

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

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128. Upon information and belief, the actions of the Developers are capable of repetition and have, in fact, been repeated.

129. As a direct, foreseeable, and proximate result of the Defendants' unfair and deceptive trade practices, the Plaintiff has suffered an ascertainable loss of money and property.

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

FOR AN EIGHTH CAUSE OF ACTION
(Alter Ego/Piercing the Corporate Veil/Amalgamation as to the Developers)

131. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

132. Concord & Cumberland, LLC has been held out to the Plaintiff and the public as the developer of Concord & Cumberland.

133. Upon information and belief, Estates and Concord & Cumberland Manager, LLC and their officers, directors, and shareholders wholly own and control Concord & Cumberland, LLC.

134. Defendant Concord & Cumberland, LLC, upon information and belief, at all times relevant to this action:

- a) Failed to observe corporate formalities;
- b) Was grossly undercapitalized for the purposes of the corporate undertaking, to wit, the development of Concord & Cumberland and the remediation of any and all defects in the construction of Concord & Cumberland should they arise;
- c) Was controlled by Estates and Concord & Cumberland Manager, LLC to the extent that it was merely a façade for the operations of Estates and Concord & Cumberland Manager, LLC;
- d) Does not have any functioning officers or directors that are independent of Estates and/or Concord & Cumberland Manager, LLC; and
- e) Is functionally insolvent.

135. In addition, upon information and belief, any and all funds that were paid to Concord & Cumberland, LLC, through the sale of the individual units, including the Plaintiff's Building, at Concord & Cumberland, were siphoned from the company by Estates, Concord & Cumberland Manager, LLC and their directors, officers, and/or shareholders.

136. Estates, Inc. and its directors, officers, and/or shareholders, dominated and controlled Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC and Estates Management Company such that they were merely alter egos of Estates set up to shield Estates and its directors, officers and/or shareholders from personal liability resulting from their construction and sale of residential structures in South Carolina.

137. Upon information and belief, Estates has failed to follow the necessary corporate formalities, as required by law, and has undercapitalized Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC and Estates Management Company and siphoned corporate funds for personal use of its shareholders, used corporate facilities and employees for personal ends, and has otherwise so intermingled the personal and financial affairs with the corporations' that they have become the alter ego of Estates, its directors, officers and/or shareholders.

138. Further, upon information and belief the interests of Estates, Inc. and its shareholders, Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC and Estates Management Company are so amalgamated that the Plaintiff is entitled to disregard the corporate forms and recover against Estates and its shareholders.

139. Upon information and belief, Concord & Cumberland, LLC is a shell and/or sham company dominated and controlled by Estates and Concord & Cumberland Manager such that they are not legally distinct. Concord & Cumberland, LLC is nothing

more than the alter ego of Estates and Concord & Cumberland Manager, LLC and their officers, directors, and shareholders.

140. It would be inequitable to allow Defendants to hide behind a corporate shield that has no basis in fact for the express purpose of avoiding their obligations and responsibilities and liabilities to the Plaintiff.

141. Plaintiff is entitled to pierce the corporate veil of Concord & Cumberland, LLC and thereby obtain a judgment against Estates and Concord & Cumberland Manager, LLC for the liability of Concord & Cumberland, LLC in an amount to be determined by the trier of fact.

142. Further, because the interests of Estates, Inc. and its shareholders, Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC and Estates Management Company are so amalgamated, Plaintiff is entitled to disregard the corporate forms and recover against Estates and its shareholders in an amount to be determined by the trier of fact.

FOR A NINTH CAUSE OF ACTION

(Negligence as to Superior, Subcontractors and Metro)

143. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

144. Superior and Subcontractors, either by their own employees or through the use of subcontractors, constructed the Building and the common elements and limited common elements of Concord & Cumberland.

145. Superior and Subcontractors owed a duty to the Plaintiff to exercise due care in the construction of the Building, as well as the common elements and limited common elements, and to build the Building, common elements and limited common elements, free from defects and in conformity with all applicable building codes, design documents, plans &

specifications, using good construction practices.

146. At all times relevant hereto, Superior and Subcontractors, their agents, servants, employees, and/or subcontractors undertook and were under a duty to construct the Building, common elements and limited common elements in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, free from latent defects.

147. Metro, either by its own employees or through the use of subcontractors, performed certain repairs at the Project to the common elements and limited common elements of Concord & Cumberland.

148. Metro owed a duty to the Plaintiff to exercise due care in performing its repair work, and to perform the work free from defects and in conformity with all applicable building codes, using good construction practices.

149. At all times relevant hereto, Metro, its agents, servants, employees, and/or subcontractors undertook and were under a duty to perform its work in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, free from latent defects.

150. Superior, Subcontractors and Metro, their agents, servants, employees, and/or subcontractors were negligent, careless, reckless, willful and wanton in failing to construct and/or repair the Building, common elements and limited common elements in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, free from latent defects, thereby breaching the above-referenced duty by, but not limited to, the particulars set forth above.

151. As a direct, foreseeable and proximate result of the negligence and gross negligence of Superior, **Subcontractors and Metro**, Plaintiff has spent and will continue to expend substantial sums of money in order to renovate and restore the Building to make it safe and habitable, and in addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages. In addition, Plaintiff will be required to expend substantial sums which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and Indirect damages all to Plaintiff's damage in an amount to be determined.

152. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

153. The violation of applicable building codes constitutes negligence *per se*.

154. The breach of duty, code violations, and deviations from industry standards on the part of the Superior, **Subcontractors and Metro** constitute gross negligence, entitling Plaintiff to an award of all actual, consequential, and punitive damages.

155. As a result of the negligence of Superior, **Subcontractors and Metro**, the Plaintiff is entitled to a judgment against Superior, **Subcontractors and Metro** in an amount to be determined at the trial of this case.

FOR A TENTH CAUSE OF ACTION
(Breach of Implied Warranty of Workmanlike Service
as to Superior, Subcontractors and Metro)

156. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

157. By performing construction work on Concord & Cumberland, Superior, Subcontractors and Metro impliedly warranted that their work would be performed in a careful, diligent, and workmanlike manner and would be free from all defects.

158. Superior, Subcontractors and Metro have breached these implied warranties by the construction defects and deficiencies set forth above.

159. Plaintiff has been proximately damaged by Superior, Subcontractors, and Metro's breach of their implied warranty of workmanlike service in that Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the Building to make it safe and habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

160. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

161. As a result of the Superior, Subcontractors and Metro's breach of their implied warranties, Plaintiff is entitled to a judgment against Superior and Subcontractors in an amount to be determined at trial.

FOR AN ELEVENTH CAUSE OF ACTION
(Breach of Express Warranty as to Superior and J. Davis)

162. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

163. Superior, pursuant to the terms of its contract with Concord & Cumberland, LLC to serve as the general contractor for the construction of Concord & Cumberland, expressly warranted that its work would be of good quality, free from defects, and would conform to the contract documents.

164. J. Davis, pursuant to its contract with Concord & Cumberland, LLC, expressly warranted that its plans, specifications, and other instruments of service would be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards.

165. Plaintiff is a beneficiary of the express warranties provided by these Defendants.

166. These Defendants have breached their express warranties by failing to design and construct Concord & Cumberland and the Plaintiff's Building such that it would be free from defects and in compliance with the applicable building codes and industry standards.

167. Plaintiff has been proximately damaged by Defendants' breaches of their express warranties in that Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the Building to make it safe and habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

168. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building

and to the common elements and limited common elements of Concord & Cumberland.

169. The Plaintiff is entitled to a judgment against these Defendants for the breach of their express warranties for an amount to be proven at trial.

FOR A TWELFTH CAUSE OF ACTION
(Breach of Express Warranties as to Weather Shield and Muhler)

170. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

171. Weather Shield and Muhler expressly warranted that the products they manufactured and sold for use in Concord & Cumberland would be of good quality, free from defects, suitable for use, and in compliance with applicable building codes of the City of Charleston as it relates to a luxury four-story waterfront condominium project.

172. The products designed, marketed, manufactured, sold and distributed by Weather Shield and Muhler and incorporated into Concord & Cumberland have failed and are allowing water to intrude into the building and into the Plaintiff's Building. Further, upon information and belief, these products are not in compliance with the applicable building codes and industry standards as it relates to the Concord & Cumberland project.

173. The failures of the products designed, marketed, manufactured, sold and distributed by Weather Shield and Muhler have resulted in damage to various components of the Plaintiff's Building and will require extensive repair and restoration by the Plaintiff. Additionally, the products themselves must be replaced with products which will be in compliance with the current building codes applicable to Concord & Cumberland.

174. The failures of these products constitute a breach of the express warranties made by Weather Shield and Muhler.

175. As a direct and proximate result of these breaches of warranties, Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and

restore the Building to make it safe and habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

176. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

177. Plaintiff is entitled to a judgment against Weather Shield and Muhler in an amount to be determined at trial, as a result of the breach of its express warranties.

FOR A THIRTEENTH CAUSE OF ACTION

(Breach of Implied Warranty of Merchantability as to Weather Shield and Muhler)

178. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

179. By selling its products for use in Concord & Cumberland, Weather Shield and Muhler impliedly warranted that the products would be merchantable.

180. The products sold by Weather Shield and Muhler and incorporated into Concord & Cumberland have failed and are allowing water to intrude into the Building. Weather Shield and Muhler's products were not merchantable and could not pass without objection in the trade at the time of sale.

181. The failures of these products constitute a breach of Weather Shield and Muhler's implied warranty of merchantability.

182. The failures of the products marketed and sold by Weather Shield and Muhler and Weather Shield and Muhler's breach of their implied warranties of merchantability have resulted in damage to various components of the Plaintiff's Building and will require extensive repair and restoration by Plaintiff including, but not limited to, removal of the defective products and replacement with products which comply with the building codes currently applicable to the Concord & Cumberland project.

183. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

184. As a result of their breaches of the implied warranties of merchantability, Plaintiff is entitled to a judgment against Weather Shield and Muhler in an amount to be determined at trial.

FOR A FOURTEENTH CAUSE OF ACTION
(Breach of Implied Warranty of Fitness for a Particular Purpose as to
Weather Shield and Muhler)

185. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

186. Weather Shield and Muhler were aware that its products were being used as building components in the exterior building envelope for Concord & Cumberland and knew that Concord & Cumberland was to be a luxury four-story waterfront building located in the City of Charleston.

187. Weather Shield and Muhler, at the time of the sale of its products, had reason to know that the Plaintiff and the Regime, or those authorized to act on their behalf, were relying on the skill or judgment of Weather Shield and Muhler to furnish a product which was

appropriate for use as a component of the structure's exterior envelope and which was in compliance with all applicable building codes.

188. Upon information and belief, Weather Shield and Muhler recommended its products for the particular purposes stated by the Developers, Superior, and J. Davis.

189. By selling the products for a particular use in Concord & Cumberland, Weather Shield and Muhler impliedly warranted that its products would be fit for their intended purpose.

190. The products sold by Weather Shield and Muhler and incorporated into the Concord & Cumberland have failed and are allowing water to intrude into the Building.

191. The failure of these products amounts to a breach of the implied warranty of fitness for a particular purpose.

192. The failure of the products has resulted in damage to the various components of the Building and will require extensive repair and restoration by the Plaintiff including removal and replacement of all of Weather Shield and Muhler's products which are not in compliance with applicable building codes.

193. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

194. As a result of their breaches of implied warranties of fitness for a particular purpose, Plaintiff is entitled to a judgment against Weather Shield and Muhler in an amount to be determined at trial.

FOR A FIFTEENTH CAUSE OF ACTION
(Negligence against Weather Shield and Muhler)

195. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

196. Weather Shield and Muhler designed, manufactured, marketed, distributed, sold and/or otherwise placed into the stream of commerce, the windows and doors which were installed in the Building.

197. Weather Shield and Muhler owed the Plaintiff a duty to design the windows and doors to be free of any and all defects that prevent the windows and doors from properly performing and satisfying their ordinary, intended and foreseeable uses. Weather Shield and Muhler owed the Plaintiff a duty of due care and Weather Shield and Muhler knew or should have known that the Plaintiff and its property would be damaged if Weather Shield and Muhler acted negligently.

198. Weather Shield and Muhler breached its duty of due care and was negligent, careless, willful, wanton, and reckless in the following particulars:

- a) In designing, manufacturing, marketing, distributing, and selling a product that is defective in that it has allowed water and moisture to continuously intrude into the wall system, thereby significantly damaging component parts of the Building;
- b) In developing the windows and doors in a defective manner;
- c) In failing to reasonably test the windows and doors to determine if they would perform in accordance with applicable building codes and industry standards;
- d) In failing to promulgate appropriate installation instructions in compliance with applicable building codes and industry standards;
- e) In failing to appropriately train, instruct and educate the installers of its product;
- f) In failing to use the requisite degree of care and caution that a reasonably prudent manufacturer would have used in manufacturing the windows and doors; and

g) In such other failures that will be shown during the discovery of this case and at trial.

199. As a direct, foreseeable and proximate result of Weather Shield and Muhler's negligence and gross negligence, the Plaintiff has been damaged in that the Plaintiff has suffered significant physical damage to the Building, including water intrusion as well as diminution in its value. The Plaintiff has further been damaged in that he has spent and will continue to expend large sums of money in order to determine the extent of the damage to the structure and to repair it.

200. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

201. Weather Shield and Muhler's breach of duty in designing, manufacturing, marketing, distributing and selling the defective windows, constitutes gross negligence, entitling the Plaintiff to a recovery of actual, consequential, and punitive damages.

FOR A SIXTEENTH CAUSE OF ACTION
(Strict Liability/Products Liability against Weather Shield and Muhler)

202. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

203. Weather Shield and Muhler are in the business of designing, manufacturing, marketing, distributing, selling, and/or installing windows. Weather Shield and Muhler marketed the windows and doors as ones that would provide a safe and durable barrier from the elements. Weather Shield and Muhler further marketed its windows and doors as ones requiring little or no maintenance.

204. The windows and doors installed in the Building were defectively designed and manufactured in that they allow water to intrude into the wall system, resulting in significant damage in the form of rot and mold contamination to the structure into which the windows and doors were installed.

205. Weather Shield and Muhler, in violation of South Carolina Code §15-73-10, designed, manufactured, marketed, distributed and sold a product that was defective and was in a condition unreasonably dangerous to the Plaintiff and its property. Upon information and belief, the windows and doors reached the Plaintiff, and were intended to reach the Plaintiff, without substantial change in the condition in which they were sold.

206. Weather Shield and Muhler's products have failed and are allowing water to intrude into the Plaintiff's Building and portions of the common elements and limited common elements from the exterior during rain events.

207. The failure of Weather Shield and Muhler's products has and continues to cause damage to Plaintiff's property.

208. As a direct, foreseeable and proximate result of the defective Weather Shield and Muhler products, Plaintiff has and will continue to suffer damages, including, but not limited to, removal of all Weather Shield and Muhler products and replacement with products that comply with the local applicable building codes.

209. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

210. Due to the damages caused by the defective products, Plaintiff is entitled to a judgment against Weather Shield and Muhler for an amount to be determined at the trial of this case.

FOR A SEVENTEENTH CAUSE OF ACTION
(Negligence as to Muhler and ITW)

211. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

212. Upon information and belief, Muhler and ITW installed the Windows & Doors in the Concord & Cumberland building.

213. In undertaking and performing the installation of the Windows & Doors, Muhler and ITW owed a duty to the Plaintiff to perform the installation in accordance with all applicable building codes, manufacturer's printed installation instructions, industry standards, and in a good workmanlike manner.

214. Muhler and ITW have breached their duties to the Plaintiff by, *inter alia*, the particulars set forth above.

215. As a direct, foreseeable and proximate result of the negligence and gross negligence of Muhler and ITW, Plaintiff has spent and will continue to expend substantial sums of money in order to renovate and restore the Building to make it safe and habitable, and in addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages. In addition, Plaintiff will be required to expend substantial sums which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

216. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue

through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

217. The violation of applicable building codes constitutes negligence *per se*.

218. The breach of duty, code violations, and deviations from industry standards on the part of the Muhler and ITW constitute gross negligence, entitling Plaintiff to an award of all actual, consequential, and punitive damages.

219. As a result of the negligence of Muhler and ITW, the Plaintiff is entitled to a judgment against Muhler and ITW in an amount to be determined at the trial of this case.

FOR AN EIGHTEENTH CAUSE OF ACTION
(Breach of Implied Warranty of Workmanlike Service as to Muhler and ITW)

220. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

221. By performing construction work on Concord & Cumberland, Muhler and ITW impliedly warranted that their work would be performed in a careful, diligent, and workmanlike manner and would be free from all defects.

222. Muhler and ITW have breached their implied warranties by the construction defects and deficiencies set forth above.

223. Plaintiff has been proximately damaged by Muhler and ITW's breach of their implied warranty of workmanlike service in that Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the Building to make it safe and habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to

be determined.

224. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

225. As a result of Muhler's and ITW's breach of their implied warranties, Plaintiff is entitled to a judgment against Muhler and ITW in an amount to be determined at trial.

FOR A NINETEENTH CAUSE OF ACTION
(Negligence as to J. Davis)

226. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

227. J. Davis agreed to provide professional architectural services for the design of Concord & Cumberland, specifically including, but not limited to, the issuance of the plans and specifications for construction. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards. Upon information and belief, J. Davis agreed to make periodic visits to the project during construction to observe whether the construction was being completed in accordance with the plans and specifications and all applicable building codes.

228. It was foreseeable that Plaintiff, as the owner of a condominium unit as well as an undivided interest in the Concord & Cumberland common elements and limited common elements would be damaged if J. Davis breached the above-referenced duties.

229. J. Davis breached its duty of care as follows:

- a) By failing to properly design and prepare specifications for the Concord & Cumberland which were compliant with all applicable building codes and

professional standards;

- b) Failing to specify products that were in compliance with applicable building codes;
- c) Failing to design and specify an exterior cladding system for Concord & Cumberland with an adequate water management system to prevent water from intruding into the interior of the condominium units or the wall cavities of the building;
- d) Failing to design and specify an adequate water management system in and around building openings, including, but not limited to, the exterior windows at Concord & Cumberland;
- e) Failing to properly administer, observe and inspect the construction of the building for compliance with the plans and specifications and applicable building codes; and
- f) Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at Concord & Cumberland.

230. As a direct, foreseeable and proximate result of the design defects and resulting property damage, Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the Building to make it safe and habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

231. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

232. Plaintiff is entitled to a judgment against J. Davis in an amount to be determined at the trial of the case for J. Davis's negligence.

FOR A TWENTIETH CAUSE OF ACTION
(Breach of Warranty of Plans and Specifications as to J. Davis)

233. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

234. J. Davis warranted the sufficiency of the design, plans, and specifications for Concord & Cumberland. Plaintiff is a foreseeable beneficiary of this implied warranty.

235. By failing to properly design the building and prepare appropriate plans and specifications, J. Davis breached its warranty as follows:

- a) By failing to properly design and prepare specifications for Concord & Cumberland that were compliant with all applicable building codes and professional standards;
- b) Failing to specify products that were in compliance with applicable building codes;
- c) Failing to design and specify an exterior cladding system for Concord & Cumberland with an adequate water management system to prevent water from intruding into the interior of the condominium units or the wall cavities of the building;
- d) Failing to design and specify an adequate water management system in and around building openings, including, but not limited to, the exterior windows at Concord & Cumberland;
- e) Failing to properly administer, observe and inspect the construction of the building for compliance with the plans and specifications and applicable building codes; and
- f) Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at Concord & Cumberland.

236. As a direct, foreseeable and proximate result of the design defects and resulting property damage, Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the Building to make it safe and habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special,

direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

237. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

238. Plaintiff is entitled to a judgment against J. Davis in an amount to be determined at trial, as a result of the breach of its warranty.

FOR A TWENTY-FIRST CAUSE OF ACTION
(Breach of a Performance Bond as to Safeco)

239. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

240. Upon information and belief, Safeco provided a surety bond to guarantee the obligations of Superior and others supplying labor and material to the Concord & Cumberland project.

241. Upon information and belief, Safeco has actual notice of Superior's breach of its obligations. Nevertheless, Safeco has failed to guarantee such obligations, thereby breaching the terms of its bond.

242. Plaintiff has been damaged by Safeco's breach of its bond and Plaintiff is entitled to recover from Safeco all damages that Plaintiff may suffer as a result of Superior's breach of its obligations and duties.

FOR A TWENTY-SECOND CAUSE OF ACTION
(Breach of a Performance Bond as to Companion)

243. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

244. Upon information and belief, Companion provided a surety bond to guarantee the obligations of Muhler and others supplying labor and material to the Concord & Cumberland project.

245. Upon information and belief, Companion has actual notice of Muhler's breach of its obligations. Nevertheless, Companion has failed to guarantee such obligations, thereby breaching the terms of its bond.

246. Plaintiff has been damaged by Companion's breach of its bond and Plaintiff is entitled to recover from Companion all damages that Plaintiff may suffer as a result of Muhler's breach of its obligations and duties.

