fin, that was the -- I think the main issue. And I believe there was a pan issue. And the mock-up is where the waterproofing consultant, along with everybody who was there, came up with a method to put it in, and have the nail fin contact the buck directly, to comply with Weather Shield's instructions.

Q. Okay. Did the ultimate installation comply with the recommendations Weather Shield had, to your knowledge?

A. As best -- yeah, to my knowledge, it did.

Q. And was In the Wind a sub at all for Muhler?

A. They were.

Q. But for the buck work, were they a sub for Muhler or for Superior?

A. Superior.

Q. You had mentioned, earlier in your deposition today, about Sutton-Kennerly making --

Well, first, let me point out to you, was Sutton-Kennerly a part of that meeting?

A. They were.

Q. And who else was present?

A. Joe Murphy, Johnny Barfield, myself, Travis Horschel and Mark McFarland.

Q. Okay. Was there anybody that sort of took the lead in making or setting forth that division of labor, or was that sort of a joint exercise everyone ultimately agreed to? Or do you have any recollection one way or the other?

A. I don't. I have no idea.

Q. All right. Let me show you what has been previously marked as Exhibit 353 to Mr. Sykora's deposition.

For the record and for the benefit of the people here, it's a transmittal from Richard

concerning -- well, before we get into that issue, let me back up and just get some other questions answered.

Who were Muhler's subcontractors on this job?

A. In the Wind was in the beginning, and then I think Watts Builders was, towards the end of the project.

Q. And do you recall who the primary contacts were with each company?

A. Mark McFarland with In the Wind and Curt Watts with Watts Builders.

Q. Okay. Did you have any role in supervising the work of either of those two subcontractors?

A. Not directly.

Q. Was that Travis Horschel's job?

A. Yes.

Q. Do you know what instructions, if any, were provided to each of those subcontractors for their work?

A. They received Weather Shield installation documents. And that's all I know for sure. I don't remember what else. I'm sure we provided lots more, but the only thing I

from the installation plane in, uh...

Q. Did you ever determine, yourself, personally, or learn from anyone else, what the cause or a possible cause of the leak with the window was with respect to the product? In other words, what the product or window issue was that was leading to it?

A. Well, I remember some of the glazing leaks. There were voids in the sealant. I remember, as I said before, there was a warped sash where the sash was bowed, and then the middle of it couldn't contact the weather stripping.

I remember a lot of the sash had been left open during construction and sagged and had been damaged during construction, which wouldn't allow it to contact the weather stripping properly.

Q. How often did that condition occur, window left open and the sash --

A. Constantly. I mean, I have pictures of every window, just about, in the building, standing open in rainstorms and --

Q. Were these by interior trades doing work, or do you know?

A. I don't know who it was by.

Q. You have photos of these?

MS. VARNADO: Objection.

THE WITNESS: I don't remember.

BY MR. EPPS:

Q. As you go through the different bullet points of installation procedures, you've got certain contractors listed in parentheses, and really it's just two, Superior or Muhler.

Let me make sure -- well, let me make sure I understand this correctly. The name of the contractor is for the person that is in charge of that scope of work?

A. Correct, that particular task, yes, or who would be responsible for that task.

Q. All right. When you get to the areas that say Muhler, which are the last three, how much involvement did Muhler have in coming up with the information that you have written out here?

A. Muhler was basically the referee between Superior, JDavis and Sutton & Kennerly.

Our role was to make sure that Weather Shield's installation documents were complied with.

So those parties had to all -- we would object based on if the nail fin didn't contact the sheathing, or if they violated some provision of Weather Shield's installation documents and

basically were there to let them know what those were, in our opinion, having put windows in before.

So we were there to get these parties to agree to how they wanted to put it in, as long as it complied with Weather Shield's documents.

Q. When this meeting was taking place, did you have those installation documents with you?

A. Yes, yes.

Q. And you were able to show them to Superior and SKA and JDavis?

A. Yes.

Q. And did you do that?

A. Yes.

Q. During that installation meeting, did you ever call anyone from Weather Shield, like Mr. Drake or any other representative?

A. I don't remember that.

Q. Would you say that the last three bullet points are the window installation procedures?

A. I would say they're all the window -- I mean, it just depends on how you look at it, when the installation starts, you're asking --

Q. Well, before the fourth bullet point, there's no mention of a window being installed.

testing -- about some of the issues with workmanship issues and things that were happening out there.