WHEREFORE, the Plaintiff prays this Honorable Court inquire into the matters set forth herein and award judgment in favor of the Plaintiffs against the Defendants, jointly and severally, as follows:

- a) That the Court issue a Declaratory Judgment with respect to the first cause of action against the Defendants in the following respects:
 - i. That Section 3.6 of the Master Deed is invalid and unenforceable under the laws of South Carolina and should be struck, *in toto*, from the Master Deed;
 - ii. Alternatively, as to Section 3.6 of the Master Deed, that the portions of Section 3.6 purporting to disclaim the implied warranty of habitability and the portion purporting to limit the liability of the developers to the cost to repair and replace defective work, be declared invalid for such purpose and unenforceable under the laws of South Carolina.
- b) For all actual and consequential damages against the Defendants, jointly and severally, in an amount to be shown at trial;
- c) An Order requiring a complete accounting as to receipts and expenses of Plaintiff while under the Developers' control and as to the receipt and distribution of any and all profits the Developers realized from the development and sale of Concord & Cumberland;
- d) For treble actual damages against the Developer Defendants pursuant to applicable law;
- e) For punitive damages in an amount to be determined by the trier of fact;

- f) For prejudgment interest;
- g) For all attorneys fees and costs associated with investigating and prosecuting this action; and
- h) For all other relief this Honorable Court deems just and proper.

Respectfully submitted,

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

By: 

JESSE A. KIRCHNER

SC BAR NO.: 70479

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Charleston, SC 29401

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F: 843-937-4200

jkirchner@tktylawfirm.com

Attorney for Plaintiff

May 31, 2012

Charleston, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

)
)
)
)

AFFIDAVIT OF MYLES GLICK, AIA,
LEED AP

I, Myles Glick, being first duly sworn, depose and say:

1. I am over the age of eighteen years and understand the meaning of an oath. The following statements are based on my personal knowledge. I have read the following statements and they are true and accurate.

2. This affidavit is given in order to satisfy the requirements of South Carolina Code Annotated Section 15-36-100.

3. My current curriculum vitae reflecting my experience, education, and qualifications is attached hereto as Exhibit A.

4. It is my professional opinion that JDavis Architects, PLLC (the "Architect") has violated the standard of care relative to its role on the Concord & Cumberland condominium project (the "Project"), in failing to perform construction administration responsibilities on the Project as provided in the architect licensing laws of South Carolina.

5. This violation of the standard of care is evidenced by the Architect submitting field reports notifying the general contractor of construction deficiencies but failing to provide follow-up methodology to review the general contractor's correction of such deficiencies on the Project.

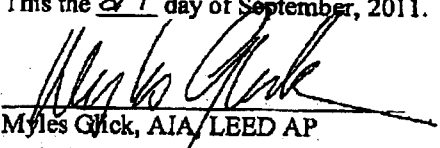
6. As further evidence of this violation of the standard of care, the Architect approved applications for periodic payment and issued the Substantial Completion Certificate for the Project despite the general contractor's failure to correct the construction deficiencies that the Architect, itself, identified.

7. Additionally, the Architect has violated the standard of care by failing to properly detail critical intersections of the tile balconies and the interior/enclosed space. The lack of a curb between the tile balconies and the thresholds of the door/window systems in these locations does not allow a reasonable barrier against wind driven rain and does not allow for that rain and other moisture to be diverted from the interior of the units of the Project.

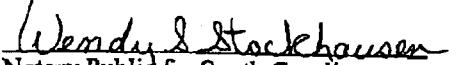
8. As a basis for my opinions contained in this affidavit, I reviewed the entire Architect's file, all plans and specifications, and other documents related to the Project. Further, I have investigated several defective construction and design conditions on the Project and have issued a separate report detailing the nature and extent of those defective conditions. In addition, I have reviewed and considered all applicable codes, laws, and standards governing the architect's standard of care on the Project.

FURTHER AFFIANT SAYETH NAUGHT.

This the 27 day of September, 2011.


Myles Glick, AIA, LEED AP

Sworn to and subscribed before me
this 27 day of September, 2011.


Wendy L. Stockhausen
Notary Public for South Carolina
My Commission Expires: 04-29-2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

James C. Kirkpatrick,

Plaintiff,

vs.

Concord & Cumberland, LLC; Concord & Cumberland Manager, LLC, Estates, Inc.; 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.; and Turner Electrical of SC, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2010-CP-10-3200

2271

**SUPERIOR CONSTRUCTION
CORPORATION'S ANSWER TO
PLAINTIFF'S SECOND AMENDED
COMPLAINT, AND CROSSCLAIMS**

FILED
2012 JUN 19 PM 3:48
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

**TO: JESSE A. KIRCHNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF, AND TO
THE ABOVE-NAMED PLAINTIFF:**

The Defendant, Superior Construction Corporation, (herein, "Superior") answering Plaintiff's Second Amended Complaint and Crossclaims herein would respectfully show unto the Court the following:

FOR A FIRST DEFENSE
(Admit or Deny)

1. This Defendant denies each and every allegation of the Plaintiff's Second Amended Second Complaint that is not hereinafter expressly admitted, modified or explained.

2. This Defendant admits on information and belief the allegations contained in Paragraphs 1, 2 and 3 of the Plaintiff's Second Amended Complaint.

3. Paragraph 4 of the Plaintiff's Second Amended Complaint states legal conclusions to which no response is required. To the extent a response is required, this Defendant is without knowledge or information at this time to form a belief as to the truth of such allegations.

4. This Defendant admits on information and belief the allegations contained in Paragraphs 5, 6 and 7 of the Plaintiff's Second Amended Complaint.

5. Paragraph 8 of the Plaintiff's Second Amended Complaint states legal conclusions to which no response is required. To the extent a response is required, this Defendant admits on information and belief that Estates is a South Carolina corporation doing business in Charleston County. As to the remaining allegations in Paragraph 8, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

6. This Defendant admits on information and belief the allegations contained in Paragraphs 9 and 10 of the Plaintiff's Second Amended Complaint.

7. Paragraphs 11 and 12 of the Plaintiff's Amended Complaint state legal conclusions to which no response is required. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

8. This Defendant admits on information and belief the allegations contained in Paragraphs 13, 14, 15, 16 and 17 of the Plaintiff's Second Amended Complaint.

9. In responding to the allegations contained in Paragraph 18 of the Plaintiff's Second Amended Complaint, this Defendant admits that it was formerly a North Carolina corporation registered to do business in South Carolina and formerly did business in Charleston County. In further responding, this Defendant admits that it served as the general contractor for the construction of the Concord & Cumberland project pursuant to its contract with the developers and agreed to perform the project in accordance with the applicable construction contract document, including but not limited to the Plaintiff's specifications prepared by J. Davis Architects. Except as expressly admitted herein, the allegations are denied.

10. This Defendant admits on information and belief the allegations contained in Paragraphs 19 through 38 of the Plaintiff's Second Amended Complaint.

11. Paragraph 39 of the Plaintiff's Second Amended Complaint states legal conclusions to which no response is required. To the extent a response is required, this Defendant admits that it complied with all applicable duties. Except as expressly admitted herein, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

12. This Defendant admits on information and belief the allegations contained in Paragraph 40 and 41 of the Plaintiff's Second Amended Complaint.

13. In responding to the allegations contained in Paragraph 42 of the Plaintiff's Second Amended Complaint, this Defendant admits that Plaintiff has alleged water intrusion either at Plaintiff's residence or at other locations at Concord & Cumberland. Except as expressly admitted herein, the Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

14. This Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the allegations contained in Paragraph 43 of the Plaintiff's Second Amended Complaint.

15. This Defendant denies the allegations contained in Paragraph 44 of the Plaintiff's Second Amended Complaint. The Defendants offered a repair fix for the known and reported incidences of water intrusion concerning the windows, which was either not accepted or rejected and/or its former counsel.

16. This Defendant denies the allegations contained in Paragraph 45 of the Plaintiff's Second Amended Complaint.

17. This Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the allegations contained in Paragraphs 46, 47, 48 and 49 of the Plaintiff's Second Amended Complaint and, accordingly, all such allegations are denied.

18. This Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the allegations contained in Paragraphs 50 and 51 of the Plaintiff's Second Amended Complaint.

19. This Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the allegations contained in Paragraphs 52, 53, 54, 55, 56 and 57 of the Plaintiff's Second Amended Complaint and, accordingly, all such allegations are denied.

20. In responding to the allegations contained in Paragraph 58 of the Plaintiff's Second Amended Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

21. Paragraphs 59 through 73 of the Plaintiff's Second Amended Complaint state legal conclusions to which no response is required. To the extent a response is required, this

Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

22. By their terms the allegations contained in Paragraphs 74 through 134 of the Plaintiff's Second Amended Complaint are not directed to this Defendant and, therefore, require no response. To the extent a response is required, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference. In further responding, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the specific allegations directed others.

23. In responding to the allegations contained in Paragraph 135 of Plaintiff's Second Amended Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

24. In responding to the allegations contained in Paragraph 136 of the Plaintiff's Second Amended Complaint, this Defendant admits that it contracted with the developer to act as the general contractor for the construction of the shell of the Concord & Cumberland project, which work was completed through the use of subcontractors. Except as expressly admitted herein, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the allegations.

25. Paragraph 137 of the Plaintiff's Second Amended Complaint states legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. In further responding, this Defendant admits that it complied with all applicable duties.

26. Paragraph 138 of the Plaintiff's Second Amended Complaint states legal conclusions to which no response is required. To the extent a response is required, this Defendant admits that it complied with all applicable duties it owed.

27. This Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the allegations contained in Paragraph 139, 140 and 141 of the Plaintiff's Second Amended Complaint.

28. To the extent the allegations contained in Paragraphs 142 through 147 of the Plaintiff's Second Amended are directed to this Defendant, such allegations are denied. To the extent the allegations are directed to others, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

29. In responding to the allegations contained in Paragraph 148 of the Plaintiff's Second Amended Complaint, this Defendant realleges all prior paragraphs of this answer and incorporates them herein by reference.

30. Paragraphs 149 through 153 of the Plaintiff's Second Amended Complaint states legal conclusions to which no response is required. To the extent a response is required and to the extent the allegations are directed to this Defendant, such allegations are denied. To the extent the allegations are directed to others, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth such allegations.

31. In responding to the allegations contained in Paragraph 154 of the Plaintiff's Second Amended Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

32. In responding to the allegations contained in Paragraph 155 of the Plaintiff's Second Amended Complaint, this Defendant craves reference to the terms of its actual contract

with Concord & Cumberland, LLC, which terms speak for themselves. Except as expressly admitted herein, the allegations are denied.

33. This Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the allegations contained in Paragraph 156 of the Plaintiff's Second Amended Complaint.

34. Paragraph 157 through 161 of the Plaintiff's Second Amended Complaint state legal conclusions to which no response is required. To the extent a response is required and to the extent the allegations are directed to this Defendant, such allegations are denied. To the extent the allegations are directed to others, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

35. By their terms, the allegations contained in Paragraphs 162 through 238 are not directed to this Defendant and, therefore, require no response. To the extent a response is required, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference. In further responding, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the specific allegations alleged against others.

FOR A SECOND DEFENSE

36. This Defendant asserts that whatever damages, if any, that were sustained by the Plaintiff was due to, caused solely or partly by, and were the direct and proximate result of the negligence of the Plaintiff, including, but not limited to his acts or omissions in properly carrying out his contract, in improperly selecting materials, in improperly supervising the project, in failing to act as a reasonably prudent person would have acted under the same or similar circumstances, and in any other particulars that may come to light through investigation and

discovery, and therefore the recovery, if any, should be barred, or reduced, in proportion to his own negligence.

FOR A THIRD DEFENSE

37. This Defendant would show, upon information and belief, that any injuries or damages sustained by the Plaintiff was due to his own negligent, careless, reckless and grossly negligent acts or omissions which combined and concurred with any negligence on the part of this Defendant, which is specifically denied, to produce such injuries or damages, if any, and without which such injuries or damages would not have occurred. This Defendant pleads such negligence, carelessness, recklessness and gross negligence on the part of the Plaintiff and would ask that this court compare the negligence of the Plaintiff and this Defendant and if it is determined that the Plaintiff's negligence, carelessness, recklessness and gross negligence was greater than the negligence, carelessness, recklessness and gross negligence of this Defendant, which is specifically denied, then the Plaintiff should be totally barred from recovery and if it is determined that the Plaintiff's negligence, carelessness, recklessness and gross negligence is equal to or less than the negligence of this Defendant, then the amount of recovery available to the Plaintiff should be reduced by the percentage of the Plaintiff's own negligence, carelessness, recklessness and gross negligence.

FOR A FOURTH DEFENSE

38. This Defendant asserts that it constructed the building in conformance with all plans and specifications and, therefore, is entitled to complete defense under the Spearin doctrine.

FOR A FIFTH DEFENSE

39. The Second Amended Complaint fails to state a claim upon which relief can be

based and accordingly, this Defendant is entitled to judgment as a matter of law pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SIXTH DEFENSE

40. This Defendant asserts the doctrine of Laches as complete or partial bar to the Second Amended Complaint.

FOR A SEVENTH DEFENSE

41. This Defendant asserts that any alleged remedies and/or warranties have been properly and effectively excluded, modified and are limited either by applicable contracts or by applicable law.

FOR AN EIGHTH DEFENSE

42. This Defendant asserts Plaintiff's failure to mitigate damages and/or the doctrine of avoidable consequences as a complete or partial bar to the Second Amended Complaint.

FOR A NINTH DEFENSE

43. This Defendant asserts the negligence of others not in the employ or control of this Defendant as a complete or partial bar to the Second Amended Complaint.

FOR A TENTH DEFENSE

44. To the extent this Defendant may be liable to the Plaintiff, which liability is denied, this Defendant would show upon information and belief that the subject property has either been destroyed or modified and as such this Defendant pleads the doctrine of spoliation of evidence as a complete bar to the Second Amended Complaint.

FOR AN ELEVENTH DEFENSE

45. To the extent this Defendant is liable to the Plaintiff, which liability is denied, this Defendant would show upon information and belief that Plaintiff failed to give this Defendant

timely and reasonable notice of any alleged defects and/or timely and reasonable opportunity to cure or correct any alleged defects as required in the applicable contracts. This Defendant asserts such lack of notice as a complete bar to the Second Amended Complaint.

FOR A TWELFTH DEFENSE

46. This Defendant substantially performed the requirements of the applicable contract and all work in question was done in a good and workmanlike manner, within the limitations of materials and design provided.

FOR A THIRTEENTH DEFENSE

47. This Defendant provided work or services which met all construction industry customs, practices, and standards applicable to the claims in this lawsuit.

FOR A FOURTEENTH DEFENSE

48. This Defendant asserts the defenses of waiver and estoppel as a complete or partial bar to the Second Amended Complaint.

FOR A FIFTEENTH DEFENSE

49. This Defendant asserts the doctrine of unclean hands as a complete or partial bar to the Second Amended Complaint.

FOR A SIXTEENTH DEFENSE

50. This Defendant is informed and believes that the Second Amended Complaint against this Defendant is barred as a result of the Plaintiff's failure to make a claim within the applicable warranty period.

FOR A SEVENTEENTH DEFENSE

51. This Defendant asserts the doctrine of payment and release as a complete and partial bar to the Second Amended Complaint.

FOR AN EIGHTEENTH DEFENSE

52. To the extent punitive damages are claimed, this Defendant would show, upon information and belief, that the claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that this Defendant could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because this Defendant can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiff's claim for punitive damages violates this Defendant's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills this Defendant's exercise of that right; the Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed, the Plaintiff's claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiff's claim for punitive damages should be dismissed.

FOR A NINETEENTH DEFENSE

53. This Defendant asserts the economic loss doctrine as complete or partial bar to the Second Amended Complaint.

FOR A TWENTIETH DEFENSE

54. This Defendant asserts the statute of frauds as a complete or partial bar to the Second Amended Complaint.

FOR A TWENTY-FIRST DEFENSE

55. This Defendant preserves and reserves the right to rely on and assert any and all other applicable defenses either in contract or under the law as may be asserted by any other Defendant in this action or that may become evident through its investigation and discovery.

FOR A TWENTY-SECOND DEFENSE

56. The damages awarded to Plaintiff, if any, must be reduced by the proportional value of the beneficial use which the Plaintiff has received from the project.

FOR A TWENTY-THIRD DEFENSE

57. Plaintiff's claims are barred against this Defendant on the grounds that this Defendant was provided with deficient plans and specifications.

FOR A TWENTY-FOURTH DEFENSE

58. This Defendant asserts the applicable Statute of Limitations and/or Statute of Repose as a complete or partial bar to the Second Amended Complaint.

CROSS CLAIMS
OF
SUPERIOR CONSTRUCTION CORPORATION

(Facts Common to All Cross Claims)

59. Defendant Weather Shield Mfg., Inc., (Weather Shield) is a corporation organized and existing under the laws of Wisconsin and conducts business in the State of South Carolina and Charleston County. Weather Shield manufactured and sold and/or supplied the windows,

exterior doors, and related accessories ("the products") that were installed at Concord and Cumberland (the Subject Property).

60. The Muhler Company, Inc. (Muhler) is a corporation organized and existing under the laws of South Carolina and conducts business in the State of South Carolina and Charleston County. Muhler performed the installation of all windows, entry doors, patio doors, door and window trim, and all related work thereto in the construction of the Subject Property, as a subcontractor to Superior. Companion Property and Casualty Insurance Company is a South Carolina corporation and the Surety of Muhler on its subcontract performance bond for the entire scope of work at the Subject Property.

61. Craui "Chris" Tocitu d/b/a Wallcraft Construction, upon information and belief, has its principle place of business located in Myrtle Beach, South Carolina, and conducts business in the State of South Carolina and Charleston County. This person and entity, along with Wall Craft Construction, Inc., performed the stucco and related work on the original construction of the Subject Property, as a subcontractor to Superior.

62. Wall Craft Construction, Inc. is a corporation organized under the laws of the state of Georgia, and conducts business in the State of South Carolina and Charleston County. Wall Craft Construction, Inc., along with Chris Tocito d/b/a WallCraft Construction, performed and provided the stucco cladding and related work on the original construction of the Subject Property, as a subcontractor to Superior.

63. Weatherholtz Masonry, LLC (Weatherholtz) is a Limited Liability Company organized under the laws of South Carolina and Charleston County, and doing business in the same. Weatherholtz performed the complete masonry work on the Subject Property.

64. In the Wind, Inc. is a corporation organized under the law of South Carolina and doing business in the same. In the Wind, as a second tier subcontractor under The Muhler Company, performed part or all of the window installation for the original construction of the Subject Property. In The Wind also performed certain work as a direct subcontractor to Superior to prepare the window rough openings to receive the window installation.

65. Philip Gasque d/b/a Philip Gasque Construction, ("Philip Gasque Construction") upon information and belief, is a sole proprietorship with its principle place of business located in Conway, South Carolina. Philip Gasque Construction provided and installed the exterior sheathing work at the Subject Property as a subcontractor to Superior.

66. Architectural Stone Company, (herein "ASC") upon information and belief, is a sole proprietorship with its principle place of business in Plano, Texas. ASC supplied and installed certain exterior stone façade and cladding elements at the Subject Property as a subcontractor to Superior.

67. Defendant Southern Mechanical Inc. ("SMI") is a corporation organized under the laws of the State of Tennessee, and conducting business in the State of South Carolina. Southern Mechanical Inc. performed the mechanical/ HVAC installation work at the Subject Property as a subcontractor to Superior.

68. Greg Gasque Metal Works is a sole proprietorship conducting business in the State of South Carolina. Greg Gasque Metal Works performed the exterior balcony railing work at the Subject Property as a subcontractor to Superior.

69. Keating Roofing and Sheet Metal, Inc. ("Keating") is a South Carolina corporation conducting business in the State of South Carolina. Keating Roofing and Sheet Metal, Inc. performed the roofing work at the Subject Property as a subcontractor to Superior.

70. Lowcountry Tile Contractors, Inc. is a corporation organized under the laws of the State of Tennessee and conducting business in the State of South Carolina. Lowcountry Tile Contractors, Inc. performed the tile and related balcony waterproofing work on the subject property as a subcontractor to Superior.

71. American Drywall Construction, Inc. is a corporation organized under the laws of State of South Carolina and conducting business in the State of South Carolina. American Drywall performed the drywall installation and related insulation work on the subject property as a subcontractor to Superior.

72. Turner Electrical of SC, Inc. is a corporation organized under the laws of the State of South Carolina and conducting business in the State of South Carolina. Turner Electrical of SC performed the turn-key electrical work on the subject property as a subcontractor to Superior.

73. Renaissance Steel, LLC (Renaissance) is a Limited Liability Company presently or formerly organized under the law of the State of Florida and conducting business in South Carolina. Renaissance performed the light gauge metal framing work at the Subject Property as a subcontractor to Superior.

74. Watts Builders, LLC (Watts) is a Limited Liability Company organized under the law of South Carolina and conducting business in South Carolina. Watts performed certain window installation and related work as a second tier subcontractor at the Subject Property.

75. Elias Duffy d/b/a/ Masonry Pros is a citizen and resident of Georgia and conducting business in South Carolina. Masonry Pros performed all or part of the stucco work and related flashings as a second-tier subcontractor at the Subject Property.

76. Defendants Weather Shield, Mfg., Inc, The Muhler Company, Inc., In The Wind, Inc., Chris Tocito d/b/a WallCraft Construction, Wall Craft Construction, Inc., Weatherholtz

Masonry, LLC, Philip Gasque Construction, Architectural Stone Company, Southern Mechanical, Inc., Greg Gasque Metal Works, Keating Roofing and Sheet Metal, Inc., Lowcountry Tile Contractors, Inc., American Drywall Construction, Inc., Renaissance Steel, LLC and Turner Electrical of SC, Inc. are collectively referred to herein as "the Subcontractors and Suppliers."

77. The Plaintiff has alleged in its Second Amended Complaint a number of allegedly improper and/or defective items of workmanship and materials, and various resulting damages regarding the Subject Property that directly arises out, or, relates to the respective scope of work of, or materials supplied by, the Subcontractors. While Superior has denied these allegations, the claims and allegations by the Plaintiff, if proven substantiated, entitle Superior to full recovery pursuant to the various claims in law and equity enumerated below.

FOR A FIRST CAUSE OF ACTION
(Contractual Indemnity- Subcontractors & Suppliers)

78. Superior is entitled by contractual provisions, to the fullest extent permitted by law, full indemnity from the Subcontractors and Suppliers, to include the assumption of Superior's defense, as a result of the allegations and claims made by the Plaintiff, if substantiated.

FOR A SECOND CAUSE OF ACTION
(Equitable Indemnity- Subcontractors & Suppliers)

79. By virtue of the special relationship between Superior and the Subcontractors and Suppliers, and the claims asserted by the Plaintiff against Superior as a result of the subcontractors and suppliers' work, Superior is entitled to equitable indemnity for losses, damages, and other harm that it incurs as a result of the claims and allegations of the Plaintiff, if

substantiated, that relate to the Subcontractors and Supplier's respective scope of work and provision of materials.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract- to include Performance Bond Claims)

80. The Suppliers and Subcontractors are in breach of their contractual obligations towards Superior in regards to the construction of the Subject Property, due to the above-referenced claims and allegations of the Plaintiff, if substantiated, and due to project delays caused by the Subcontractors and Suppliers that resulted in Superior being assessed various delay penalties and withheld retainage by the Owner, and for corrective work that Superior had to undertake in the course of construction to cure non-compliant work by the Suppliers and Subcontractors. Furthermore, to cure said breach to the extent that the action of any performance bond is required, Superior asserts a demand of performance against Companion Property and Casualty Insurance Company, and petitions for declaratory judgment against the same on the obligation of the bond.

FOR A FOURTH CAUSE OF ACTION
(Breach of Express and Implied Warranties)

81. If the claims and allegations of the Plaintiff's Second Amended Complaint regarding alleged defective workmanship and materials are substantiated, then the Subcontractors and Suppliers, and Watts Builders, LLC, and Masonry Pros have breached their respective express warranties, as well as the implied warranty of workmanlike performance, the implied warranty of merchantability, and the implied warranty of use of particular purpose. Furthermore, apart from the claims and allegations of the Plaintiff, the Subcontractors and Suppliers have breached their express warranty obligations in failing to perform on proper demands for warranty work at the Subject Property that were made by Superior.

FOR A FIFTH CAUSE OF ACTION

(Negligence as to In the Wind, Inc., Watts Builders, LLC, and Masonry Pros)

82. While not in direct privity with Superior, In the Wind, Inc., Watts Builders, LLC, and Masonry Pros (collectively herein, Second Tier Subcontractors) nonetheless was entrusted with, and knowingly undertook a duty of care that extended to Superior, the Owner, and the Plaintiff to install the windows at the subject property in conformance with the requirements of the controlling building code, manufacturer's instructions, industry standards, and proper workmanship. If the claims and allegations of the Plaintiff's Second Amended Complaint regarding alleged defective workmanship and materials pertaining to the window installation are substantiated, which is denied, then the Second Tier Subcontractors have breached this duty of care, thereby subjecting Superior to damages for which it was not directly responsible. Such damages include, but are not limited to direct repair costs, investigation costs and testing undertaken by Superior, and claims of resulting damages asserted against Superior by the Plaintiff, the Owner, and individual unit owners in the Subject Property.

FOR A SIXTH CAUSE OF ACTION

(Spearin Doctrine Claims of Breach of Express and Implied Warranty of Sufficiency of Plans and Specifications as to J. Davis Architects, PLLC and Concord & Cumberland, LLC)

83. In the original construction of the Subject Property, Superior was contractually bound to perform its work in accordance with the plans and specifications, and other directives of J. Davis Architects, PLLC ("J. Davis") and Concord & Cumberland LLC. Superior did not perform any design services, nor created the plans and specifications for the construction of the Subject Property.

84. Superior performed its work in reliance of and in conformance with the plans and specifications for the construction of the Subject Property, in particular, but not exclusively related to the installation procedures of the windows.

85. J. Davis and Concord & Cumberland, LLC expressly and impliedly warranted to Superior that the work could be performed in accordance with the plans and specifications that it supplied to Superior, and that said plans and specifications were sufficient for the purpose intended.

86. The warranty of sufficiency alleged herein is duty that exists separately and apart from any duty of care under a professional design negligence theory.

87. Superior has been subjected to liability, costs, and other claims by the Plaintiff, as well as other persons and entities, for the work it performed in the construction of the subject property in accordance with the aforementioned plans and specifications. Therefore, pursuant to United States vs. Spearin, 248 U.S. 132 (1918) and Hill Vs. Polar Pantries, 219 S.C. 263, 63 S.E.2nd 885 (1951), J. Davis Architects and Concord & Cumberland, LLC should indemnify Superior for any and all claims asserted in this lawsuit found to be proximately caused by the stated breach of warranty of sufficiency of the plans and specifications.

This Defendant preserves the right to assert any and all other applicable legal, contractual, or equitable defenses that may be asserted by any other defendant in this action, or which may become evident during its investigation and through discovery.

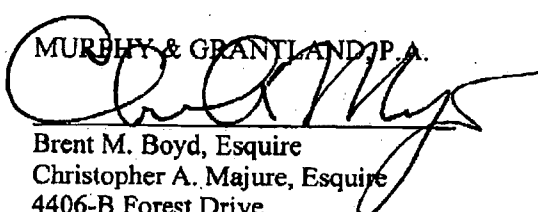
WHEREFORE, having fully answered the Second Amended Complaint, the Defendant prays that this Court award it the following relief:

1. Dismiss the Second Amended Complaint with prejudice to the Plaintiff;
2. Declare that the Plaintiff is entitled to no recovery from this Defendant;

Superior Const. Answer to Plaintiff's Second Amended Complaint, and Cross Claims

3. Tax the costs of this action against the Plaintiff;
4. Award this Defendant its attorneys' fees;
5. Grant Judgment in favor of Superior upon all of its Crossclaims;
6. Grant such other relief in favor of this Defendant, as the Court may deem just and appropriate.

MURPHY & GRANTLAND P.A.


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Attorneys for Defendant Superior Construction Corporation

Columbia, South Carolina
June 14, 2012

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Concord and Cumberland Horizontal Property
Regime,

Plaintiff,

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 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.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-10-2271

**ANSWER TO SECOND AMENDED
COMPLAINT OF CONCORD &
CUMBERLAND, LLC**

and
CROSSCLAIMS

against

Superior Construction Corporation,
J. Davis Architects, PLLC, Weather Shield
Mfg., Inc., The Muhler Company, Inc., Wall
Craft Construction, Inc., Weatherholtz
Masonry, LLC, Safeco Insurance Company
of America, Companion Property and
Casualty Group and Metro Waterproofing,
Inc.

The Defendant, Concord & Cumberland, LLC (hereinafter "C&C LLC") answering the
Plaintiff's Second Amended Complaint, respectfully responds as follows and asserts Cross-
Claims as set out herein.

FOR A FIRST DEFENSE
(General Denial)

1. Each and every allegation of the Complaint not specifically admitted herein is denied.
To the extent any allegation or part thereof may not be expressly referred to and specifically

answered, it is hereby denied and legal proof thereof is requested.

FOR AN ADDITIONAL DEFENSE
(Specific Responses)

2. The allegations contained in Paragraphs 1 through 4 are admitted with the exception that, upon information and belief, Plaintiff does not qualify as a "horizontal property regime" under SC Code §27-31-10 et seq.

3. C&C LLC lacks sufficient information and knowledge to form a belief as to the allegations contained in Paragraphs 5 and 6 and therefore can neither admit nor deny same and demands legal proof thereof.

4. The allegations contained in Paragraph 7 are admitted.

5. The allegations contained in Paragraph 8 are admitted only to the extent that they are proper interpretations of the Master Deed and the legal obligations and rights of Plaintiff.

6. The allegations contained in Paragraph 9 are admitted.

7. As to the allegations contained in Paragraph 10, it is admitted that Concord & Cumberland, LLC is limited liability company organized and existing under the laws of South Carolina and has conducted business in Charleston County. All remaining allegations are denied and legal proof thereof is demanded.

8. As to the allegations contained in Paragraph 11, it is admitted that Concord & Cumberland Manager, LLC is limited liability company organized and existing under the laws of South Carolina and has conducted business in Charleston County. All remaining allegations are denied and legal proof thereof is demanded.

9. As to the allegations contained in Paragraph 12, it is admitted that Estates, Inc. is a South Carolina corporation. All remaining allegations are denied and legal proof thereof is demanded.

10. As to the allegations contained in Paragraph 13, it is admitted that Estates Management Company is a South Carolina corporation. All remaining allegations are denied and legal proof thereof is demanded.

11. As to the allegations contained in Paragraph 14, it is admitted that C&C LLC developed and sold some condominium units. All remaining allegations are denied and legal proof thereof is demanded. To the extent that Plaintiff's claims rely upon acts or omissions of others to assert claims against C&C LLC, this Defendant specifically denies any liability for any acts or omissions of others acting without this Defendant's express or other legal authority. This Defendant objects to the Plaintiff's use of the word "Defendants" (or similar language or use of conjunctives) to allege that it acted in concert with, by, and/or through any other party or entity, or is liable for the acts of others, without sufficient legal proof of such authority or liability.

12. The allegations contained in Paragraphs 15 and 16 are denied and legal proof thereof is demanded.

13. As to the allegations contained in Paragraphs 17 and 18, it is admitted that C&C LLC developed and sold some condominium units. All remaining allegations are denied and legal proof thereof is demanded.

14. As to the allegations contained in Paragraph 19, it is admitted that a Master Deed dated October 18, 2007, including amendments and attachments thereto, was filed with the Charleston County RMC Office.

15. The allegations contained in Paragraphs 20 and 21 are denied as alleged and legal proof thereof is demanded.

16. The allegations contained in Paragraphs 22 through 45 are admitted upon information and belief.

17. As to the allegations contained in Paragraphs 46 through 48, it is admitted that Plaintiff reported some instances of moisture intrusion to C&C LLC, which, upon information and belief, were properly addressed at that time. All remaining allegations are denied and legal proof thereof is demanded.

18. The allegations contained in Paragraphs 49 through 54 are denied as alleged and legal proof thereof is demanded.

19. The allegations contained in Paragraphs 55 and 56 are denied and legal proof thereof is demanded.

20. The allegations contained in Paragraphs 57 through 59 are denied as alleged and legal proof thereof is demanded.

21. As to the allegations contained in Paragraph 60, C&C, LLC craves reference to the Complaint itself.

22. As to the allegations in Paragraph 61, C&C LLC does not oppose venue of this matter in this Court at this time.

23. Paragraph 62 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

24. Paragraph 63 states pleading information that requires no response. To the extent that a response is required, C&C LLC denies that any provisions of the Master Deed are unenforceable.

25. The allegations contained in Paragraphs 64 and 65 are admitted.

26. The allegations contained in Paragraph 66 are denied as alleged and legal proof thereof is demanded.

27. The allegations contained in Paragraph 67 are denied and legal proof thereof is

demanded.

28. As to the allegations contained in Paragraph 68, C&C LLC craves reference to the Master Deed itself.

29. The allegations contained in Paragraphs 69 through 75 are denied as alleged and legal proof thereof is demanded.

30. Paragraphs 76 and 77 state pleading information that requires no response. To the extent that a response is required, the same is denied. Further, C&C LLC asserts that Plaintiff does not raise a justiciable controversy sufficient to invoke a declaratory judgment.

31. Paragraph 78 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

32. The allegations contained in Paragraphs 79 through 83 are denied and legal proof thereof is demanded.

33. Paragraph 84 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

34. The allegations contained in Paragraph 85 are denied as alleged and legal proof thereof is demanded.

35. The allegations contained in Paragraphs 86 through 96 are denied and legal proof thereof is demanded.

36. Paragraph 97 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

37. The allegations contained in Paragraphs 98 and 99 are denied as alleged and legal proof thereof is demanded.

38. The allegations contained in Paragraphs 100 through 106 are denied and legal proof

thereof is demanded.

39. Paragraph 107 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

40. The allegations contained in Paragraphs 108 through 115 are denied as alleged and legal proof thereof is demanded.

41. Paragraph 116 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

42. Paragraph 117 states a legal conclusion to which no response is required; however, legal proof thereof is demanded.

43. The allegations contained in Paragraphs 118 through 122 are denied and legal proof thereof is demanded.

44. Paragraph 123 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

45. Paragraph 124 states a legal conclusion to which no response is required.

46. The allegations contained in Paragraphs 125 through 130 are denied as alleged and legal proof thereof is demanded.

47. Paragraph 131 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

48. The allegations contained in Paragraphs 132 through 142 are denied and legal proof thereof is demanded.

49. The allegations contained in Paragraphs 143 through 246 are not directed towards C&C LLC; thus no response is required. However, to the extent that any allegation of liability is made therein against C&C LLC, the same is hereby denied.

50. C&C LLC denies the allegations contained in the concluding "WHEREFORE" paragraphs and demands legal proof thereof.

FOR AN ADDITIONAL DEFENSE
(Failure to State Claim)

51. Plaintiff fails to state a claim against C&C LLC for which relief may be granted.

FOR AN ADDITIONAL DEFENSE
(Standing)

52. Plaintiff lacks standing to assert any claims in regard to anything other than the common areas.

FOR AN ADDITIONAL DEFENSE
(Privity)

53. Plaintiff lacks sufficient privity or other relationship with C&C LLC to maintain a claim against it.

FOR AN ADDITIONAL DEFENSE
(Statute of Limitations/Repose)

54. The claims set forth in the Second Amended Complaint are barred, in whole or in part, by the applicable statutes of limitation and/or statutes of repose.

FOR AN ADDITIONAL DEFENSE
(Waiver/Estoppel/Laches)

55. The claims set forth in the Second Amended Complaint are barred by the doctrines of waiver, estoppel or laches.

FOR AN ADDITIONAL DEFENSE
(Liability/Remedy Limitations)

56. Plaintiff's claims and remedies are limited, restricted, or excluded by the substance of any communication between the parties, including documents and/or oral conversations. Further, C&C LLC's liability, if any, may be limited, restricted, or excluded by the rights, responsibilities, and liability of Plaintiff and/or third parties, either by contract, statute, or equity.

FOR AN ADDITIONAL DEFENSE
(Agency/Authority)

57. To the extent that Plaintiff's claims rely upon acts or omissions of others to assert claims against this Defendant, this Defendant specifically denies any liability for any acts or omissions of others acting without this Defendant's express or other legal authority. This Defendant objects to the Plaintiff's use of the word "Defendants" (or similar language or use of conjunctives) to allege that it acted in concert with, by, and/or through any other party or entity, or is liable for the acts of others, without sufficient legal proof of such authority or liability.

FOR AN ADDITIONAL DEFENSE
(Failure to Mitigate)

58. Plaintiff has failed to act reasonably to prevent, mitigate, or otherwise lessen the alleged damages.

FOR AN ADDITIONAL DEFENSE
(Contract/Warranty Defenses)

59. C&C LLC pleads the following affirmative defenses to any breach of contract or breach of warranty claim: Plaintiff's own breach, Plaintiff's acceptance of modification, waiver, estoppel, and all equitable defenses applicable to such claim, including without limitation the doctrine of unclean hands.

FOR AN ADDITIONAL DEFENSE
(Notice)

60. Plaintiff's claims are barred or limited by the failure to give timely and reasonable notice to C&C LLC as required by law.

FOR AN ADDITIONAL DEFENSE
(Conditions Precedent)

61. C&C LLC pleads that, to the extent that Plaintiff claims liability against it, in any manner, conditions precedent to such liability have not been met.

FOR AN ADDITIONAL DEFENSE

(Reliance)

62. C&C LLC pleads that, to the extent that Plaintiff claims reliance on any action or omission under which it seeks to impose liability on C&C LLC, such reliance did not induce a change in Plaintiff's position, such reliance was unreasonable and unjustified under the circumstances, Plaintiff has not been prejudiced by such asserted reliance, and/or such asserted reliance was not the proximate cause of any damages sustained by Plaintiff.

FOR AN ADDITIONAL DEFENSE

(Economic Loss Rule)

63. Plaintiff seeks damages for purely economic losses and therefore Plaintiff's remedies are limited by the Economic Loss Rule, to include the prohibition against tort-based causes of action.

FOR AN ADDITIONAL DEFENSE

(Warranty-Defenses)

64. To the extent that Plaintiff claims a breach of warranty, C&C LLC specifically pleads the following defenses: non-existence of warranty, non-applicability of warranty to Plaintiff's claim(s), disclaimer of warranty, modification of warranty, acceptance by Plaintiff, compliance with warranty, and/or waiver by Plaintiff.

FOR AN ADDITIONAL DEFENSE

(Third Party Fault)

65. C&C LLC asserts that the claims against it are barred or limited by the contributing, concurring, intervening, or superseding fault, negligence, or breach by persons or entities other than C&C LLC, including Plaintiff, and that any fault or negligence by C&C LLC, the existence of which is denied, was passive and secondary in light of the primary and active fault, negligence, or breach by others, including Plaintiff. C&C LLC asserts such fault, negligence, or

breach as a basis for the elimination or reduction of any liability by C&C LLC, the existence of which is denied.

FOR AN ADDITIONAL DEFENSE
(Contributing/Comparative Fault)

66. C&C LLC alleges that any damages sustained by the Plaintiff were caused and occasioned by the Plaintiff's own negligence, recklessness, willfulness and wantonness or other fault, and

- A. That the fault attributable to Plaintiff is a complete bar to the Plaintiff's claim;
- B. That the fault attributable to Plaintiff was greater than any alleged fault of C&C LLC or others and is a complete bar to the Plaintiff's claim;
- C. That the fault attributable to Plaintiff combined with, contributed to, or concurred in any alleged fault of C&C LLC or others and acted as a proximate cause of the damages allegedly sustained and is therefore a complete bar to Plaintiff's claim;
- D. Should the Plaintiff be entitled to a recovery, such recovery should be reduced in proportion to the fault attributable to Plaintiff; and
- E. Should Plaintiff be entitled to a recovery, C&C LLC specifically requests and moves that such liability should be assessed in accordance with SC Code § 15-38-15, if applicable. In addition and in the alternative, C&C LLC asserts its right under due process of law to have liability, if any, assessed in proportion to the responsibility of each party for such liability and that the amount of recoverable damages, if any, be assessed in accordance with such apportionment.

FOR AN ADDITIONAL DEFENSE
(Assumption of the Risk)

67. C&C LLC alleges that any damages sustained by the Plaintiff were the result of a dangerous condition or the risk thereof, known to Plaintiff, the nature and extent of which Plaintiff fully appreciated, and the Plaintiff voluntarily and knowingly exposed itself to such condition and risk.

FOR AN ADDITIONAL DEFENSE

(Set-off/Credit)

68. C&C LLC asserts entitlement to a set-off and/or credit for all proceeds received by or on behalf of Plaintiff as a result of Plaintiffs' claims in this matter, regardless of the source or basis of such proceeds, to include any contractual or gratuitous reduction in charges or provision of services or materials.

FOR AN ADDITIONAL DEFENSE

(Non-Waiver)

69. C&C LLC reserves and does not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

FOR AN ADDITIONAL DEFENSE

(Incorporation)

70. C&C LLC hereby incorporates and asserts all defenses, counterclaims, set-offs, and credits pled by other parties in this action, to include any pleadings filed after this Answer, and specifically, without limitation, all defenses, counterclaims, set-offs, and credits pled to Plaintiffs' claims, to the extent not inconsistent with its Answer herein and its denial of liability of any kind.