Q. Workmanship issues being -- you were talking earlier about the windows being left open and some other things of that nature?

A. Correct.

Q. Is that yes?

And maybe to even further define that, workmanship issues being items not related to the installation or manufacture of the windows.

A. Correct.

Q. In your earlier testimony today, if I heard you correctly, you believe you have pictures of almost every window at the project -- or made pictures of almost every window of the project?

A. Well, I had pictures from across the street in the restaurant parking lot of [redacted]

Q. Fleet Landing?

A. -- yeah, Fleet Landing -- of nearly every window standing open. And I believe there was a picture, when it was raining, there were windows standing open.

Q. Okay. And was that because -- do you remember what time of day the pictures were taken?

Q. Your meeting minute notes -- if you need to look at them, this is Exhibit 352. But just so I have my notes clear, I thought I heard you say that you do not recall any subsequent revisions to the installation method outlined here after these meeting minutes were prepared by you.

A. Well, there had to have been -- well, I say there had to have been. I don't recall it, but seeing the rejection letter by Sutton & Kennerly, I'm not sure what came out of that, so there may have been, but I don't recall.

Q. Whether there were or were not, you don't recall what the changes were?

A. No.

Q. If Mr. Drake testified that part of the problems with the windows that are causing them to leak is that they were not installed square, plumb, or level, would you disagree with that?

A. I would, for the most part, but there may be -- it could be -- I don't know what's happened since they were installed. I will put it that way.

Q. Have you ever seen a window that was hit -- whether by 2-by-4s coming through it, or errant hammer strikes, or anything like that with

sufficient force to knock it out of square, plumb or level -- and it not cause some cosmetic damage to the window?

MS. VARNADO: Objection.

THE WITNESS: No, but I have seen buildings settle, I have seen headers drop, I have seen concrete crack, I have seen lots of other things where there is no visible damage to the window that would cause that window or that opening to be out of square, plumb or level.

BY MR. EPPS:

Q. Are you aware of any of those conditions going on at Concord?

A. Again, I don't know what's happened since, but I'm not aware of it. I don't know.

Q. As of March 2012, you're not aware of anything like that?

A. No. I don't know. I haven't been there in seven years -- or six years -- whatever it's been.

Q. When was your last time on site?

A. Uh, I couldn't say, probably close to these water tests or right before litigation started. Whenever that was.

Q. The job you had for Concord and

A. Uh, for the most part, it was pretty much a group effort, but looking for them to tell us that they approve, or this is the way we want it done.

Q. Okay. And then 25 windows were installed, right?

A. Yes.

Q. And you were told to take those out, is that correct?

A. Correct.

Q. Okay. And then let's look at Exhibit 676. That talks about the 25 windows, right?

A. Right.

Q. And after those 25 windows were taken out, you were given new instructions, correct?

A. I can't recall that, but I would assume, based on this, we had an -- again, I think it was involving the buck and the responsibility that Superior had, is what the change was around.

Q. All right. And Superior was installing the bucks?

A. Correct.

Q. Was Superior doing that with their own labor?

A. No.

Q. Which labor were they using to install the bucks?

A. In the Wind.

Q. Is that true from the beginning?

A. It was not.

Q. And in the beginning, who installed the bucks?

A. It was temp labor hired by Superior Construction.

Q. Okay. Did Muhler hire any temp labor?

A. No.

Q. Was there a lot of temp labor on site?

A. Yes.

Q. And what was your understanding of who was hiring temp labor?

A. Superior.

Q. Did you form any opinions about the ability of the temp labor that was hired to perform the construction work that they were asked to perform?

A. Yes. It was very incompetent.

Q. Okay.

MS. VARNADO: What? I'm sorry. Very --

THE WITNESS: Very incompetent.

MR. NISTAD: Objection to form.

THE WITNESS: Not necessarily. We wouldn't install the window until the buck was corrected, so we were seeing poor workmanship, and we would have to make them correct it sometimes two or three times before we would install the window.

BY MR. EPPS:

Q. So in every instance, if Muhler put in a window, it was saying it's a plumb, level, square proper buck?

A. That was the process that our superintendent would go by, was, he would inspect the rough opening, and if it didn't -- if it wasn't up to specs, then we would go back to Superior and say, this is what has to occur before we'll put the window in.

Q. And I imagine it's going to be the same for that next sentence where it talks about the bucking technique is a bad situation.

MR. NISTAD: Objection to form.

BY MR. EPPS:

Q. In the instance of the bucking technique, Muhler would not put a window in until it had satisfied itself that the frame, opening, buck system, what have you, was proper, according

to Muhler, to have a window installed in?

MR. NISTAD: Objection to form.

THE WITNESS: No, what that sentence is saying is that, the design that Sutton-Kennerly and Estates and Superior came up with, I didn't feel -- I didn't have confidence in it that it was going to be weatherproof.

BY MR. EPPS:

Q. Then why use it?

A. Well, because, you know, I did raise the objection, but, at that point, they're the experts, that's their building, this is how they wanted it put in.

Q. Did you ever have any conversations with Ron Sykora or Henry Hay or any members of my clients' -- let me rewind that.

Have you ever met any potential -- did you ever meet any potential purchasers of units at the Concord and Cumberland building before they actually bought the unit?

A. No.

Q. Did you ever have any conversations with Henry Hay or Ron Sykora or anyone else with Muhler that this bucking technique is a bad situation, is vulnerable to water intrusion, and we

Attachment H

Chas Agosti

From: Brad Lawson
Sent: Wednesday, January 31, 2007 9:44 AM
To: Chas Agosti; Michael Spera
Subject: C&C Costs

Chas/Mike,
As discussed, the costs on this job have the potential to increase far beyond the original install price. The following needs to be addressed with Superior as soon as possible:

1. 25 openings have been completed per agreed upon procedures but developer/waterproofer changed bucking procedures and wants them removed and re-installed. Our cost to remove and re-install the windows is: **$14,562.00 installer cost + $2000 in lift costs (2 days)**
2. There is potential for the windows to be damaged upon removal requiring re-ordering new units. Cost: ???
3. The majority of the stainless steel pans are fabricated and on site. Openings were measured for each pan and are made to exact dimensions. Each pan is labeled for the opening that it fits. However, Superior is using any pan that comes close and hammering it into the opening. Many pans are being damaged and will need to be re-ordered. **Cost per pan: $40.00**
4. Superior stated they would turn over the building to us and have all openings ready on Jan. 2. None of the openings were ready on that date and so they then asked us to begin on 1/8. We planned for 1/15 given the history. The lifts were delivered on 1/15 and none of the openings were ready so our installer, Mark McFarland contracted directly with Superior to install the bucks in order to get the installation moving. To date, Superior has only prepped the 25 openings that we have installed which now have to be removed due to Superior prepping them wrong. We currently have **$7600** in lift costs (2 weeks plus 3 days) and we do not have one window completed.
5. We have another **$2400** in Project Manager costs (15 days/fully burdened rate of $20 per hour) since 1/15.
6. This building contains extremely poor workmanship and WILL leak. Tyvek is not installed properly, Densglass is hit or miss. The bucking technique that Superior/Sutton-Kennerly developed to comply with Weathershield's specs is a bad situation and is vulnerable to water intrusion.

As I stated in our meeting, this project is a BAD situation and getting worse by the minute. To make matters even worse, Mark is frustrated as and has stated that he is close to pulling out. He has stated that if he does stick it out any longer, he cannot go past 2/23 as most of his crew will be leaving to go back to Ohio.

Not sure who the TOP decision makers are with Superior or of the contract language but we need to take some action immediately.

Brad

$25K
+ window mullions. reinstall

2/6/2007

EXHIBIT 9/26/12 356 Sefkow

Muhler 01915

Attachment I-1

STATE OF SOUTH CAROLINA	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	
CONCORD AND CUMBERLAND HORIZONTAL PROPERTY REGIME,	CASE NO. 2010-CP-10-2271
and	
THOMAS R. MATHER,	CASE NO. 2010-CP-10-2919
and	
BETTY Y. SEGAL,	CASE NO. 2010-CP-10-3206
and	
SIGNATURE CHARLESTON, LLC and WADE ROBINSON,	CASE NO. 2010-CP-10-3207
and	
JAMES C. KIRKPATRICK,	CASE NO. 2010-CP-10-3208
and	
PAUL A. BRIM,	CASE NO. 2010-CP-10-3209
and	
FRED RAPPAPORT and JOYCE RAPPAPORT,	CASE NO. 2010-CP-10-3210
and	
THOMAS R. DEBNAM, AS TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM,	CASE NO. 2010-CP-10-9580
and	
PAMELA L. VAUGHN,	CASE NO. 2010-CP-10-9767
Plaintiffs,	
vs.	
CONCORD & CUMBERLAND, LLC; et al., Defendants.	