FOR AN ADDITIONAL DEFENSE

(Punitive Damages-Procedural)

71. C&C LLC alleges, upon information and belief, that punitive damages as currently awarded in the State of South Carolina violate the Constitutions of the United States and of South Carolina.

FOR AN ADDITIONAL DEFENSE

(Punitive Damages-Substantive)

72. C&C LLC alleges that a verdict for the Plaintiff for punitive damages would deprive C&C LLC of property without due process of law and without equal protection of the laws:

- A. If the award is based upon conduct that is not intentional or malicious, or conduct that was lawful at the time and place where the conduct occurred or had no impact upon the State of South Carolina or its residents;
- B. If the amount awarded bears no reasonable relationship to the proven harm claimed by Plaintiff;
- C. If the award is based upon other, dissimilar acts or omissions;
- D. If the award is based upon other parties' hypothetical claims;
- E. If the award is based upon economic rather than physical harm;
- F. If the award is excessive in comparison to penalties imposed or authorized in comparable cases.

**FOR AN ADDITIONAL DEFENSE AND BY WAY OF CROSS CLAIM AGAINST
SUPERIOR CONSTRUCTION CORPORATION**

FIRST CAUSE OF ACTION
(Contractual Indemnity)

- 73. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.
- 74. To the extent that Plaintiff's allegations are true, which is specifically denied, C&C LLC is entitled by contractual provisions to be fully indemnified by Superior for any and all amounts awarded as a result of settlement or judgment, along with costs and attorney's fees associated with the defense of this action.

SECOND CAUSE OF ACTION
(Equitable Indemnity)

- 75. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.
- 76. By virtue of the special relationship between C&C LLC and Superior and the claims asserted by the Plaintiff against C&C LLC as a result of the contractor's work, C&C LLC is entitled to equitable indemnity for losses, damages, and other harm that it incurs as a result of the claims and allegations of the Plaintiff, if substantiated, that relate to the contractor's scope of work and provision of materials.

THIRD CAUSE OF ACTION
(Contribution)

77. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.
78. To the extent that Plaintiff prevails on any of his claims against C&C LLC, C&C LLC is entitled to contribution from Superior.

FOURTH CAUSE OF ACTION
(Breach of Contract)

79. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.
80. C&C LLC entered into a contractual agreement with Superior. This contract stated the scope and specifications of Superior's responsibilities, which is the subject of this action.
81. Superior agreed to perform its work in a workmanlike manner in accordance with the plans and specifications.

82. The Plaintiff herein has alleged that the subject property was defectively designed and constructed, which C&C LLC denies, resulting in damages the Plaintiff has suffered including costs for repairs, as a result of negligence on the part of Defendants, including C&C LLC.

C&C LLC denies the allegations of the Second Amended Complaint; however, in the event that the facts as alleged by the Plaintiff are substantiated, then Superior has breached its contract with C&C LLC and, therefore, is liable to C&C LLC for the actual, consequential and/or punitive damages proximately resulting there from, said damages to include the costs and attorney's fees associated with the defense of this action.

FIFTH CAUSE OF ACTION
(Breach of Implied Warranty)

83. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.
84. Pursuant to the terms of the contract, Superior furnished labor and materials for the project, thereby impliedly warranting that the work would be done in a good and workmanlike

manner.

85. The Plaintiff herein has alleged that the subject property was defectively designed and constructed, which C&C LLC denies, resulting in damages the Plaintiff has suffered including costs for repairs, as a result of negligence on the part of Defendants, including C&C LLC.

C&C LLC denies the allegations of the Second Amended Complaint; however, in the event that the facts as alleged by the Plaintiff are substantiated, then Superior has breached its implied warranty of workmanlike service and as such, is liable to C&C LLC for the actual, consequential and/or punitive damages proximately resulting there from, said damages to include the costs and attorney's fees associated with the defense of this action.

SIXTH CAUSE OF ACTION
(Breach of Express Warranty)

86. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

87. The contract between Superior and C&C LLC contained various express warranties, including but not limited to the following:

"The Contractor warrants to the Owner...that the work will be free from defects not inherent in the quality required or permitted and that the work will conform with the requirements of the Contract Documents." (A201, Section 3.5.1)

88. The Plaintiff herein has alleged that the subject property was defectively designed and constructed, which C&C LLC denies, resulting in damages the Plaintiff has suffered including costs for repairs, as a result of negligence on the part of Defendants, including C&C LLC.

C&C LLC denies the allegations of the Second Amended Complaint; however, in the event that the facts as alleged by the Plaintiff are substantiated, then Superior has breached its express warranty and as such, is liable to C&C LLC for the actual, consequential and/or punitive damages proximately resulting there from, said damages to include the costs and attorney's fees

associated with the defense of this action.

SEVENTH CAUSE OF ACTION
(Negligence)

89. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

90. Superior undertook to construct the building and had a duty to construct the building according to applicable building codes and industry standards in a reasonable and prudent manner.

91. The Plaintiff herein has alleged that the subject property was defectively designed and constructed, which C&C LLC denies, resulting in damages the Plaintiff has suffered including costs for repairs, as a result of negligence on the part of Defendants, including C&C LLC.

92. C&C LLC denies the allegations of the Second Amended Complaint; however, in the event that the facts as alleged by the Plaintiff are substantiated, then Superior was negligent and breached its duty of care and as such, is liable to C&C LLC for the actual, consequential and/or punitive damages proximately resulting there from, said damages to include the costs and attorney's fees associated with the defense of this action.

FOR AN ADDITIONAL DEFENSE AND BY WAY OF CROSS CLAIM AGAINST
SUPERIOR CONSTRUCTION CORPORATION AND SAFECO INSURANCE
COMPANY OF AMERICA
(Performance Bond)

93. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

94. C&C LLC and Superior entered into a contract dated February 28, 2006 wherein Superior agreed to furnish all labor and materials to construct the Concord and Cumberland Condominiums according to the terms and conditions thereof and the plans and specifications prepared by the defendant J Davis Architects.

95. Superior's obligations under this Contract include without limitation requirements to:

- A. Substantially complete all work within 8 months of the notice to proceed, which notice was effective March 1, 2006;
- B. Correct work found at any time not to be in compliance with the contract documents; and
- C. Indemnify and hold harmless C&C LLC from and against all claims, damages, losses and expenses, including attorney's fees, resulting from Superior's work.

96. The Defendant Safeco Insurance Company of America executed as Surety, a Performance Bond, dated March 31, 2006. This bond named C&C LLC as the Owner, and Superior as the Contractor/Principal.

97. Pursuant to the terms of this bond, Safeco and Superior each jointly and severally "bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference."

98. Superior commenced work under this contract, but failed and refused to properly and timely perform its obligations under the contract, and committed multiple and repeated defaults in relation to the terms thereof, including but not limited to the following:

- A. Superior failed to complete the project within the contract time.
- B. Superior failed to adequately staff and man the job requiring C&C LLC to fund the cost of additional workmen and supervisory staff to manage and complete the work in a timely manner.
- C. Superior failed to pay its subcontractors and material suppliers, used money drawn for work on this project on other projects, which resulted in liens being placed against the improvements. C&C LLC was required to incur legal and other costs to bond or remove these liens, and has had its funds deposited with the Court to remove these liens.
- D. Superior failed to perform and complete all work in compliance with the contract documents, thereby causing C&C LLC to incur additional costs to correct work and to reimburse unit owners. C&C LLC was also required to retain the services of outside consultants to determine the proper remedy.
- E. Superior failed and refused to remedy issues raised by unit purchasers related to the condition of their units, and failed to comply with obligations to correct and

remedy incorrect work, work not complying with the contract documents or work not functioning as required by the contract documents.

99. C&C LLC gave Superior timely notice of these and other defaults, and made demand on Superior to correct and remedy these defaults. Superior failed and refused to remedy its defaults.

100. Safeco was and is jointly and severally responsible for the performance of all of the contract terms and conditions. Safeco was given notice of the various defaults by Superior, and C&C LLC made demand on Safeco to perform the contract and correct the defaults by Superior.

101. C&C LLC also complied with all obligations of the bond regarding notices, meetings, payment of uncontested balance of the contract, and declaration of default.

102. Safeco failed and refused to perform the contract and cure the defaults by Superior without just cause or excuse.

103. In addition to the defaults by Superior and Safeco as alleged herein, the HPR and certain individual owners of the Concord and Cumberland Condominiums have instituted this action seeking to hold C&C LLC liable for conditions in the common elements that, if proven, would constitute further defaults by Superior in regard to the performance of its contractual obligations.

104. Superior has previously ceased to operate, is no longer in existence, and no longer has the ability to respond to and perform its contractual obligations. Superior has heretofore formally announced that it cannot and will not respond to any demands in regard to its contract with C&C LLC and has advised that it will no longer perform any contractual obligations.

105. Superior has by its conduct and declaration effectively terminated the contract between itself and C&C LLC and waived its right to complete the contract. Superior's default and refusal to perform any and all terms and conditions of the contract has imposed upon Safeco

the obligation to correct Superior's default by selecting one or more of the options under its Performance Bond to obtain performance or to pay to the Owner an amount sufficient to compensate the Owner for all losses including losses due to delayed completion and non-performance by the contractor.

106. Safeco as Surety has failed and refused to meet its obligations under the terms of the bond to perform or arrange for performance of all defaulted terms of the Superior contract, and has failed to pay compensation and/or damages to C&C LLC to reimburse C&C LLC for its losses.

107. C&C LLC is entitled to judgment against Safeco Insurance Company of America and Superior Construction Corporation jointly and severally for all losses, costs and damages sustained as a consequence of Safeco's and Superior's default under the terms and conditions of their Performance Bond, including the terms and conditions of the Construction Contract which are incorporated into the Performance Bond by reference, such recovery to include all losses sustained as result of Superior's default in the performance of its contractual obligations, and all losses sustained as a result of Safeco's default, together with recovery of all amounts found to be due by C&C LLC to the Plaintiffs in this action.

**FOR AN ADDITIONAL DEFENSE AND BY WAY OF CROSS CLAIM AGAINST
J. DAVIS ARCHITECTS, PLLC**

FIRST CAUSE OF ACTION
(Contractual Indemnity)

108. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

109. To the extent that Plaintiff's allegations are true, which is specifically denied, C&C LLC is entitled by contractual provisions to be fully indemnified by J. Davis for any and all amounts awarded as a result of settlement or judgment, along with costs and attorney's fees

associated with the defense of this action.

SECOND CAUSE OF ACTION
(Equitable Indemnity)

110. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

111. By virtue of the special relationship between C&C LLC and J. Davis, and the claims asserted by the Plaintiff against C&C LLC as a result of the architect's work, and the architect's failure to properly supervise, direct, review, and approve the contractor's and subcontractors' work, C&C LLC is entitled to equitable indemnity for losses, damages, and other harm that it incurs as a result of the claims and allegations of the Plaintiff, if substantiated, that relate to the design and construction work and provision of materials.

THIRD CAUSE OF ACTION
(Contribution)

112. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

113. To the extent that Plaintiff prevails on any of its claims against C&C LLC, C&C LLC is entitled to contribution from J. Davis.

FOURTH CAUSE OF ACTION
(Breach of Contract)

114. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

115. C&C LLC entered into a contractual agreement with J. Davis. J. Davis agreed in the contract to be responsible for the design of the project and for administering the construction of the project which is the subject of this action.

116. J. Davis agreed to perform its design work in a workmanlike manner and to provide plans and specifications suitable for the purpose of constructing a high-quality luxury condominium development.

117. The Plaintiff herein has alleged that the subject property was defectively designed and constructed, which C&C LLC denies, resulting in damages the Plaintiff has suffered including costs for repairs, as a result of negligence on the part of Defendants, including C&C LLC.

C&C LLC denies the allegations of the Complaint; however, in the event that the facts as alleged by the Plaintiff are substantiated, then J. Davis has breached its contract with C&C LLC and, therefore, is liable to C&C LLC for the actual, consequential and/or punitive damages proximately resulting there from, said damages to include the costs and attorney's fees associated with the defense of this action.

FIFTH CAUSE OF ACTION
(Negligence)

118. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

119. J. Davis undertook the responsibility for the design of the project and for administering the construction of the project which is the subject of this action. J. Davis acted in the capacity of a professional architect in the design and construction administration of the project.

120. J. Davis had a duty to perform its work in the design and construction administration of the project with the degree of care and expertise a reasonable professional architect in designing and constructing a high-quality luxury condominium development.

121. The Plaintiff herein has alleged that the subject property was defectively designed and constructed, which C&C LLC denies, resulting in damages the Plaintiff has suffered including costs for repairs, as a result of negligence on the part of Defendants, including C&C LLC.

C&C LLC denies the allegations of the Complaint; however, in the event that the facts as alleged by the Plaintiff are substantiated, then J. Davis has breached its duty of care and, therefore, is liable to C&C LLC for the actual, consequential and/or punitive damages

proximately resulting there from, said damages to include the costs and attorney's fees associated with the defense of this action.

SIXTH CAUSE OF ACTION
(Negligent Misrepresentation)

122. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

123. Throughout the course of its work in the design and construction administration of the project, J. Davis made several representations of material fact to C&C, LLC. Such representations include but are not limited to certifications for payment and field reports. J. Davis made several certifications for payment, up to and including the final certification for payment, each of which represented to C&C LLC that the work completed was of sufficient quality and in accordance with the plans and specifications. J. Davis provided C&C, LLC with written field reports which represented to C&C LLC that J. Davis had performed adequate inspections and supervision of the work on the project and that the work was of sufficient quality and in accordance with the plans and specifications.

124. J. Davis had a pecuniary interest in making these statements in that J. Davis was compensated for performing these services as part of its contract for construction administration.

125. J. Davis owed C&C LLC a duty of care to undertake sufficient observations, inspections, testing, and supervision to ensure that the information communicated to C&C LLC in the field reports and certifications for payment was truthful.

126. The Plaintiff herein has alleged that the subject property was defectively designed and constructed, which C&C LLC denies, resulting in damages the Plaintiff has suffered including costs for repairs, as a result of negligence on the part of Defendants, including C&C LLC.

127. C&C LLC denies the allegations of the Complaint; however, in the event that the facts as alleged by the Plaintiff are substantiated, then J. Davis has breached its duty by failing to

exercise due care in supervising, overseeing, directing, reviewing, and inspecting the construction of the subject property.

128. C&C LLC relied on J. Davis to provide accurate and truthful information as to the quality and sufficiency of the work on the project. J. Davis occupied a superior position as to C&C LLC with respect to knowledge of the quality and sufficiency of the work on the project because J. Davis visited the site frequently in order to observe the progress of the work, J. Davis was contractually empowered and obligated to supervise and inspect the work, and J. Davis possesses specialized experience and expertise with respect to construction projects.

129. C&C LLC has suffered pecuniary loss as a direct and proximate result of reliance on J. Davis' representations. Therefore, J. Davis is liable to C&C LLC for the actual, consequential and/or punitive damages proximately resulting there from, said damages to include the costs and attorney's fees associated with the defense of this action.

**FOR AN ADDITIONAL DEFENSE AND BY WAY OF CROSS CLAIM AGAINST
METRO WATERPROOFING, INC.**

FIRST CAUSE OF ACTION
(Breach of Contract)

130. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

131. Metro performed certain repairs to the windows and balconies at Concord and Cumberland and accepted payment from C&C LLC in consideration therefor.

132. Metro owed C&C LLC a contractual duty to perform its work in a manner free from defects in materials and workmanship.

133. The Plaintiff herein has alleged that the subject property was defectively designed and constructed, which C&C LLC denies, resulting in damages the Plaintiff has suffered including costs for repairs, as a result of negligence on the part of Defendants, including C&C LLC.

C&C LLC denies the allegations of the Second Amended Complaint; however, in the event that the facts as alleged by the Plaintiff are substantiated, then Metro has breached its contract with C&C LLC and, therefore, is liable to C&C LLC for the actual, consequential and/or punitive damages proximately resulting there from, said damages to include the costs and attorney's fees associated with the defense of this action.

SECOND CAUSE OF ACTION
(Breach of Implied Warranty)

134. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

135. Metro furnished labor and materials for the project, thereby impliedly warranting the work would be done in a good and workmanlike manner.

136. The Plaintiff herein has alleged that the subject property was defectively designed and constructed, which C&C LLC denies, resulting in damages the Plaintiff has suffered including costs for repairs, as a result of negligence on the part of Defendants, including C&C LLC.

C&C LLC denies the allegations of the Second Amended Complaint; however, in the event that the facts as alleged by the Plaintiff are substantiated, then Metro has breached its implied warranty of workmanlike service and as such, is liable to C&C LLC for the actual, consequential and/or punitive damages proximately resulting there from, said damages to include the costs and attorney's fees associated with the defense of this action.

THIRD CAUSE OF ACTION
(Breach of Express Warranty)

137. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

138. The agreement between Metro and C&C LLC contained various express warranties, including but not limited to warranting the work would be done in a good and workmanlike manner free of defect in materials and workmanship.

139. The Plaintiff herein has alleged that the subject property was defectively designed and constructed, which C&C LLC denies, resulting in damages the Plaintiff has suffered including costs for repairs, as a result of negligence on the part of Defendants, including C&C LLC.

C&C LLC denies the allegations of the Second Amended Complaint; however, in the event that the facts as alleged by the Plaintiff are substantiated, then Metro has breached its implied warranty of workmanlike service and as such, is liable to C&C LLC for the actual, consequential and/or punitive damages proximately resulting there from, said damages to include the costs and attorney's fees associated with the defense of this action.

**FOR AN ADDITIONAL DEFENSE AND BY WAY OF CROSS CLAIM AGAINST
WEATHER SHIELD MFG., INC., THE MUHLER COMPANY, INC., IN THE WIND,
INC., WALL CRAFT CONSTRUCTION, INC., WEATHERHOLTZ MASONRY, LLC,
COMPANION PROPERTY AND CASUALTY GROUP AND METRO
WATERPROOFING, INC.**

FIRST CAUSE OF ACTION
(Equitable Indemnity)

140. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

141. By virtue of the special relationship between C&C LLC and Weather Shield, Muhler, In The Wind, Wall Craft, Weatherholtz, Companion and Metro and the claims asserted by the Plaintiff against C&C LLC as a result of the contractor's and subcontractors' work, C&C LLC is entitled to equitable indemnity for losses, damages, and other harm that it incurs as a result of the claims and allegations of the Plaintiff, if substantiated, that relate to the Subcontractors and Supplier's respective scope of work and provision of materials.

142. C&C LLC is entitled to full common law indemnification from these Defendants for any liability, which is denied, C&C LLC is found to have to the Plaintiff in this action, including all settlements, judgments, costs, attorney's fees or other monies expended in connection with

this action, as the same relate to the work, wrongful acts, omissions, negligence and/or representations of these Defendants.

SECOND CAUSE OF ACTION
(Contribution)

143. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

144. To the extent that Plaintiff prevails on any of his claims against C&C LLC, C&C LLC is entitled to contribution from Weather Shield, Muhler, In The Wind, Wall Craft, Weatherholtz, Companion and Metro.

FOR AN ADDITIONAL DEFENSE AND BY WAY OF CROSS CLAIM AGAINST
WEATHER SHIELD MFG., INC., THE MUHLER COMPANY, INC. AND
COMPANION PROPERTY AND CASUALTY GROUP
(Contractual Indemnity)

145. C&C incorporates its previous paragraphs as if repeated herein verbatim.

146. To the extent that Plaintiff's allegations are true, which is specifically denied, C&C LLC is entitled by contractual provisions to be fully indemnified by Superior, Weather Shield, Muhler, J. Davis, Safeco and Companion for any and all amounts awarded as a result of settlement or judgment, along with costs and attorney's fees associated with the defense of this action.

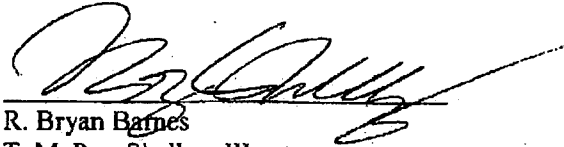
WHEREFORE, Concord & Cumberland, LLC, having responded to the Complaint and asserting its Cross Claims, prays that the Court:

1. Dismiss all claims against C&C LLC and tax the costs thereof to the Plaintiff;
2. Award C&C LLC the relief sought in its Cross Claims, including, but not limited to, judgment against the Cross-Claimants in the amount of any liability C&C LLC may be found to have to Plaintiff in this action, including attorneys' fee and costs;
3. Award C&C LLC judgment requiring the Cross-Claimants to defend and indemnify C&C LLC against any liability that C&C LLC may have to the

Plaintiff, and

4. For such other and further relief as this Court may deem just and proper.

ROGERS TOWNSEND & THOMAS, PC



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Columbia, South Carolina 29202-3200
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roy.shelley@rtt-law.com
Direct: 803-744-1818
**ATTORNEYS FOR DEFENDANT
CONCORD & CUMBERLAND, LLC**

Columbia, South Carolina
June 18, 2012

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
CONCORD & CUMBERLAND
HORIZONTAL PROPERTY REGIME,
LLC

Plaintiff,

vs.