DEPOSITION OF: RONALD G. SYKORA, JR.

DATE: September 24, 2012

relative to the window installation that Muhler ever voiced an objection to prior to the windows being installed?

MR. NISTAD: Object to the form.

THE WITNESS: I don't believe so.

BY MR. MAJURE:

Q. Prior to the windows being installed did Muhler Company have any objections to anything related to the design of the window installation?

MR. NISTAD: Form.

BY MR. MAJURE:

Q. For example, how the windows were to be incorporated with building wrap flashing, bucks, any of those types of things?

MR. NISTAD: Same objection.

THE WITNESS: As the supplier of the windows and the installer of the windows, we look to the design professional to create an installation procedure and detail and then we perform that detail procedure. That's what was done here at this project.

There was a -- you mentioned a mockup earlier. There was a mockup panel and sample windows provided for that, which, what I recall or understand, that was primarily for anesthetic BAR

approval process. Then later on there was an actual window installed in the building itself, and the architect was there. The waterproofing people were there. Superior's people were there. And I think I mentioned the architect and Estate's folks were there watching the way the window was being put in to those details.

And then that was done and everyone agreed that that was the right install, that we were installing it per the instructions in the details. And we installed 25 windows in that fashion. And then it was determined at some point after those 25 that they wanted to change the installation details. So we were asked to remove those windows. We gave a price to remove them and reinstall them and we did, and then that became the new installation protocol and detail that we followed for the rest of the building.

BY MR. MAJURE:

Q. Look at the next document, please, Bates stamped Muhler Company 02307 to 02337, if you look it over. I'll represent to you that I extracted this from the files that your counsel produced in this litigation. Is this the contract that Muhler entered into with Superior for the

Q. What difference does it make?

A. It's part of a design professional's method of removing any water that happens to get in through a caulk joint or something around the window or door and manage that intrusion of water back to the exterior of the building.

Q. At this point in time, June of 2006, did Muhler have its own personal position as to whether or not using pans at the windows and doors was a good idea or not?

MR. NISTAD: Object to the form.

THE WITNESS: No.

BY MR. MAJURE:

Q. That was a decision they were going to leave between the manufacturer and the design professional; is that correct?

MS. VARNADO: Objection.

THE WITNESS: As an installer or as a seller of windows and doors, we looked to the design professional to really be the ultimate decision maker of how a window and door needs to be installed in their building.

BY MR. MAJURE:

Q. In this particular case that was J. Davis Architects, wasn't it?

putting the windows in.

Q. That's right. So they instructed Muhler to remove 25 windows in part so that this alteration in the bucking configuration could be installed?

A. You got it. And it was agreed to pay us to do it, but we were never paid to do it.

Q. Muhler Company has never been paid to remove those 25 windows?

A. That's my understanding. It was agreed for us to do the work, and the change orders and all were accepted, but we didn't receive payment for that work.

Q. Do you know if the architect signed off on the change order?

A. I don't know that.

Q. I mean, do you even know if the architect even had any involvement with issuing Exhibit 165?

A. I do not know.

Q. Is there an invoice that we can put our hands on that indicates how much Muhler was demanding to be compensated for this amount?

A. Yes.

Q. That is in Muhler's document

everyone and place it on the record that Muhler Company had reservations about this process?

MR. SHELLEY: Object to the form.

THE WITNESS: Well, while we may have had a reservation, we're not design professionals. We saw a lot of high powered or what we suspected high powered type waterproofing people there. Certainly Estates held these people out as experts, and they knew how to do it.

Again, we were just, we were being instructed how to put windows and doors in. Certainly it was -- this particular installation with the bucks sitting in a pan and attached as they were in a pan was something we hadn't seen before, but we're not design professionals. We're not waterproofing professionals. So we wouldn't be interjecting what we felt to be a proper waterproofing method.

BY MR. MAJURE:

Q. So Muhler's position is that it simply wasn't their duty to sign off or bless an alteration of the manufacturer's window installations in the face of a professional waterproofing consultant?

A. That's correct. We weren't contracted

MR. NISTAD: Object to the form.

THE WITNESS: Again, they're inducing us to get work done, and then they didn't do what they said they were going to do in the agreement.

BY MR. MAJURE:

Q. Do you know to this day that there is actually still money in a trust account that's being held by Superior's personal counsel in Charlotte pending the resolution of these issues for resolving the payment issue with Muhler? Are you aware of that?

MR. NISTAD: We'll take that check any time.

THE WITNESS: That's what I believe from my understanding. That's separate. The point that we weren't paid prior to any problems with the windows and doors and we were induced to get into this agreement so that we would get paid for the work that we had already done. To me that's fraud.

I may not be using the right terminology, but we were induced to do something that we had already done, and that once we got paid or once we got into this agreement we'll get paid for that old work plus the new work and we can get finished with the job.

those results my client had no right to withhold payment to the Muhler Company? Is that your position?

MR. NISTAD: Object to the form.

BY MR. MAJURE:

Q. Is that your position?

A. Your client was withholding payment prior to any window tests. They weren't paying us. They weren't performing their portion of their contract. They then -- once the water tests came up, they used that as an excuse not to pay us anymore money, but they were in default well beyond the test, way before the tests. All of those construction delays that were documented here, we should have been paid.

Q. When does Muhler contend that Superior was in a state of breach as to undisputedly owed payment?

A. On or about in February of that year.

Q. February of 2007?

A. Right.

Q. Do you have a particular date?

A. I do not.

Q. And we have no known written declaration of default by Muhler Company; is that

Attachment I-2

In The Matter Of:

Concord/Cumberland Horiz. Prop. Reg. vs
Concord/Cumberland, LLC, et al

Ronald G. Sykora Jr
May 24, 2013

Original File Sykora_Jr_Ronald_G_-_130524.TXT
Min-U-Script® with Word Index

knowledge of construction practices.

Q. What type of training did he have?

A. He's been to various manufacturers'.

Q. Specifically as it relates to Weather Shield, do you know if he's been to a Weather Shield training?

A. Yes.

Q. And do you know what the training detailed?

A. I do not.

Q. Do you know if he performed any work, any service technician work, at Concord and Cumberland?

A. Yes.

Q. What?

A. Uh, replacing hardware, replacing door panels that were damaged during construction. Mostly that. Fix and repair-type work.

Q. What type of hardware did you replace?

A. Casements, the operating arms of casements, locks. There were a number of, you know, different trades that came onto the project after we completed our work, and there was quite a bit of damage done by various trades to the windows and doors.

During construction, that building was not conditioned. And once it approached summertime, it was so hot in the building that the subcontractors opened windows, doors, left them open all during -- I mean, day and night -- and there was quite a bit of on-site damage to the windows and doors.

Q. Do you know if -- who would Jamie report to regarding what he saw at Concord and Cumberland?

A. Brad Lawson.

Q. Okay. Do you recall -- I don't know whether to ask this as you or Muhler -- we'll just say Muhler.

Does Muhler have any knowledge of either Jamie or Brad documenting any damage to products at Concord and Cumberland?

A. Yes.

Q. By photographs?

A. Photographs and written documentation.

Q. At any point did Muhler author or draft a letter or any type of notice to Superior to say, due to the conditions we've seen at Concord and Cumberland, these window/door products may not perform as originally specified?

A. I don't know if it was worded exactly the way you're saying, but, yes, there is written documentation, and we were asked by Superior to come in and fix all the windows and doors that had construction-related damage to them. We sent back a quote to do that work, because it was separate from the contract to do that service work, and we were asked to do -- or told that we would be paid for that work -- but ultimately we never were paid to do that additional service work.

Q. The casement arms and locks that were replaced, what were -- do you have any idea what that was a result of?

A. Leaving windows and doors open. There were extension cords left, you know, run through windows, around doors, the windows being open so long, and when they were doing the stucco work, there was quite a bit of stucco that fell on to the hardware, fell on to the lock mechanism that's on the sash. I mean, it was difficult to get all of that cleaned up. And when you went to close the windows, they would grind closed because of all of that masonry material that fell into the hinges, into the hardware.

Um, we had to replace weather

stripping, as well, because the weather stripping got torn up during construction by other trades. So, yeah, it was just a lot of, you know, fix and repair.

Q. How many -- how many windows do you believe that Muhler did repair work to? Not doors, just windows.

A. Probably every window had to be swept out and get the masonry out of the hinge area. I couldn't tell you how many needed, you know, replaced weather stripping or hardware, but it was quite a bit of work.