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 COMPANY, 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.,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2010-CP-10-2271

**THE MUHLER COMPANY, INC.'S
ANSWER AND REPLY TO SUPERIOR
CONSTRUCTION CORPORATION'S
CROSS-CLAIMS AGAINST THE
MUHLER COMPANY, INC. AS SET
FORTH IN SUPERIOR
CONSTRUCTION'S ANSWER TO
PLAINTIFF'S AMENDED
COMPLAINT**

BY



JULIE J. ARMSTRONG
CLERK OF COURT

2012 AUG 22 PM 4:08

FILED

Defendant, The Muhler Company, Inc. hereinafter ("Defendant"), answering the Cross-Claims of Superior Construction Corporation hereinafter ("Superior") as set forth in Superior's

Answer to the Amended Complaint and Cross-Claims ("Cross-Claims") respectfully shows the Court the following:

FOR A FIRST DEFENSE

1. This Defendant denies each and every allegation of the Cross-Claims that is not specifically and unconditionally admitted hereinafter:

FOR A SECOND DEFENSE

2. The allegations as contained in paragraphs 1 through 58 of Superior's Cross-Claims relate to Superior's Answer to the Amended Complaint and no response is required.

FOR A THIRD DEFENSE AND ANSWER TO CROSS-CLAIMS

3. The allegations of Paragraph 59 do not concern this Defendant and no response is required.

4. In response to Paragraph 60 of the Cross-Claims, this Defendant admits the allegations of the first sentence of the Paragraph. In response to the second sentence, this Defendant admits it performed installation of windows and doors but craves reference to the project documents for a complete and accurate record of the scope of that work and denies the scope of work alleged in this Paragraph. In response to the third sentence of Paragraph 60, this Defendant craves reference to the documents that create a performance bond and deny any allegations that is inconsistent therewith.

5. The allegation of Paragraphs 61, 62 and 63 do not concern this Defendant and no response is expected.

6. In response to Paragraph 64 of the Cross-Claims, this Defendant denies that In The Wind performed all of the window installation for the original construction of the Subject

Property and craves reference to the project documents for a complete and accurate recall for the scope of work performed by Muhler and the other contractors and sub-contractors.

7. The allegations of Paragraphs 65 through 73 of the Cross-Claims, do not concern this Defendant and no response is required.

8. This Defendant admits the allegation of Paragraph 74, but craves reference to the project documents for a complete and accurate record of the scope of work performed by Watts.

9. The allegation of Paragraph 75 does not concern this Defendant and no response is required.

10. The allegation of Paragraph 76 does not concern this Defendant and no response is required.

11. In response to Paragraph 77 of the Cross-Claims, this Defendant admits the allegations of the first sentence but craves reference to the pleadings for an accurate record. This Defendant denies the allegations of the second sentence of Paragraph 77.

ANSWERING THE FIRST CAUSE OF ACTION
(Contractual Indemnity as to Subcontractors and Suppliers)

12. This Defendant denies the allegations of Paragraph 78 of the Cross-Claims.

ANSWERING THE SECOND CAUSE OF ACTION
(Equitable Indemnity as to Subcontractors and Suppliers)

13. This Defendant denies the allegations of Paragraph 79 of the Cross-Claims.

ANSWERING THE THIRD CAUSE OF ACTION
(Breach of Contract as to Subcontractors and Suppliers To Include Performance Bond Claims)

14. This Defendant denies the allegations of Paragraph 80 of the Cross-Claims.

ANSWERING THE FOURTH CAUSE OF ACTION

(Breach of Express and Implied Warranties as to Suppliers & Subcontractors, and Second Tier Subcontractors)

15. This Defendant denies the allegations of Paragraph 81 of the Cross-Claims.

ANSWERING THE FIFTH CAUSE OF ACTION

(Negligence as to Second Tier Subcontractors)

16. The allegations of Paragraph 82 of the Cross-Claims, do not concern this Defendant and no response is required.

ANSWERING THE SIXTH CAUSE OF ACTION

(Breach of Implied Warranty of Sufficiency of Plans and Specifications)

17. The allegations of paragraph 83 through 87 do not concern this defendant and no response is required.

FOR A FOURTH DEFENSE

18. Muhler hereby incorporates by reference all the cross-claims alleged by Muhler against Superior that are contained in Muhler's Answer to the Complaint.

AS A FIFTH DEFENSE AND AS AN AFFIRMATIVE DEFENSE

19. Superior's claims against this Defendant are barred by the doctrine of waiver and estoppel.

FOR A SIXTH DEFENSE

20. If this Defendant acted or failed to act as alleged in the Complaint, which is specifically denied, there were separate and intervening acts or failure to act on the part of persons or entities other than this Defendant which are the sole and proximate cause of Superior's damages and serve as a complete bar to any recovery against this Defendant.

FOR A SEVENTH DEFENSE

21. Superior's claims against this Defendant are barred or must be reduced because

even if this Defendant were negligent, grossly negligent, reckless and willful as alleged, which is specifically denied, any negligence, gross negligence, recklessness and willfulness by this Defendant must be measured against the negligence, gross negligence, recklessness, wantonness, willfulness of one or more of the entities other than this Defendant to include Superior, over whom this Defendant had no control, in failing or refusing to exercise reasonable care in the design, development and construction of the project.

FOR AN EIGHTH DEFENSE

22. This Defendant reserves all rights it may have to demand binding arbitration.

FOR A NINTH DEFENSE

23. This Defendant would allege that Superior has failed to state a claim sufficient to constitute a cause of action against this Defendant upon which relief can be granted, and therefore, Superior's Cross-Claims should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A TENTH DEFENSE

24. Superior has failed to mitigate his damages as required by law.

FOR AN ELEVENTH DEFENSE

25. This Defendant would allege that Superior's Cross-Claims are barred by the doctrine of waiver and/or laches.

FOR A TWELTH DEFENSE

26. Superior's claims are barred by applicable statute of limitations or statute of repose.

FOR A THIRTEENTH DEFENSE

27. These claims are barred in whole or in part by the doctrine of unclean hands.

FOR A FOURTEENTH DEFENSE

28. This Defendant would allege that any injury and damage sustained by Superior was due to and caused by the sole and negligent acts or omissions of some person or persons other than this Defendant, and over whom this Defendant exercised no authority or control and for that reason, this Defendant is not liable to Superior in any sum whatsoever.

FOR A FIFTEENTH DEFENSE

29. This Defendant would show that Superior and/or his agents inspected, approved and ratified all work performed by this Defendant. Furthermore, Superior knew or should have known if any of this Defendant's work was not in accordance with the plans and specifications and in a workmanlike manner. Accordingly, this Defendant pleads the applicable statute of limitations or statutes of repose as a complete bar to all of Superior's claims.

FOR A SIXTEENTH DEFENSE

30. Any express warranty allegedly provided by this Defendant has expired.

FOR A SEVENTEENTH DEFENSE

31. This Defendant would show the materials and workmanship of this Defendant at all times and in all manners met applicable plans, specifications, building code requirements, and industry standards and that this Defendant are, therefore, not liable to Superior in any sum whatsoever.

FOR AN EITHTTEENTH DEFENSE

32. Superior's damages, if any, are the direct and proximate result of intervening and superseding acts of third parties not affiliated with this Defendant and not under this Defendant's domain or control.

FOR A NINTHTEENTH DEFENSE

33. Superior may have failed to join a party necessary to this litigation as required by Rule 19, SCRCP, and Superior's Cross-Claims should be dismissed pursuant to Rule 12(b)(7), SCRCP.

FOR A TWENTIETH DEFENSE

34. Superior's Cross-Claims are barred to the extent that Superior and/or Superior's members and agents discovered, or should have discovered, or were aware of any defects and nevertheless unreasonably proceeded to pay for this Defendant's services.

FOR A TWENTY-FIRST DEFENSE

35. Any damages suffered by Superior are the direct and proximate result of his comparative and contributory negligence and Superior's recovery should be barred or, alternatively, reduced proportionately to Superior's comparative negligence or others unrelated and not under the control of this Defendant.

FOR A TWENTY-SECOND DEFENSE

36. That even if Superior was damaged as alleged, which is denied, the claims are barred pursuant to the doctrine of spoliation.

FOR A TWENTY-THIRD DEFENSE

37. This Defendant alleges Superior failed and refused to comply with the contractual conditions precedent to this action, including but not limited to, timely written notice and detailed statements of the amounts claimed, thereby extinguishing the right to maintain the action herein.

FOR A TWENTY-FOURTH DEFENSE

38. Superior's claims are barred to the extent that Superior or Superior's members

and agents discovered, or should have discovered, or were aware of any defects and failed to allow this Defendant an opportunity to investigate and cure any alleged defect.

39. This Defendant would show the claim of Superior for punitive damages against this Defendant cannot be sustained, because any award of punitive damages under South Carolina law by a jury that (1) is not provided standards of sufficient clarity for determining the appropriateness, and the appropriate size, of the punitive damages award, (2) is not adequately instructed on the limits of punitive damages imposed by the applicable principles of deterrence and punishment, (3) is not expressly prohibited from awarding punitive damages, or determining the amount of an award of punitive damages, in whole or in part, on the basis of invidiously discriminatory characteristics, including the resident, wealth, and corporate status of Defendant, (4) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes punitive damages permissible, and (5) is not subject to trial court and appellate judicial review for reasonableness and furtherance of legitimate purposes on the basis of objective standards, would violate Defendant's due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the South Carolina constitutional provisions providing for due process and equal protection, and would be improper under the common law and public policies of the State of South Carolina.

FOR A TWENTY-FIFTH DEFENSE

40. Punitive damages are inappropriate in this case since this Defendant did not engage in any malicious, reckless, wrongful or intentional conduct upon which an award of punitive damages would be based.

FOR A TWENTY-SIXTH DEFENSE

41. Superior's claims against this Defendant are barred to the extent they seek to recover a tort for purely economic loss.

FOR A TWENTY-SEVENTH DEFENSE

42. Superior cannot recover under the theory of an implied warranty because all implied warranties have been explicitly disclaimed by this Defendant.

FOR A TWENTY-EIGHTH DEFENSE

43. If this Court finds that an express warranty was given by this Defendant, which it denies, Superior's remedy must be limited to the remedies available under the warranty as its sole and exclusive remedy.

FOR A TWENTY-NINTH DEFENSE

44. This Defendant would allege and show that it has substantially performed all requirements, contractual or otherwise, in a reasonable manner.

FOR A THIRTIETH DEFENSE

45. Any injuries and damages sustained by Superior may have been the result of the misuse and/or abuse of the product in question. Additionally, Superior and/or other parties may have failed to use the product properly and may have abused the product and subjected it to abnormal use at the time or times and places alleged in the Complaint. Further, the product may have been used and handled contrary to the normal method of using the same, which was well known or ought to have been well known to Superiors and/or other parties.

FOR A THIRTY-FIRST DEFENSE

46. Assuming that this Defendant manufactured the product in question, which is denied at this time, if, after the product left the possession of this Defendant, and without this

Defendant's knowledge or approval, the product was modified or altered or subjected to treatment that substantially changed its character and condition, then the alleged defect, as set forth in the Complaint, resulted from the modification, alteration, or treatment or other change of the product after this Defendant relinquished possession and control over it and not from any act or omission of this Defendant.

FOR A THIRTY-SECOND DEFENSE

47. Superior's Cross-Claims are barred, in whole or in part, by the doctrine(s) contained in Restatement (Fourth) of Torts §402(a), Comment k.

FOR A THIRTY-THIRD DEFENSE

48. This Defendant would allege and show that the Complaint is barred pursuant to S.C. Code Ann. §15-73-20.

FOR A THIRTY-FOURTH DEFENSE

49. On information and belief, any and all alleged warranties were effectively excluded, modified and/or disclaimed.

FOR A THIRTY-FIFTH DEFENSE

50. This Defendant would allege and show that they made no warranties of any kind, express or implied, or any representation of any nature to Superior, and such constitutes a complete defense to Superior's Cross-Claims.

FOR A THIRTY-SIXTH DEFENSE

51. If this Defendant made any warranties to Superior, which is denied, Superior's claims for breach of warranties are barred because Superior did not rely on any warranties allegedly made by this Defendant.

FOR A THIRTY-SEVENTH DEFENSE

52. This Defendant pleads the state-of-the-art doctrine as a complete defense to Superior's Complaint.

FOR A THIRTY-EIGHTH DEFENSE

53. That all claims against this Defendant based upon warranty or the Uniform Commercial Code are barred because, among other considerations, the transaction at issue is a contract for services rather than goods; and the product supplied by this Defendant, once installed as improvement to the property, ceased to be goods.

FOR A THIRTY-NINTH DEFENSE

54. That this Defendant is entitled to a set-off for damages collected by Plaintiff for joint tortfeasors.

FOR A FOURTIEITH DEFENSE

55. This Defendant hereby gives notice that they intend to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserve the right to amend its Answer to assert any such defenses.

WHEREFORE, having fully answered the Answer and Cross-Claim by Superior Construction Corporation, Defendant, The Muhler Company, Inc. prays that the Cross-Claims be dismissed and that it be awarded attorney's fees, costs and any other remedy that is just and appropriate, as determined by the Court.

MCANGUS GOUDELOCK & COURJE, LLC



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

ATTORNEYS FOR DEFENDANT, THE
MUHLER COMPANY, INC.

August 20, 2012

FILED

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

2014 MAY 16 PM 2:40

COUNTY OF CHARLESTON

JULIE J. ARMSTRONG
CLERK OF COURT

Concord and Cumberland Horizontal Property
Regime,

CIVIL ACTION NO: 2010-CP-10-2271

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.,

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

CIVIL ACTION NO: 2011-CP-10-8550

CIVIL ACTION NO: 2011-CP-10-8551

CIVIL ACTION NO: 2011-CP-10-8549

CIVIL ACTION NO: 2011-CP-10-4663

CIVIL ACTION NO: 2011-CP-10-9585

CIVIL ACTION NO: 2011-CP-10-4608

Superior Construction Corporation's
Memorandum of Law
In Support of Its
Motion For Partial Summary Judgment
Against
THE MUHLER COMPANY, 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.

**TO: GUNNER NISTAD, ESQUIRE ATTORNEY FOR DEFENDANT THE MUHLER
COMPANY INC.:**

Superior Construction Corporation ("Superior") provides this Memorandum of Law in support of its motion for Partial Summary Judgment Against the Muhler Company Inc.

Superior moves for Partial Summary Judgment against The Muhler Company, Inc. on the grounds that it is entitled to a reimbursement of amounts paid in settlement and its costs and attorneys fees pursuant to Superior's claim of contractual indemnity. Superior's present motion does not extend to its ongoing defense costs related to the presently unsettled cross claims of Concord and Cumberland, LLC, which include, enter alia, their claims of contractual indemnity that relate to the windows and doors. Superior petitions the Court to declare The Muhler Company Inc. liable to Superior under contractual indemnity, with a damages hearing thereafter.

I. Statement of Undisputed Facts

Superior Construction served as the General Contractor for the construction of the building shell of Concord and Cumberland Condominiums (The Subject Property), located in the French Quarter district of downtown Charleston, South Carolina. The Developer or Owner of this project was Concord & Cumberland, LLC, an affiliate of Estates, Inc. Once the building shell was finished, the Developer sold the individual condominium units at the Subject Property to individual purchasers, who would then be responsible for "up-fitting" or completing the interiors of their condominium units to their desired finished condition.

The Muhler Company, Inc. ("Muhler") served as a subcontractor to Superior for the provision and installation of the windows and exterior doors, including the supply and installation of all related caulking and sealants. All of the installation work was performed in the field by subcontractors of Muhler, namely Watts Builders, Inc. and In The Wind, Inc. Weather Shield MFG, Inc. manufactured the windows and exterior doors. Muhler was a certified dealer of Weather Shield products and served as a liason between the Owner and Architect of the project, and Weather Shield generated the shop drawings for the installation of the windows and doors. Initially, Superior construction was directly responsible for preparing the window rough opening to receive the window installation; generally speaking this entailed wrapping the window rough opening with a vapor barrier, installing a metal pan at the sill of the rough opening, and then installing wooden "bucks" around the perimeter of the rough opening. Superior would later subcontract this work to Watts Builders, Inc.

The subcontract (which is an American General Contractors' Association form 600 contract) between Superior and Muhler for the windows and exterior doors is attached hereto as Exhibit A. At Article 12.1, the subcontract provides as follows:

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 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 Subcontract's Work provided that:

(a) any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease, or death, or 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.

See Subcontract for Building Construction, AGC form 600 attached hereto as exhibit 1[emphasis added]. Excluded from the obligation of indemnity is any liability of the Architect for the preparation of the drawings, plans and specifications, or the failure of the Architect to give directions or instructions by the Architect, provided such failure is the primary cause of damage or injury. See Article 12.3 of the Subcontract. Exhibit A, of the contract, at page 6 of 7 also provides:

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.

See Exhibit 1, Subcontract for Building Construction, Exhibit A.

The installation of the windows and doors commenced (approximately) in the last week of February 2007. The following month, the windows were water tested by a third party consultant hired by the Owner called Sutton Kennerly and Associates (SKA), which produced failing results. However, it has since been conceded by both Superior and Muhler that the initial battery of six tests by SKA was performed incorrectly, primarily due to an excessive amount of water pressure applied by SKA. Later tests performed by SKA in the latter half of March 2007 were within accepted industry parameters, but still produced failing results. Thereafter, an independent certified window testing company called Architectural Testing, Inc. (ATI) conducted additional window water tests; this company was specifically selected by Muhler and Weather Shield. See Rule 30(b)6 Deposition of The Muhler Company Inc. by Ronald Sykora, p. 148, line 16 through p. 149, line 13.

ATI conducted water infiltration tests from April through early June 2007. Initially, the tests produced failing results, but after some remedial work performed by Muhler and Weather Shield, several batteries of passing tests were achieved in the last week of May 2007 and the first two weeks of June thereafter. It was during this time that the personal Counsel for Weather Shield, Superior, and the Muhler Company began collectively negotiating and drafting a legal agreement governing various issues related to the performance capabilities of the windows, warranty issues, payment issues, and addressing contingencies in the event of future claims by condominium unit purchasers, among other items.

On June 14, 2007, the Architect issued a letter to Superior Construction noting the recent series of passing window water tests in accordance with the prescribed testing method. The Architect declared that the windows could perform to the design intent and were acceptable

subject to further review and testing as the work progressed. See Exhibit 2, Letter of June 14, 2007.

Superior, Muhler and Weather Shield finalized the legal agreement, which is referred to as the "June 2007 Agreement" and is attached hereto as Exhibit 3. [Technically, Muhler did not execute and deliver the Agreement until August 31, 2007, but that has no bearing upon the motion at hand.] At Paragraph 11 of the Agreement, the instrument 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 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 [sic] including, but not limited to costs and attorneys' fees, any remedial costs of expert witnesses, cost of arbitration and all other damages incurred.

At paragraph 13 of the Agreement, the instrument provides:

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.

In Paragraphs twenty through twenty-four of the Agreement, the instrument provides:

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 an 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 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.

June 2007 Agreement, Exhibit 3. Additionally, nowhere in the Agreement did Superior relinquish its right to settle any claims asserted against it by third parties.

Less than one month after Muhler delivered their executed signature page to the Agreement on August 31, 2007, new leak events were reported by the Owner related to the windows and doors. From that point forward, over a period of two- and- a- half years before the Plaintiff Concord and Cumberland Horizontal Property regime filed the first of the fifteen above-captioned lawsuits in April 2010, there were approximately thirty- five separate instances of reported window and/or exterior door leaks by natural weather events or via formal testing protocol, and in almost every instance reported, the leaks encompassed multiple window or door units in multiple separate condominium units (see below for discussion of the details of these events). Superior would ultimately become a defendant in each of the fifteen lawsuits in this consolidated action, each of said Plaintiffs alleging, *inter alia*, that the windows and doors of the Subject Property were improperly or negligently manufactured and installed in violation of accepted industry practices, manufacturer's installation instructions and the building code, resulting in damage to personal property of the individual unit owners, and other portions of the common elements and limited common elements of the Subject Property. See Paragraphs 45 through 54 of Amended Complaint of Plaintiff Concord and Cumberland Horizontal Property Regime, filed June 1, 2012. [The remaining fourteen above-captioned individual unit owner

lawsuits consolidated herein alleged substantially identical conditions.] The Plaintiffs further alleged loss of use and diminution of the value of their property as a result of the alleged deficiencies with the doors and windows.