My recollection was I want to say that work was 25, 30,000 dollars worth of service work. There was also some glass that the plumbers were cutting cast iron pipe and they -- sparks would fly off the cast iron pipe and were hitting the glass. Some of the glass had to be replaced as well. The sparks would leave etch marks into the glass.

There was not a lot of good supervision on the part of the contractor there. There was just a lot of -- as I said, many, many subcontractors that were working on individual units were all through that building, so it was hard for the -- it was readily apparent to us that

did obtain the materials from Weather Shield. We did do the work. We weren't paid for that work. And there was more work later on to be done. And because we weren't paid for the initial service work, we decided we weren't going to do any more. And my understanding is Superior then found another vendor which was --

Q. -- Emerald Solutions?

A. Emerald Solutions, thank you.

And they obtained those materials from them.

Q. Do you know if Muhler ever made or gave any recommendations on the installation of these windows at Concord and Cumberland?

MR. NISTAD: Objection to form.

THE WITNESS: Just repeat it, please.

BY MR. EPPS:

Q. Sure. In the grand scheme of things, does Muhler -- or did Muhler feel that it had any role in coming up with the installation method of the windows?

MR. NISTAD: Object to the form.

THE WITNESS: No.

BY MR. EPPS:

Q. Who did?

A. There was a number of people that were held out to be the design professionals for installation at the site.

Q. And Muhler would take its orders from them?

A. It was best described as a collaborative approach. And, you know, as I think you said before in the testimony, there was a mock-up done. We installed windows per the mock-up, roughly 25 windows. At some point the various design professionals came through looking at that. They decided to do a different method of installation.

We removed those windows, had another meeting about the installation, and we were directed to put them in a little bit differently, and that's the way the rest of the project went at that point.

Q. Do you know if either one -- the initial installation of the 25 windows and then the secondary installation done afterwards -- if either of those followed a particular instruction set by Weather Shield?

A. Weather Shield's instructions are primarily designed from a structural standpoint.

That's what manufacturers really are responsible for, are making sure that a window or door doesn't blow into a building or blow out of a building. The actual waterproofing methods are done by the designer of record on an individual project.

The reason for that, to my understanding, is that every building is unique and has a unique set of requirements for the facade and the way the window or door is set into the building.

So it's -- and it's not just for Weather Shield. We sell other window brands. It's very difficult for a window manufacturer to come up with a waterproofing methodology for the windows and doors that they sell, because, as I said, every building is different, and every building is unique.

So, we, as a supplier, we rely on a design professional to instruct us as to the method that they want in their building to have the windows installed. And that's what we did at Concord and Cumberland.

Q. What was particularly different in Muhler's mind in the way that these windows were installed, as opposed to many other construction

gave me, you were talking about putting caulk behind the nailing fin based on Weather Shield instructions.

Were you just -- you being Muhler -- using a standard set of instructions, or is that something that you, Muhler, and Weather Shield, collaborated on relative to this project?

A. A standard set of instructions. And by the way, it's not necessarily from a waterproofing standpoint, but it's also a structural part of the installation.

Q. It helps with the DP?

A. Correct.

Q. Do you recall ever any instances of bucks not being square, such that you had to straighten out the buck to make a square opening to put in a window that then was squared, once it was installed?

A. Yes, and that could be accomplished also with shimming underneath the window, too.

Q. As the prime installer sub, it would be your duty to at least make sure you could install a product that was square and plumb, correct --

MR. NISTAD: Objection.

THE WITNESS: Yes.

BY MR. EPPS:

Q. -- whether or not that meant taking care of a potentially out-of-square or out-of-plumb wood buck?

A. I recall that there were some bucks that were not installed to where you could install a window in the given rough opening, that there wasn't enough room to do that. The bucks had to be reworked.

Q. And that was Muhler telling someone this has to be reworked?

A. Telling Superior, correct.

Q. Do you recall Mr. Drake or any other Weather Shield representative telling you -- and by you I'm meaning the Muhler writ large, not you Ron Sykora -- that the windows it installed -- that it installed the windows out of square?

MS. VARNADO: Objection.

THE WITNESS: I believe there was one window that Phillip was taking a look at that he believed was out of square.

We put -- when I say we, I think it was Jamie. He measured it as well. And Brad was there. And they came to the determination about how they were measuring the diagonals of the

window, that, in fact, it was almost square, not really out of square. Within tolerance.

BY MR. EPPS:

Q. Do you know what the tolerances were?

A. I believe that on the casement window it's an 8th, or maybe just over an 8th of an inch.

Q. Okay. And who would the tolerances be supplied by? Is that a building code thing or is that a Weather Shield thing?

A. It's a Weather Shield.

Q. Do you recall if there was an agreement on the fact that that window was within tolerance for square?

A. Yes.

Q. Okay. If there wasn't, would the window need to be pulled and reinstalled?

A. No.

Q. Can it be adjusted?

A. It can be adjusted, unless it's, you know, beyond a tolerance level.

Q. Okay. And you don't recall that window being adjusted, the one you were talking about?

A. I do believe it was adjusted.

Q. Okay. Adjusted to within tolerances?

A. Correct.

Q. And I may have missed it, but I think you said the building was not conditioned at that time.

You mean the air conditioning was not running?

A. Well, in other construction projects that I've been involved in, particularly on condominium-type work, many contractors will close and lock down all of the windows and doors during construction, and they will bring in auxiliary fans or auxiliary dehumidifiers, air conditioners, something to move the air in the building while the other trades are working, so that windows and doors don't get damaged.

Q. That didn't happen at Concord and Cumberland?

A. That did not happen.

Q. And so as a result, with no air conditioning and no alternative air movement, they were using -- leaving the windows and doors open for airflow.

A. They had to. That summer was very, very hot, and the insides of the buildings were too hot to work in, I mean, without an open window, or door.

Q. Okay. Did you ever observe any occasions where any workers passed any materials through the -- came up the scaffolding -- passed materials from the scaffolding through the open windows --

A. Yes.

Q. -- into the project?

Did you ever observe situations where workers would come up through the inside of the building and then step out through an open window onto the scaffolding?

A. Yes.

Q. Did you see that on more than one occasion?

A. Yes.

Q. I'm assuming these workers were not employed by Muhler?

A. Correct.

Q. You mentioned extension cords were run through the windows?

A. Yes.

Q. What was happening there?

A. Just using small hand tools, you know, to grind down brick, grind down masonry, stucco.

Q. Okay. So is this a situation where the

cord is -- is the window open or closed at this point?

A. The window is open.

Q. And then they've got the cords out, and they're using them around -- on the exterior of the building?

A. Yes. And also with doors.

Q. And so potentially the problem there is you could damage your weather stripping?

A. That's correct. And not "could."

It did damage weather stripping.

Q. It did damage it, okay.

And these windows, when they were open, were the interior surfaces primed, painting, or finished, or were they generally in an unfinished condition?

A. Can I look?

Q. Sure.

A. They were primed interiors.

Q. Primed?

A. Yes.

Q. Okay. But not painted all the way?

A. Not painted all the way.

Q. And do you know what Weather Shield's recommendation is in regard to how soon one should

contractor; is that correct?

A. Yes.

Q. What did you observe that brings you to that conclusion?

A. Just not being -- the superintendents not keeping the various other subcontractors well supervised, as we've mentioned previously, you know, extension cords coming through windows and doors, and windows and doors being left open.

On other projects that I've been on, typically at the end of the day, there's somebody at the contractor level that would go through the building, close everything up for the night, if anything had been left open.

Most projects today -- or over the last few years -- that I've been involved in typically don't allow windows and doors to be open.

Q. Did Muhler also experience a failure of Superior to timely sequence the work at the project such that bucks weren't ready for the installation of windows at the time when Muhler was told to be there with its workers?

A. Yes, at the beginning of the construction project, we were led to believe that it was going to be an orderly fashion of going

window directly to a window buck, yes.

Q. Was Weather Shield -- okay, when you say -- okay, first of all, does that include any weatherproofing of the installation to the buck?

A. Yes. I think what you're getting to is that Weather Shield's installation instructions and comments from the architecture department did not want a window or door installed directly into a pan.

Weather Shield's methodology of installation is for the window to go directly -- fasten directly into a rough opening buck.

Estates and their waterproofing design professionals wanted a pan to be installed around the window, so they developed a system where the window buck would sit into a pan.

Q. Right.

A. So at that point, Weather Shield then had an approved installation detail with their published documents, a window installed into a window buck.

Q. But their window -- their published details did not include a pan under that buck, correct?