In the course of litigation, Superior thoroughly investigated the allegations of the Plaintiffs related to the windows and doors and vigorously defended itself. Superior served repeated demands upon Muhler and Weather Shield to either assume the defense of Superior or contribute to its costs of defense; all such demands were flatly rejected. After four and a half years of litigation, with extremely extensive discovery involving over a half million pages of document production, over forty depositions and three mediations, on April 25, 2013 Superior elected to settle all of the Plaintiffs' claims related to or arising from the windows and exterior doors, including all loss of use and diminution of value claims, increased assessments levied on unit owners, and claims for resulting property damage, for the sum of Seven Hundred and Seventy-Five Thousand Dollars (\$775,000.00). See Exhibit 4, "Partial Settlement and Release By and Between All Plaintiffs and Superior Construction Company and Safeco Insurance Company. [Superior also entered into other carve-out settlements for claims related to other scope of work outside of the windows and doors, which are not subject to the present motion and will not be sought against Muhler and Weather Shield.]. Leading up to the settlement, Superior separately incurred over five hundred thousand dollars (\$500,000.00) in legal fees and expenses that are affiliated with its defense of the window and door claims, over one hundred thousand dollars (\$100,000.00) in expert witness fees that directly relate to the Plaintiffs' window and door claims, and over thirty thousand dollars (\$30,000.00) in court reporter fees. While Superior seeks to have the final determination of its damages award in a damages hearing, the amount of Superior's damages for the settlement of the window and door claims, and all associated defense

costs and legal expenses leading up to the settlement of said claim is approximately 1.4 million dollars¹.

II. Legal Argument

a. Summary Judgment Standard

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Keith v. River Consulting, Inc., 365 S.C. 500, 504-505, 618 S.E.2d 302, 304, George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Keith, at 504, *citing* Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. Keith, at 504, *citing* Sauner v. Pub. Serv. Auth., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Even if there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Keith, at 504, *citing* Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law. Keith, at 504, *citing* Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). However, a cause of action of contractual indemnity is a narrow exception to the scintilla rule of evidence that precludes summary judgment, as least as to liability, as explained

¹ Furthermore, as of the date of this Memorandum, Superior has still been unable to settle with the Developer, Concord & Cumberland, LLC for its claims of contractual indemnity, which include, *enter alia*, the sums the Developer paid to Plaintiffs to settle their window claims against the Developer. Whereas these claims are still pending, Superior reserves the right to amend the scope of its damages sought via this Motion, since the underlying legal and factual support for such claim is essentially identical to circumstances of Superior's settlement with the Plaintiffs.

below by Griffen v. Van Norman 302 S.C. 520, 523, 397 S.E.2d 378 (Ct. App. 1990). Instead, it is a three-pronged test of reasonableness that is required for recovery.

b. Contractual Indemnity- General

Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. Campbell v. Beacon Mfg. Co. Inc., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct.App.1993), *citing* Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 398 S.E.2d 500 (Ct.App.1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992). South Carolina law also recognizes a broader form of indemnity arising from certain contingencies between two parties- a contractual allocation of responsibility for certain risks or contingencies- but the agreement in question must explicitly state such an intention. *See* Laurens Emergency Medical Specialist, P.A. v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375. A right of indemnity may arise by contract (express or implied) or by operation of law as a matter of equity. Campbell, at 453. Superior's claim of contractual indemnity resides entirely in contract. A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally. Campbell, at 453, *citing* Federal Pacific Electric v. Carolina Production Enterprises, 298 S.C. 23, 378 S.E.2d 56 (Ct.App.1989). Generally, an action to construe a contract is one at law. Sherlock Homes Pub. Inc. v. City of Columbia, 389 S.C. 77, 81, 697 S.E.2d 619, 621 (Ct. App. 2010). "In other words, it involves a question of interpreting the contract. We must look to the language of the contract, and if it is unambiguous, the language alone determines the force and effect of the agreement." Campbell, at 453, *citing* American Bankers Life Assurance Co. v. Frederick, 315 S.C. 97, 431 S.E.2d 636 (Ct.App.1993). While South Carolina law has developed a level of public policy to protect individual consumers from

unconscionable, oppressive contracts with sophisticated commercial entities (for example, *See Simpson v. MSA of Myrtle Beach, Inc.* 373 S.C.14, 644 S.E.2d 663), our Courts have generally not intruded upon the enforcement of unambiguous contractual terms between two sophisticated commercial entities, or the internal business affairs of a commercial entity. A cornerstone opinion in this regard is *McPherson v. J.E. Sirrine & Co.*, 206 S.C.183, 33 S.E.2d 501:

The guiding legal principles that render the applicable provision of the contract in this case binding upon the respondent, without regard to any hardship or injustice or oppression that it is claimed resulted therefrom, are thus stated in 17 C.J.S., Contracts, § 296, pp. 702-707:

'It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, and, in the absence of any ground for denying enforcement, to enforcing or giving effect to the contract as made, that is, to enforce or give effect to the contract as made without regard to its wisdom or folly, to the apparent unreasonableness of the terms, or to the fact that the rights of the parties are not carefully guarded, as the court cannot supply material stipulations or read into the contract words which it does not contain so as to change the meaning of words contained in the contract.'

As stated in 12 Am.Jur. 928:

'Parties sui juris bind themselves by their lawful contracts, and Courts cannot alter them because they work a hardship. The rights of the parties must be measured by the contract which they themselves made.'

McPherson, at 206-207.

c. Contractual Indemnity- Griffen Elements

Whereas Superior has settled the claims of the Plaintiffs related to the windows and doors, it is unnecessary to conduct a trial of the underlying claims related to Muhler's scope of

work. In accordance with Griffen v. Van Norman 302 S.C. 520, 523, 397 S.E.2d 378 (Ct. App. 1990), Superior has satisfied the elements at law to enforce its right of indemnity, and the Court need only address the final determination of the proper amount of damages. Under the elements cited by Griffen, Superior is entitled to indemnity (1) if the settlement is bona fide, with no fraud or collusion by the parties; (2) if, in the circumstances, the decision to settle is a reasonable means of protecting the innocent party's interest; and (3) if the amount of the settlement is reasonable in light of the third party's estimated damages and the risk and extent of defendant's exposure if the case is tried. Griffen, at 523. Superior, as an indemnitee under the present circumstances, "[i]s not required to prove the Plaintiff's actual ability to recover the amount paid in settlement so long as the indemnitee proves that he was potentially liable to the plaintiff."

Otis Elevator, Inc. v. Hardin Construction Co. Group, Inc. 316 S.C.292, 297, 450 S.E.2d 41, 44.

It should be noted that Griffen elements above made reference to an "innocent party" – which might lead one to conclude that a indemnitee with concurrent negligence could not fulfill the Griffen elements, however Griffen was a case involving a claim of equitable indemnity, which requires a showing of "clean hands" as a element of the cause of action. While South Carolina law forbids a party to be indemnified for its sole negligence, it will permit contractual indemnification for a party who is negligent in a contributory or concurrent manner, so long as the written terms of the indemnity agreement make this condition clear. "Indeed, most courts agree with the basic rule that 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." Federal Pacific Electric v. Carolina Production Enterprises, 298 S.C. 23, 26, 378 S.E.2d 56, 57, (Ct.App. 1989) citing University Plaza Shopping Center, Inc. v. Stewart, 272 So.2d 507 (Fla.1973) and Cox v. E.I. Du Pont de Nemours and Company, 39

F.R.D. 47 (W.D.S.C.1965). There is no reason why, once standing is established under the contractual indemnity standard or the equitable indemnity standard, that Griffen would not apply as to the enforcement of contractual indemnity for a settled claim. In fact, Otis Elevator, which is a case involving contractual indemnity claim, cites the Griffen factors in its analysis that allowed Otis Elevator to recover on a claim that it settled. Furthermore, Superior contends that the issue of contributory negligence is not even relevant in the instant case against with Muhler for two reasons. First, the aforementioned subcontract allows indemnity notwithstanding any concurrent negligence of a party to be indemnified. See Article 12.1 of Exhibit 1, *supra*. Secondly, the June 2007 agreement does not predicate Muhler's obligation to indemnify upon any finding of negligence, but instead Superior's right to indemnity is triggered when Superior has been subjected to legal action that raises the mere *allegation* of the windows being defective or in non-compliance with the contract documents. See Exhibit 3, June 2007 Agreement, at Paragraph 11, *supra*.

i. First Griffen Element

As to the first element of Griffen, a bona fide settlement with no fraud or collusion by the parties, Superior faces no hurdle. There is no evidence whatsoever that Superior's settlement with all Plaintiffs for their window and door claims was the result of any fraud or collusion. Superior has paid the full amount of the settlement in accordance with the terms of an arm's-length negotiation by the undersigned counsel and counsel for the Plaintiffs. There has been no allegation whatsoever by The Muhler Company that Superior's settlement is not bona fide or the result of fraud or collusion.

ii. Second Griffen Element

As to the second element of Griffen, under the circumstances of the present case, Superior's decision to settle was certainly reasonable to protect its interests in light of the sheer mountain of evidence that the course of approximately four years of discovery uncovered regarding the consistent failure of the windows and exterior doors to perform in accordance with the requirements of the contract documents, the applicable building code, and relevant industry standards. Probably the best starting point in the analysis of this element is the testimony of Plaintiffs' expert Christine Quigley, PE, of Stafford Consulting Engineers, who was tasked to comprehensively examine the whole record of all known expert testing of the windows at the Subject Property, spanning a period of over five years beginning at the time of installation in 2007 up until the last testing conducted in February of 2012. See Report of Stafford Consulting Engineers, dated October 3, 2012, attached hereto as Exhibit 5. In essence, Christine Quigley cites a total of seventy-seven tests on a total of at least twenty-one window and door specimens, over a period of five years by three different independent testing agencies (Sutton-Kennerly & Associates, Architectural Testing, Inc., and Stafford Consulting Engineers) of which sixty tests produced failing results. See the "Discussion" section of Exhibit 5, at pages 7-8. These tests were conducted in general conformance with the relevant standards of the American Society of Testing and Materials (ASTM) and the American Architectural Manufacturer's Association (AAMA). Based upon the totality of the evidence, she concluded that all of the windows must be removed and replaced. Deposition of Christine Quigley, PE, Vol. 2, pp. 139- 141. The reason for this conclusion was that the windows themselves leak, and that they were observed to not be installed in accordance with the contract documents:

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25 Q. Okay. Your opinion that all windows

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1 must be removed and replaced is based on what?

2 A. Um, several things, the first being the
3 amount of windows that have been tested and have
4 failed. And that's based on the window units
5 themselves, not perimeter leakage.

6 The second is that the windows are not
7 installed in accordance with the contract documents
8 and the specifications --

9 Q. Okay.

10 A. -- and/or the specifications.

11 The third is that they are installed
12 with numerous deficiencies, as far as the
13 installation. They're not attached to the rough
14 openings correctly. The windows are installed to
15 various conditions, out of plumb, out of square,
16 bowed in some conditions.

17 The fasteners that were installed at
18 the jambs and the head, where they were
19 installed -- and there were numerous occasions
20 where the fasteners were not installed, or they
21 were installed at the incorrect spacing, and they
22 were not shimmed in a lot of locations, per the
23 requirements.

24 The sealant, in numerous locations, is
25 not installed in accordance with the installation

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1 instructions.

2 The sashes are not installed square.

3 There have been -- I think there was
4 one test report where approximately 20 repairs were
5 made to a window, and the five tests that were
6 performed on the window, it still failed.

7 So I think there have been a lot of
8 attempts at repair of these windows to get them to
9 perform, which have been unsuccessful.

10 And, again, additionally, the windows
11 do not meet the certification that they are
12 required to meet to meet the building code and the
13 contract documents.

Id., at p. 180, line 25 through p. 183, line 13. Mrs. Quigley further elaborates as follows:

13 Q. Any other opinions that you feel you're
14 in a position to offer to a reasonable degree of

15 engineering certainty, most probably, regarding the
16 windows or doors at the project?

17 A. Well, several of the things that we
18 identified in our investigation is that the
19 doors -- or the units are installed out of square,
20 they are bowed at the jambs, they are not fastened
21 correctly from the window frame to the rough
22 opening. They're not shimmed. They are not level.
23 And I'm just summarizing. They leak. They leak in
24 numerous places. The spacing between the
25 window -- the installed window and the rough

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1 opening -- does not meet the manufacturer
2 requirements.

3 The sealant, where we observed, was not
4 installed in the correct location, between the
5 nailing fin and the substrate.

6 I've seen pictures -- limited -- that
7 the nailing fins may not be fastened in accordance
8 with the requirements --

9 Q. What requirements?

10 A. Manufacturing requirements.

11 Q. Okay.

12 A. -- as well as, subsequent to our
13 report, reading or looking at defects in the
14 windows related to fasteners not installed
15 correctly, the question of the correct application
16 of the Sikaflex between the glazing and the frame,
17 or the sash.

18 Apparently, the incorrect hardware
19 installed. And I would have to go back and kind of
20 re-read some of that, but the wrong hardware was
21 installed.

22 Did I say they leak?

23 Q. Yes, you said that.

24 A. And consistently leak.

Id., at p. 144, line 13 through p. 145, line 24.

Quigley also observed deterioration around the perimeters of the windows. Id. at p. 203, lines 14-15. She further elaborates that the installation deficiencies noted above are also a cause of the window leakage, as well as a lack of a watertight seal between the sashes and frames. Id.

at p. 224, line 17 through p. 226, line 10. She testified that the "big thing is that the windows don't perform to the required design pressures that were specified and that the windows were certified to." Id. at p.146, lines 2-10.

In addition to the formal testing, discovery of the case revealed numerous instances of water intrusion through and around the windows in connection with natural weather events, none of which have been documented to be at conditions that exceeded the design specifications of the window products per the manufacturer's product literature, or more importantly, the performance criteria of the applicable building code. The evidence of these leaks is in the form of both deposition testimony and the extensive document production of the parties.

The following witnesses testified as to naturally occurring window and/or door leaks (i.e., not in connection with testing) or other problems with the operation of the windows that they observed in condominium units or elsewhere in the Subject Property:

1. Plaintiff Betty Segal, owner of Unit 401.

- a. Experienced water intrusion around and through the windows of her library, the transom windows of living room, and exterior door in the kitchen.

Deposition of Betty Segal, Vol. 1, pp. 70-76

2. Plaintiff Fred Rappaport, co-owner owner of Unit 306.

- a. Experienced issues with water intrusion and air infiltration at the head of the front windows in the living room and back bedroom window. Deposition of Fred Rappaport, Vol. I, pp.61, 74-77.

3. Plaintiff Joyce Rappaport, co-owner of Unit 306.

- a. Experienced issues with water intrusion at the front windows in the living room and back bedroom window. Deposition of Joyce Rappaport, p.29, line 6-8, 16-18.

4. Plaintiff James Kirkpatrick, owner of Unit 206.

- a. Experienced leaks at the front bedroom windows which damaged the hardwood floors shortly after completing the upfit of his unit. Deposition of James Kirkpatrick, pp. 42-45.
 - b. Experienced leaks at his balcony windows during "the first big storm" that occurred after completing his upfit, although he believed that the windows were later fixed. *Id.*, p.55, l. 14 to p. 56 l. 1.
5. Paul Brim, Owner of unit 205.
 - a. Experienced water intrusion at living room windows. Deposition of Paul Brim, p. 49-50, lines 25-2. His tenant reported that water was coming in the top of the window and the sides of the window, over the top, and running down the inside of the window. *Id.*, at p. 51, l.16-18.
6. Stuart Reeves, owner of unit 202.
 - a. Observed water intrusion in the guest bedroom window at the head of the window unit and pooling on the floor. Deposition of Stuart Reeves, P. 39.
 - b. States master bedroom right window will not latch. *Id.*, at p. 69.
 - c. States that numerous windows are "jammed in" under the installation such that they do not go up and down properly. *Id.*, at p. 89.
7. Thomas Debnam, owner of Unit 101.
 - a. Substance of his claims that he has particular to his unit are that he has windows that leak "profusely." Water would pour in through one of the windows, but he was able to mitigate his damages because he was mopping it up as fast as it was coming in. See Deposition of Thomas Debnam, p.49-50.
 - b. Cites windows with issues at the bedroom window, off of the main bath, the front, which is facing Concord Street. *Id.*, p. 55
 - c. The living room windows leak and the sill has separated. (Condition 2.) He has observed the water actually coming through the panes when the wind blows or when the rain comes in on the Cumberland side of the street. *Id.*, p.65.
 - d. Experienced window leak in the den. States "water comes in at the bottom almost like cutting on a spigot." *Id.*, p. 74.

8. Dr. Thomas Mather, owner of Unit 301. This witness' testimony contained in his multi-volume deposition is so replete with instances of naturally occurring water intrusion through his windows (aside from numerous cases of formal water testing) that citing even half of them would be more than all of the other witnesses combined. The windows that were water tested all had prior natural leaks. He hired a consultant named Dave Harvey who performed extensive investigation into the cause of the leaks, and ultimately could not do anything more to help after January of 2009. Dr. Mather summarizes by saying that after this time, he still experiences window water intrusion "[a]bout every three or four months, depending on where the rain is coming from, we'll get a different window that will still leak...one in the bathroom, one in the bedroom...that looks out towards Fleet Landing Restaurant, there's one in the boys' room that has upon occasion, but they're dispersed over the whole unit depending upon which way the wind or rain is coming at any given time." Deposition of Thomas Mather, Vol. 1, p. 207, line 23 to p. 208, line 14. Volume one of his deposition was taken on July 14, 2011. When Dr. Mather completed his deposition eleven months later on May 18, 2012, he was asked for an update of any water intrusion events he stated: "[w]ell, it leaks every rain [sic]. We put towels up on the windows in the areas that mostly leak. And [sic] quite frankly, I don't check it every single time because we just assume it's going to leak. Because [sic] all the windows leak, all the doors can leak, and so we just prepare for it." *Id.*, Vol. III, p. 256, line 24 through p. 257, line 15.
9. Wade Robinson, owner of Unit 308.
 - a. Reports water intrusion through windows in his great room, and all of his bedrooms have experienced window water leaks. Deposition of Wade Robinson, p. 163, 223.
10. Teresa Hodge, Rule 30(b)6 designee for Concord & Cumberland, LLC
 - a. Reported naturally occurring window leaks on January 8, 2008 in unit 306 at fixed windows at the balcony and in a bedroom. Deposition of Marianna Teresa Hodge, Vol. 1, pp. 177 -180.
11. Landon Davis, supervisor for up-fit contractor Harvin Construction who prepared punch lists for certain unit up-fits. While he stipulated in deposition that most of

these issues appeared repaired by the spring of 2008, he reported numerous leaks leading up to that time, and in some instances occurring several years thereafter:

- a. Reported several reoccurring window leaks at Units 102, 103. Deposition of Landon Davis, pp. 55-63, 65-69.
- b. Observed out-of-square and out-of-plumb windows in unit 105. *Id.*, p. 73, line 11 through p 74, line 18.
- c. Had to replace the trim on "just about all of the windows" in unit 108. *Id.*, P. 101. Observed water intrusion at side bedroom windows and the kitchen windows overlooking the balcony. *Id.*, p. 103, line 7-15.
- d. Reported a window leak in the back bedroom facing Concord Street in unit 202, although it was later corrected by March of 2008. *Id.*, p. 104.
- e. In unit 306, he observed water intrusion in 2011 water intrusion at a front bedroom. *Id.*, pp. 117-119.
- f. In unit 307, he reported a leak at the pan at the master bedroom window overlooking the balcony, although he believed the condition to be rectified. *Id.*, p. 125, l. 22 to p 127, l. 14.

In addition to the expert testing and reporting related to the windows and doors, and the testimony of the various unit owners, one major source of information related to the window issues was Richard Andrews, who served as one of the primary Owner's representatives throughout the construction of the subject property. As his deposition testimony reveals, he was extensively immersed in the on-site events involving the installation of the windows and doors, the third-party window water testing, and responding to unit owner complaints about window leaks. He was exhaustively examined by counsel for the parties of the case regarding the window and door leaks. He was no fan of Superior construction; he testified extensively that in his opinion, Superior's management significantly delayed the job. See Deposition of Richard Andrews, Vol. II, pp. 350-366. When asked by counsel for The Muhler Company: "[d]id Superior do anything right?" Mr. Andrews responded: They did very little right, in my

experience, in construction." *Id.*, at p.350, l. 13-17. However, when asked if any of the delay issues, management issues, Superior's preparation of the window rough openings via a separate subcontractor, or other aspects or elements of the project were responsible for causing the windows to leak and otherwise fail to perform in accordance with the contract documents Mr. Andrews made it clear that the failure of the windows was due to the windows themselves- their installation by Muhler's subcontractors and the material or performance problems with the Weather Shield windows:

Vol. II, p. 424

22 Q. You've been asked a lot of questions today by
23 a lot of counsel about issues relating to delay, and I
24 want to make sure that your opinions about delay don't
25 relate to the end product about the windows. So I

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1 just want to ask you do you believe -- well, first of
2 all, do you believe that the windows on the project
3 and the exterior -- windows and doors, the exterior
4 doors on the project comply with the requirements of
5 the contract documents in terms of their performance?

6 A. I do not believe they comply with the
7 contract requirements, as I understand, even to this
8 day with all the documentation of the failed window
9 tests that I've seen.

10 Q. Okay. And do you attribute that failure to
11 anything related to delay issues?

12 A. I don't attribute them to the -- I think
13 you're phrasing it --

14 Q. Well, let me rephrase my question. Is there
15 any kind of delay issue that you've discussed today,
16 delay involving the foundations, delay involving HVAC,
17 delay involving stucco, putting up exterior cladding,
18 do you attribute any of the delay in those activities,
19 as you have testified to today, to the failure of the
20 windows to perform in accordance with the contract
21 documents?

22 A. I don't think that there's a correlation
23 between the delays and the performance of the windows.

24 Q. Okay. And do you attribute in any way, to
25 any degree, the failure of the windows to perform in

1 accordance with the requirements of the contract
 2 documents to any other failure of any other element of
 3 the building to comply with the requirements of the
 4 contract documents? For example --

5 A. I apologize. Your questions are just -- it's
 6 a little bit too hard to quite fathom what you're
 7 asking. If you'll put it in a real easy format.

8 Q. I'll break it into parts. Do you attribute
 9 the failure of the windows to perform in accordance
 10 with the requirement of the contract documents to any
 11 aspect of the balconies?

12 MS. VARNADO: Objection.

13 THE WITNESS: I don't attribute the failure
 14 of the windows to any other balcony concerns or
 15 balcony defects or -- if that's --

16 BY MR. MAJURE:

17 Q. Okay. Do you attribute any failure of the
 18 windows to perform in accordance with the contract
 19 documents to some defect related to the brick
 20 cladding?

21 MS. VARNADO: Objection.

22 THE WITNESS: I'm not aware of any defect in
 23 the brick cladding per se. I don't think there's a
 24 correlation between the performance of the windows
 25 meeting the contract documents that tied to the brick

1 performance or brick installation.

2 BY MR. MAJURE:

3 Q. Okay. How about the stucco? Is there some
 4 defect in the stucco that you contend causes the
 5 windows to fail to perform in accordance with the
 6 contract documents?

7 A. No, I do not see a correlation between the
 8 stucco and the defective windows.

9 Q. How about the roof?

10 A. Again, no, I don't see a relationship between
 11 the roof and the defective windows. Or the failure of
 12 the windows to meet the contract requirements.

13 Q. How about any other work performed by any
 14 other subcontractor that I've not listed?

15 A. I think the failure of the windows stand on
 16 their own failure, not related to any other building
 17 component.

18 Q. Okay. And you said that you have not seen
19 any expert reports by any other engineers or anyone
20 like that related to this project?

21 A. I've understood that the Glick firm or Miles
22 Glick, I understand is the name of someone down in
23 Charleston that has made a forensic analysis. I have
24 not seen that report. I've not seen anybody else's
25 expert testimony or witness or forensic information

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1 concerning this.

2 My information is from my personal job site
3 visits, certainly while Metro Waterproofing did some
4 remedial work and while one of the homeowners brought
5 their own waterproofing consultant onto the job site
6 to do some destructive work around his fourth floor
7 balcony. Otherwise, it's limited to the window
8 testing that was done that -- the two testing
9 companies performed.

10 Q. Okay. And is it your testimony that -- well,
11 do you attribute any of the failures of the windows to
12 perform in accordance with the contract documents to
13 the preparation of the window rough opening?

14 A. I do not attribute any of the window failures
15 to the preparation of the opening and/or the flashing
16 of the openings or the final attachment of the Tyvek
17 to the window fins.

18 Q. Okay. And you understand when I say,
19 "preparation of the window rough opening," I'm talking
20 about putting in the Tyvek, installing the pans and
21 installing the bucks. You understand that's what I
22 mean?

23 A. Now, the only issue I've seen with the pans
24 is that I think Wally had all the pans made to one
25 consistent depth and that in some cases you'll see

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1 some photographs where the depth of the pan got back
2 into the space further than it should be in order to
3 keep the front of the pan, the exterior face of the
4 pan where it needed to be.

5 Q. Okay. Did that condition cause the windows
6 to fail to perform?

7 A. It did not cause the windows to fail to
8 perform to the specs.

9 Q. Okay. And you would agree that the windows

10 and doors leaking under ordinary prevailing weather
11 conditions would be a failure of the windows to
12 perform in accordance with the project documents?

13 A. I would agree with that.

14 Q. And you would agree that the windows being
15 properly tested with a proper protocol -- now,
16 granted, you might not be an expert, but assuming that
17 they're properly tested in accordance with the proper
18 protocol that's relevant to these windows and they
19 fail those tests, that that would also be a condition
20 that fails to meet the performance requirements of the
21 contract documents?

22 A. I understand that if a proper procedure is
23 followed with the proper equipment, properly operated
24 and done in accordance with the ASTM procedures
25 outlined, that the windows from the frame of the

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1 window, the actual window proper and not the fin, that
2 the windows failed to meet the plans and spec
3 requirements.

4 Q. Okay. And do you attribute the failure of
5 the windows to perform in accordance with the contract
6 documents to any malfeasance or negligence
7 specifically on the part of Superior as opposed to
8 Superior's subcontractors?

9 A. I'm not aware of any efforts on Superior that
10 created those leaks of the windows themselves.

Deposition of Richard Andrews, Vol. II, p. 424, l. 22 to p. 430, l. 10

In summary for the second Griffen element, the body of evidence generated in the course of over four years of discovery regarding the failure of the windows and doors was certainly enough for Superior to reasonably conclude that there was a significant risk of liability to the Plaintiffs for their window and door claims. Compounding that assessment of liability was the fact that Superior was subject to contractual indemnity rights by the Developer, Concord and Cumberland, LLC for the liability it was exposed to with the Plaintiffs for the breach of the implied warranty of habitability and negligence as a result of the defects with the windows and doors. See Exhibit 6, Section 3.18 at page 18-19. The Developer would thus potentially have the

ability to shift its settlement or portion of a judgment regarding the windows and door back onto Superior. Superior was well within its rights to seek to settle these claims with the Plaintiffs.

iii. Third Griffen Element

The third Griffen element is the determination of whether or not the amount of the settlement is reasonable in light of the third party's estimated damages and the risk and extent of defendant's exposure if the case is tried. [Again, Superior settled the window and door claims for \$775,000.00.] In assessing this element, Superior looks to the Plaintiffs' repair estimates produced in the case, Superior's own repair estimates, and Plaintiffs' loss of use claims.

Plaintiffs produced a repair estimate in the course of discovery that is attached hereto as Exhibit 7. The total cost of the repair estimate (including contractor's fee, architectural and engineering fees, a design contingency allowance, and an indoor air quality assessment) is Five Million, Fifty-Seven Thousand, Four Hundred and Fifty Two Dollars (\$5,057,452.00), of which \$1,276,886.00 was specifically apportioned to just window and door repairs. However, while there are concededly different methods for doing this, a certain portion of the non-specific estimate line items that are not directed towards any particular area of repair would inevitably have to included in the assessment of potential liability, such as the general conditions (\$345,434.00), demolition, protection and scaffolding (\$169,958), exterior repairs allowance (\$277,493.00) and interior repairs allowance (\$611,600.00), along with the aforementioned fees and allowances would have to be allocated among the specific repair line items. These items total \$3,028,052.00 of the total repair estimate. Given that the line item for window & door repairs is more than twice the amount of the next highest individual repair item (exterior wall cladding: brick, stucco and plaster for \$554,867.00), it stands to reason that the proper allocated share of the "non-specific" line items relating to window and door repairs could easily amount to

a million dollars. Superior would be certainly reasonable in estimating a potential liability for the window and door repairs in the range of \$1.7 million to \$2.2 million dollars, if the Plaintiff's number were deemed to be the proper measure of damages in the trial of the case.

Superior also obtained its own alternate repair estimate from Watkins Services, Inc., ("Watkins") a well-known local contractor who frequently conducts these types of repairs, and has provided repair estimates in numerous complex construction cases in Charleston County. Watkins provided an "apples to apples" estimate of what it believed it would cost to perform the same scope of repairs asserted on behalf of the Plaintiffs. See Concord & Cumberland Apple to Apple Estimate dated October 4, 2012, attached hereto as Exhibit 8. Watkins' total repair number was substantially lower, at \$3,378,545.00, but its own repair number for just the windows and doors was \$1,236,177.00 – only about \$50,000.00 less than the Plaintiffs' line item for the same repair, a four percent (4%) difference from Plaintiffs' number. As with the Plaintiff's repair estimate, a certain portion of the non-specific line items in the Watkins estimate would also have to be equitably apportioned to the window and door repairs. Watkins' corresponding total for the general conditions and other non-specific line items as discussed above totals \$1,451,383.00. In the Watkins estimate, the window repair line item was more than three times the cost of the next highest specific line item repair (exterior wall cladding for \$402,564.00). In sum, it would be reasonable for Superior to estimate up to a half million dollars of the non-specific line items to be allocated to the window repairs, thus resulting in a total potential liability for the window and door repairs in the range of 1.5 million to 1.7 million dollars, if Superior's numbers were deemed to be the proper measure of damages in the trial of the case.

In addition to the repair cost claims, Plaintiffs were pursuing loss of use damages for displacement of all of the unit owners while the repairs were taking place. In support of these claims, Plaintiffs issued an opinion letter dated October 3, 2012 by Thomas Hartnett of Hartnett Realty Co. Inc. ("Hartnett"), attached hereto as Exhibit 9. Both Superior's apples-to-apples repair estimate and Plaintiffs' repair estimate identifies a 44 week duration for the work—roughly four and a half months. Hartnett provided a range of temporary housing options at several local hotels, ranging from \$3,100.00 per month on the low end to \$4,470.00 per month on the high end. Applying this range of rates to the twenty-seven condominium units in the property, for the stated duration of repairs, yields a range of potential damages for loss of use of \$376,650.00 to \$543,105.00 for substitute housing in a hotel. In addition, Mr. Hartnett provided cost quote information from a local moving company for the cost of the unit owners to have their possessions moved out and stored during the time of repairs. See Exhibit 9, page 3. Again, using the same duration of repairs (rounded to five months), and the median rates cited by Hartnett, an additional \$309,600.00 of damages for moving costs and storage would be involved. Therefore, the cost for replacement housing at a hotel and storage costs- using the median figures- could range from \$686,600.00 to \$852,705.00. However, Mr. Hartnett also provides estimated rental rates for residential property that would be more comparable to the higher-end condominiums at the subject property, ranging from \$1,475.00 to \$6,000.00 per month, which would likely require a minimum of a one year lease. If this argument was deemed to be the appropriate amount of damages, combined with the aforementioned moving costs, the loss of use claim could range from \$787,500.00 to \$2,253,600.00

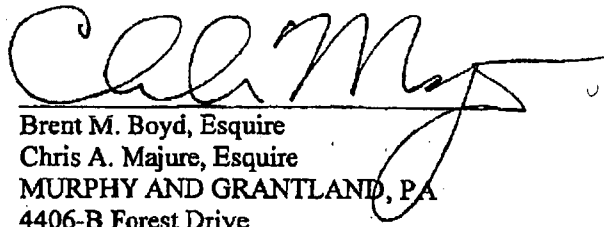
Taking all of the damages scenarios into consideration, Superior was faced with a range of potential liability to the Plaintiffs for just window and door claims (repair cost plus loss

of use) of approximately \$2.28 million dollars to \$4.45 million dollars. This does not even take into account the potential contractual indemnity claims of the Developer if it should be permitted to shift its liability for the windows and doors, plus its litigation costs and attorneys fees, against Superior. Given the totality of these circumstances, Superior settling with the Plaintiffs for \$775,000.00 is certainly within the bounds of reasonableness as required by Griffen.

III. Conclusion

The Muhler Company is bound to Superior pursuant to the terms of its subcontract, as modified by the terms of the June 2007 Agreement to indemnify Superior in the event of any lawsuit against Superior that merely alleges problems with the windows and doors of the Subject Property as set forth above. Superior's right to indemnity was not lessened by any concurrent negligence of or causation by Superior. The body of evidence that Superior had to face regarding the windows and doors makes it more than clear that there was clearly a reasonable risk of liability. Superior has demonstrated that its claim is well within the parameters set forth by Griffen v. Van Norman, supra, to recover its settlement of \$775,000.00 for the window and door claims of the Plaintiffs, and additionally its costs of defense and attorneys fees incurred in defending Plaintiffs' window and door claims, as well as those costs and attorneys fees associated with pursuing the enforcement of its claims against The Muhler Company. Superior requests the Court to find The Muhler Company liable to Superior for its claim of contractual indemnity, and hold a damages hearing to affix the final determination of damages due and owing to Superior.

(Signature Page below)



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*Attorneys for Defendant Superior Construction
Corporation*

Columbia, South Carolina
May 15, 2014

SUPERIOR CONSTRUCTION CORPORATION

GENERAL CONTRACTOR

RECEIVED
JUN 13 2007

SUBCONTRACT FOR CONSTRUCTION

WITH

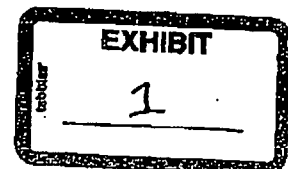
MUHLER

FOR ALL

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

**Concord & Cumberland
Charleston, SC 29401**

**Project No. 06-MBD-017
Subcontract Number: 06MBD017-614-509
Subcontract Amount: \$723,355.68
Cost Code: 08-501**



[Handwritten signature]

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

SUBCONTRACT FOR BUILDING CONSTRUCTION



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2. SCOPE OF WORK
3. SCHEDULE OF WORK
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15. CONTRACT INTERPRETATION
16. SPECIAL PROVISIONS

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 1976 edition.

AGC DOCUMENT NO. 600-

SUBCONTRACT FOR BUILDING CONSTRUCTION

August 1984
Associated General Contractors of America

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SUBCONTRACT FOR BUILDING CONSTRUCTION

ARTICLE I

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 Muhler, 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
539 Glenwood Ave Suite 291
Raleigh, NC 27603

CONTRACTOR: Superior Construction Corporation
3723 Suite C Forestbrook Drive
Myrtle Beach, S. C. 29588

SUBCONTRACTOR: Muhler
5885 Rivers Ave Suite 103
N. Charleston, SC 29406

CONTRACT PRICE: \$723,355.68

Contact: Chas Agosti
Phone: 843-377-4181
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 1.6. 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 1.6.5.

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 MUYLER COMPANY, INC. HEREIN REQUESTS WRITTEN APPROVAL TO INCLUDE ALL STORED MATERIALS IN ITS PAYMENT APPLICATIONS, WHENEVER APPLICABLE.**

AGC DOCUMENT NO. 600

SUBCONTRACT FOR BUILDING CONSTRUCTION

August 1984
Associated General Contractors of America

(a) upon receipt of the Owner's waiver of all claims related to the Subcontractor's Work except for unstated, 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 delay 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 PRIVILEGE. 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 retainer 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 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 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 I 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 windows, entry doors, patio doors, and door and window trim, and all related work required by the contract Documents and related notes 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: _____

16.5 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.

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.)

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

Subcontractor

By: [Signature]
Glen Agostini Don H. Howard

Superior Construction Corporation
Contractor

By: [Signature]
Carlton S. Clardy
President/CEO

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.

Project No. 06-MBD-017
Subcontract Number: 06MBD017-S12
Cost Code: 06-501

- N. Supply and install 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 event 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.

Project No. 06-MBD-017
Subcontract Number: 06MBD017-824
Cost Code: 08-501

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

Page 3 of 7

EXHIBIT "A" TO SUBCONTRACT
Subcontractor Initial: *[Signature]*

[Handwritten initials]

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.

Project No. 06-MBD-017

Subcontract Number: 06MBD017-S14 ⁰⁹

Cost Code: 08-501

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 desirable 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 desirable precaution to protect Concord & Cumberland and its 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.

Page 5 of 7

EXHIBIT "A" TO SUBCONTRACT
Subcontractor Initial: 



Project No. 06-MBD-017
Subcontract Number: 06MBD017-9#4
Cost Code: 08-501

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. Agosti

Signature: [Signature]

Date: 11/3/04

Project No. 006-MBD-017 09
Subcontract Number: 06MBD017-S#4
Cost Code: 02-501

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.

62-617

Page 7 of 7

EXHIBIT "A" TO SUBCONTRACT
Subcontractor Initial: LT

LT



June 14, 2007

Mr. Larry Taylor
Superior Construction
PO Box 50730
Myrtle Beach, SC 29579
(843) 236-0860

Received
JUN 19 2007
Superior Const.
Myrtle Beach

Re: Water Penetration - Weathershield Windows

Project: Concord and Cumberland, Charleston, SC

Dear Mr. Taylor,

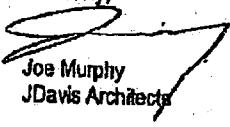
It is our understanding that, over the past several weeks, continued testing of the window installation has been performed and that a passing test has been achieved in accordance with the prescribed testing method. It is our position that the windows can conform to the design intent and are acceptable subject to further reviews and testing as the work progresses. It is also our understanding that the Contractor (or subcontractor) will perform any remedial work necessary to ensure that the windows perform to the specified standards.

Any corrective measures taken to repair the windows or the installation thereof will need to be approved in advance by the Owner. We are anticipating that Superior Construction will fully cooperate with the Owner's representatives concerning the level of testing required and the performance of those tests.

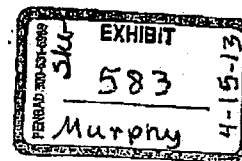
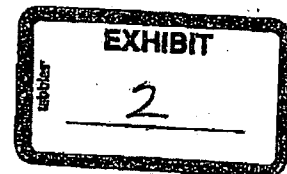
Please contact our office should you have any questions regarding our position on this matter.

Thank you.

Sincerely,


Joe Murphy
JDavis Architects

CC: Jeff Davis, JDavis Architects
Bob Mundy, Concord and Cumberland, LLC
Richard Andrews, Concord and Cumberland, LLC
Wally Baughn, Superior Construction



www.jdavisarchitects.com

Superior-C&C 07523

AGREEMENT

This Agreement is entered into this the June 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;

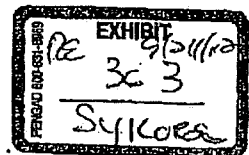
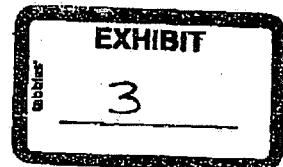
WHEREAS, Weathershield has represented to Superior that it has now inspected certain window and door units at the Project;

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.



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.

[Handwritten signature]

Superior-C&C 11409

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. Weathershield 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 Weathersfield 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 Weathersfield 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: [Signature]
Title: President/C.E.O.
Date: June 7, 2007

WEATHER SHIELD MFG., INC.

By: _____
Title: _____
Date: _____

THE MUEHLER COMPANY, INC.

By: [Signature]
Title: CEO
Date: 6/7/07

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.F.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:

6/27/09

[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 Charlotte

I, the undersigned Notary Public, hereby certify that B.W. 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 Charlotte

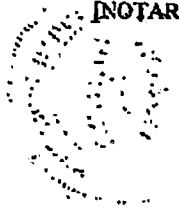
Witness by hand and notarial seal, this the 7th day of June, 2007.

Susan [Signature]
Notary Public

My commission expires:

My Commission Expires
April 26th 2014

[NOTARY SEAL]



[Signature]

AGREEMENT

This Agreement is entered into this the 11th 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;

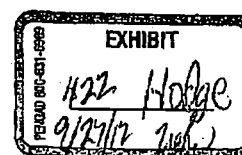
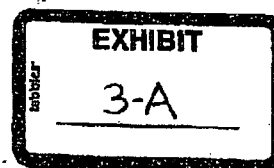
WHEREAS, Weathershield has represented to Superior that it has now inspected certain window and door units at the Project;

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.



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.

18. Muhler and Weathersfield 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 Weathersfield 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.

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. Weathershield 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.

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	WEATHER SHIELD MFG., INC.
By: _____	By: <i>[Signature]</i>
Title: _____	Title: _____
Date: _____	Date: 6/11/27
THE MUHLER COMPANY, INC.	
By: _____	
Title: _____	
Date: _____	

I, the undersigned Notary Public, hereby certify that _____
personally appeared before me and acknowledged that he is the
_____ 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

State of North Carolina

County of _____

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

Notary Public

My commission expires:

[NOTARY SEAL]

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

State of Wisconsin

County of Taylor

Witness by hand and notarial seal, this the 11th day of June,
2007.

Debra R. Meyer
Notary Public

My commission expires:

Permanent

[NOTARY SEAL]

I, the undersigned Notary Public, hereby certify that _____
personally appeared before me and acknowledged that he is the
_____ 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.

State of North Carolina

County of _____

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

Notary Public

My commission expires:

[NOTARY SEAL]

UNDER SEAL

Concord & Cumberland Horizontal Property Regime

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 et al

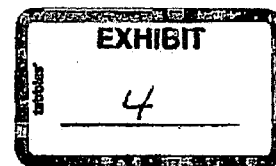
CIVIL ACTION NO: 2010-CP-10-2271
(Consolidated)

CONFIDENTIAL EXHIBIT NUMBER FOUR

To

Superior Construction Corporation's Memorandums of Law
In Support of Partial Summary Judgment
Against The Muhler Company, Inc. and Weather Shield Mfg., Inc.,
Produced Under Seal Pursuant to the Consent Motion to Seal
Under to Rule 41.1 of the South Carolina Rules of Civil Procedure

Description: A settlement agreement by and between all Plaintiffs of the consolidated actions and Superior Construction Corporation, related to the settlement of certain window and door claims, which contains a confidentiality clause forbidding disclosure of the settlement agreement to the public.



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.,

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

CIVIL ACTION NO: 2011-CP-10-8550

CIVIL ACTION NO: 2011-CP-10-8551

CIVIL ACTION NO: 2011-CP-10-8549

CIVIL ACTION NO: 2011-CP-10-4663

CIVIL ACTION NO: 2011-CP-10-9585

CIVIL ACTION NO: 2011-CP-10-4603

PARTIAL SETTLEMENT AND RELEASE
BY AND BETWEEN ALL PLAINTIFFS
AND
SUPERIOR CONSTRUCTION CORPORATION
AND
SAFECO INSURANCE COMPANY

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.

This Settlement Agreement is entered into by the Plaintiffs of the above-referenced civil actions ("the Lawsuits") and Superior Construction Corporation, effective April 19, 2013.

RECITALS

WHEREAS, Plaintiffs are or were owners of certain condominiums, with appurtenant interest in the common elements and limited common elements of the Concord and Cumberland condominium in Charleston, South Carolina (said condominium units, common elements and limited common elements referred to collectively herein as "the Subject Property"), as more fully described in the various Complaints of the Lawsuits; and

WHEREAS, The Plaintiff Concord and Cumberland Horizontal Property Regime ("the Regime"), pursuant to the terms of the Master Deed for the Subject Property, holds all rights on behalf of the various unit owners of the Subject Property relative to the common elements of the Subject Property, as is more fully set forth in the terms of the Master Deed; and

WHEREAS, Superior Construction Corporation "(Superior)" was the original general contractor for the construction of the building shell of the Subject Property; and

WHEREAS, the Plaintiffs filed the above-referenced Lawsuits in pursuit of certain recovery against Superior and other defendants named in said Lawsuits, seeking damages for repairs to the common elements, limited common elements, the individual condominium units of the Plaintiffs, as well as other damages as set forth in the Lawsuits; and

WHEREAS, Superior and the Plaintiffs have reached separate settlements for various elements of the Subject Property excluding the windows and doors of the Subject Property; and

WHEREAS, the Plaintiffs and Superior have now reached a settlement of all claims against Superior related to, or arising out of the installation, maintenance and repair of the windows and doors of the Subject Property, as set forth herein.

RELEASE

NOW THEREFORE, the Parties agree as follows: the recitals above are incorporated herein to the extent not contrary to the forgoing provisions below, and;

(1) **Payment, Release and Discharge -**

A. In consideration of the payment of Seven Hundred and Seventy- Five Thousand and 00/100 (\$775,000.00) Dollars to Plaintiffs, the Plaintiffs, on behalf of themselves and their respective heirs, successors, assigns, partners, principals, agents, shareholders, members, officers, employees and insurers (collectively, the "Releasers") do hereby completely and forever release Superior Construction Corporation and its bond, Safeco Insurance Company, and Amerisure Mutual Insurance Company and their related heirs, successors, and assigns, affiliated entities, owners, principals, agents, representatives, employees, subsidiaries, members, shareholders, partners, attorneys, officers, directors, insurers, carriers,

sureties, reinsurers, subcontractors, suppliers (the Released Parties), to the fullest extent of the law and the operation of equity, from any and all past, present or future claims, known or unknown, arising out of, caused by, or related to the windows and doors of the Subject Property. Excepted from the scope of this Release are any and all claims against any person or entity who is not explicitly within the definition of "the Released Parties" as set forth herein; this specifically includes but is not limited to the project Architect, JDavis Architects, The Muhler Company, Inc., Weather Shield MFG, Inc., and Watts Builders, Inc. Plaintiffs further understand and agree that the payment of the above amount by The Released Parties is not to be construed as an admission of liability on the part of any of the Released Parties, any and all liability by them being expressly denied.

B. In consideration of the payment Twenty- Five Thousand and 00/100 (\$25,000.00) Dollars to Plaintiffs, the Plaintiffs, on behalf of themselves and their respective heirs, successors, assigns, partners, principals, agents, shareholders, members, officers, employees and insurers (collectively, the "Releasers") do hereby completely and forever release Superior Construction Corporation and its bond, Safeco Insurance Company, and Amerisure Mutual Insurance Company and their related heirs, successors, and assigns, affiliated entities, owners, principals, agents, representatives, employees, subsidiaries, members, shareholders, partners, attorneys, officers, directors, insurers, carriers, sureties, reinsurers, subcontractors, suppliers (the Released Parties), to the fullest extent of the law and the operation of equity, from any and all past, present or future residual claims, known or unknown, arising out of, caused by, or related to the Subject Property. A residual claim is any claim of any kind, nature, or character whatsoever that arises out of or relates to

the Subject Property that is not encompassed with the claims related to the windows and doors as referenced above, nor encompassed within the confines of any other portion of the subject property that is governed by the terms of a separate settlement agreement between Plaintiffs and Superior, including but not limited to any separate settlements pertaining to brick, stucco, stone, drywall, HVAC, electrical work, roofing, or balcony tile & railings. This portion of the release for residual claims includes, but is not limited to, light gauge metal framing, insulation, structural concrete, elevators, and interior flooring materials in common areas and any consequential damages related thereto.

C. General Release and Assumption of Risk – Plaintiffs acknowledge and agree that the Release set forth above is a General Release of all claims against the Released Parties and/or any one or more of the Released Parties. Plaintiffs expressly waive and assume the risk of all claims for future damages within the scope of this release arising out of or related to the Lawsuit or the Subject Property, if any.

- (2) **Reservation of Rights** – All Parties of this instrument hereto reserve the sole right of enforcement or specific performance of the covenants of this Release in the event of any non-compliance to the terms of this Release by any Party of this Release. All other reservations and rights are discharged. Any prevailing party in an action to enforce the terms of this release shall be entitled to all costs, expenses, and attorneys fees incurred to obtain enforcement of this instrument.
- (3) **Warranties and Representations** – As part of the consideration for the payment of the above-mentioned sums, Plaintiffs expressly warrant and represent that: (1) the individuals who execute this Release on their behalf are legally competent and legally

empowered to the fullest extent of the Law to execute this Release; (2) the individuals who execute this Release are over the age of 18 years; (3) no promise or representation of any kind has been made to them by any of the Released Parties, except as expressly stated in this Release; and (4) that they have had the opportunity to consult with their respective attorneys regarding the significance and importance of the terms of this Release and are relying solely on their own knowledge and understanding or the advice of their attorneys in execution of this Release.

- (4) **Warranty of Capacity to Execute Agreement** – Plaintiffs warrant and represent that no other person or entity has or has had any interest in the claims referred to in this Release, that they have the sole and exclusive right to approve the sum specified in it, and that they have not sold, assigned, transferred, conveyed, or otherwise disposed of any of the claims referred to in this Release.
- (5) **Successors** – This Release is binding on and inures to the benefit of the executors, administrators, heirs, personal representatives, agents, employees, successors and assigns, if any, of the Releasors and the Released Parties.
- (6) **Governing Law** – This Release is entered into in South Carolina and should be construed, interpreted enforced and governed in accordance with South Carolina law. Any action related to this Release shall be brought in South Carolina.
- (7) **Additional Documents** – All parties agree to cooperate fully, and to execute or have executed all necessary documents and to take any additional action which may be necessary to give full force and effect to the basic terms and intent of this Release, including, but not limited to, documents necessary to effect the dismissal of the Lawsuit with prejudice as towards The Released Parties, and the issuance of the settlement proceeds.

- (8) **No Representation Regarding Tax Consequences** – The Releasors acknowledge and represent that they have not relied on any representation, either express or implied, made by the Released Parties or any one of them regarding possible tax consequences of this Release and the proceeds hereunder. The Releasors also release the Released Parties from all liability in connection with any tax consequences.
- (9) **Attorneys' Fees and Costs** -- The Parties further agree not to present any claims against each other, whether in the Lawsuit or through other and further legal proceedings, for the recovery of attorneys' fees or costs and expenses of this action or any other action which the Releasors have or may incur in connection with the Subject Property, except as explicitly permitted by a provision of this instrument. All of the parties to this Lawsuit agree to bear their own costs, expenses, and fees incurred heretofore out of the Lawsuit.
- (10) **Execution** - This Release may be executed in counterparts, each of which shall be deemed an original, but all of which, when taken together, shall constitute one and the same agreement.
- (11) **Confidentiality** – The Parties also agree that the terms of this settlement shall remain confidential and shall not be disclosed to the general public, save for the fact that the case has been settled to the parties' mutual satisfaction, with the sole exceptions of (a) the possible filing of this Release, in a form that redacts the amounts paid by the Released Parties as set forth herein, in the Records of the Recorder of Deeds in the jurisdiction of the Subject Property, and (b) any disclosure of the terms of this release upon Order of a Court of competent jurisdiction, or upon the lawful demand of an officer or agency of the state or federal government, which shall not be deemed as public disclosure.

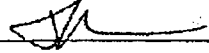
- (12) **Entire Agreement** -- All the Parties agree and acknowledge that this Release has been negotiated by the parties and embodies the entire agreement between the parties, further, no modification or amendment of this Release shall be of any force or effect unless made in writing and executed by all the parties to the Lawsuit. Further, the parties acknowledge that this Release was negotiated at arm's length with an equal opportunity for comment by the Releasors and the Released Parties and, in any action concerning the meaning, intent, or construction of the language of this Release the parties agree that there shall be no inference made or drawn regarding the meaning or intent of the language of this Release because one party was primarily responsible for drafting this Release.
- (13) **Execution by Estate Administrators or Attorneys**- In the event that any Party to the Release is presently deceased, the signature of their duly authorized or otherwise lawfully empowered executor or administrator of their estate upon this Release shall be fully binding upon the estate of such deceased person, as fully set forth herein, verbatim. Furthermore, the signature of the attorney of record for any Party of the Lawsuit and this Release, being the client of said attorney, shall likewise be fully binding upon the respective Party. Any attorney exercising their signature upon this Release on behalf of their client expressly represents that they are fully empowered to execute this Release, and have obtained the full authority from their client to execute this Release upon their client's behalf.
- (14) The Releasors agree to permit Superior unfettered access to any of their expert witnesses, and waive any conflicts of interest that may be raised in so doing, to allow Superior to utilize their services in the prosecution of any outstanding cross claims or third party claims Superior may have in this Action against persons or entities not a

party to this Agreement. Superior shall bear all related fees, expenses and costs pertaining to said experts. The Releasors shall also reasonably cooperate with Superior in providing depositions or trial testimony, so that Superior does not have to resort to formal legal proceedings to secure their cooperation.

EACH REPRESENTATIVE EXECUTING THIS AGREEMENT HAS READ THE FOREGOING MUTAL RELEASE AND VOLUNTARILY AGREES TO ITS TERMS. SIGNED THIS ____ DAY OF ____, 2013.

WITNESSES:

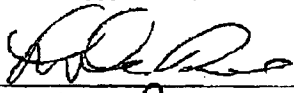
CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME

BY: 
ITS: 

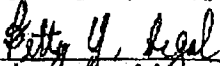
party to this Agreement. Superior shall bear all related fees, expenses and costs pertaining to said experts. The Releasers shall also reasonably cooperate with Superior in providing depositions or trial testimony, so that Superior does not have to resort to formal legal proceedings to secure their cooperation.

EACH REPRESENTATIVE EXECUTING THIS AGREEMENT HAS READ THE FOREGOING MUTAL RELEASE AND VOLUNTARILY AGREES TO ITS TERMS. SIGNED THIS 31st DAY OF October, 2013.

WITNESSES:




CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME

BY: 
ITS: 

party to this Agreement. Superior shall bear all related fees, expenses and costs pertaining to said experts. The Releasers shall also reasonably cooperate with Superior in providing depositions or trial testimony, so that Superior does not have to resort to formal legal proceedings to secure their cooperation.

EACH REPRESENTATIVE EXECUTING THIS AGREEMENT HAS READ THE FOREGOING MUTAL RELEASE AND VOLUNTARILY AGREES TO ITS TERMS. SIGNED THIS 21 DAY OF November, 2013.

WITNESSES:

[Signature]
[Signature]
Mr. E. C. [Signature]

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME

BY: Thomas R. [Signature]

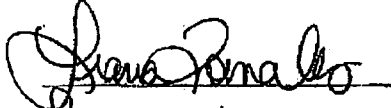
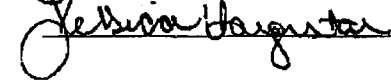
ITS: BOARD MEMBER

Candace J. [Signature]
BOARD MEMBER

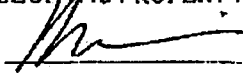
party to this Agreement, Superior shall bear all related fees, expenses and costs pertaining to said experts. The Releasors shall also reasonably cooperate with Superior in providing depositions or trial testimony, so that Superior does not have to resort to formal legal proceedings to secure their cooperation.

EACH REPRESENTATIVE EXECUTING THIS AGREEMENT HAS READ THE FOREGOING MUTAL RELEASE AND VOLUNTARILY AGREES TO ITS TERMS. SIGNED THIS 6th DAY OF November, 2013.

WITNESSES:

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME

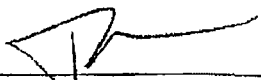
BY:  Wade Robinson

ITS: Treasurer

*Partial Settlement and Release By & Between All Plaintiffs
And Superior Const. Corp. and Safeco Ins. Co.
Concord & Cumberland Litigation*

**I HAVE READ THE FOREGOING RELEASE AND VOLUNTARILY AGREE
TO ITS TERMS. SIGNED THIS _____ DAY OF _____, 2013.**

WITNESSES:

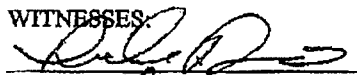
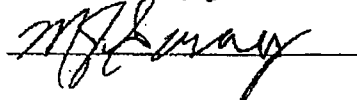


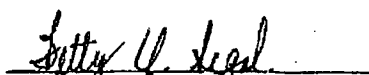
Thomas R. Mather

*Partial Settlement and Release By & Between All Plaintiffs
And Superior Const. Corp. and Safeco Ins. Co.
Concord & Cumberland Litigation*

I HAVE READ THE FOREGOING RELEASE AND VOLUNTARILY AGREE
TO ITS TERMS. SIGNED THIS 24th DAY OF October, 2013.

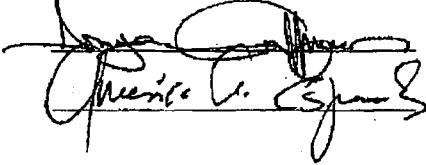
WITNESSES:


Betty Y. Legal

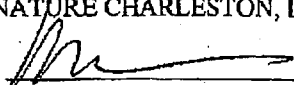
EACH REPRESENTATIVE EXECUTING THIS AGREEMENT HAS READ THE
FOREGOING MUTAL RELEASE AND VOLUNTARILY AGREES TO ITS
TERMS. SIGNED THIS 24th DAY OF October, 2013.

WITNESSES:



Janice A. Egan

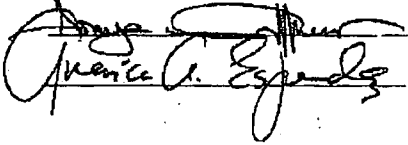
SIGNATURE CHARLESTON, LLC

BY: 

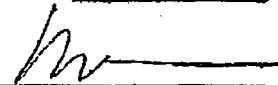
ITS: Manager

I HAVE READ THE FOREGOING RELEASE AND VOLUNTARILY AGREE
TO ITS TERMS. SIGNED THIS 24th DAY OF October, 2013.

WITNESSES:



Janice A. Egan



Wade Robinson

*Partial Settlement and Release By & Between All Plaintiffs
And Superior Const. Corp. and Safeco Ins. Co.
Concord & Cumberland Litigation*

**I HAVE READ THE FOREGOING RELEASE AND VOLUNTARILY AGREE
TO ITS TERMS. SIGNED THIS 24 DAY OF October, 2013.**

WITNESSES:

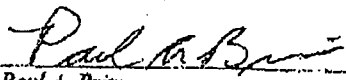
Allison M. Gillespie
Mary B. Elger

James C. Kirkpatrick

*Partial Settlement and Release by & Between All Pittsburgh
And Superior Crane Corp. and Safco Ins. Co.
Caneard & Chamberland Litigation*

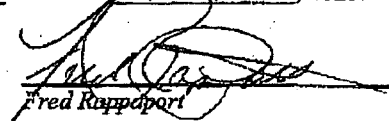
I HAVE READ THE FOREGOING RELEASE AND VOLUNTARILY AGREE
TO ITS TERMS. SIGNED THIS _____ DAY OF _____, 2013.

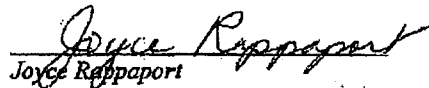
WITNESSES:


Paul A. Brim

WE HAVE READ THE FOREGOING RELEASE AND VOLUNTARILY AGREE
TO ITS TERMS. SIGNED THIS 24th DAY OF October, 2013.

WITNESSES:


Fred Rappaport


Joyce Rappaport

*Partial Settlement and Release By & Between All Plaintiffs
And Superior Const. Corp. and Safeco Ins. Co.
Concord & Cumberland Litigation*

I HAVE READ THE FOREGOING RELEASE AND VOLUNTARILY AGREE
TO ITS TERMS. SIGNED THIS ____ DAY OF _____, 2013.

WITNESSES:

Thomas R. Debnam
Thomas R. Debnam, as Trustee of the
Trust Agreement of Thomas R. Debnam

*Partial Settlement and Release By & Between All Plaintiffs
And Superior Const. Corp. and Safeco Ins. Co.
Concord & Cumberland Litigation*

I HAVE READ THE FOREGOING RELEASE AND VOLUNTARILY AGREE
TO ITS TERMS. SIGNED THIS 25th DAY OF OCTOBER, 2013.

WITNESSES:

[Signature]
[Signature]

[Signature]
Pamela L. Vaughn

Partial Settlement and Release By & Between All Plaintiffs
And Superior Const. Corp. and Safeco Ins. Co.
Concord & Cumberland Litigation

EACH REPRESENTATIVE EXECUTING THIS AGREEMENT HAS READ
THE FOREGOING MUTAL RELEASE AND VOLUNTARILY AGREES TO
ITS TERMS. SIGNED THIS 21st DAY OF October, 2013.

WITNESSES:

304 CONCORD & CUMBERLAND,
LLC

Margaret J. Schmitt
MS

BY: Kathy Sweet

ITS: managing mbr

*Partial Settlement and Release By & Between All Plaintiffs
And Superior Const. Corp. and Safeco Ins. Co.
Concord & Cumberland Litigation*

EACH REPRESENTATIVE EXECUTING THIS AGREEMENT HAS READ
THE FOREGOING MUTAL RELEASE AND VOLUNTARILY AGREES TO
ITS TERMS. SIGNED THIS 24th DAY OF October, 2013.

WITNESSES:

402 CONCORD & CUMBERLAND,
LLC

Margaret J. Schultz
[Signature]

BY: [Signature] Sweet

ITS: Managing mbr

EACH REPRESENTATIVE EXECUTING THIS AGREEMENT HAS READ
THE FOREGOING MUTAL RELEASE AND VOLUNTARILY AGREES TO
ITS TERMS. SIGNED THIS 14th DAY OF October, 2013.

WITNESSES:

AVANT & ASSOCIATES, LLC

Sally W. Walker

BY: Jim Lee Smith

ITS: Owner

EACH REPRESENTATIVE EXECUTING THIS AGREEMENT HAS READ
THE FOREGOING MUTAL RELEASE AND VOLUNTARILY AGREES TO
ITS TERMS. SIGNED THIS ____ DAY OF _____, 2013.

WITNESSES:

OAKLAND HOLDING, LLC

Sally W. Walker

BY: James C. McMillan

ITS: Owner

*Partial Settlement and Release By & Between All Plaintiffs
And Superior Const. Corp. and Safeco Ins. Co.
Concord & Cumberland Litigation*

WE HAVE READ THE FOREGOING RELEASE AND VOLUNTARILY AGREE
TO ITS TERMS. SIGNED THIS 24 DAY OF October, 2013.

WITNESSES:

Barbara Leucay
Eileen Cook

Mattison J. MacGillivray
Mattison J. MacGillivray

Teresa E. MacGillivray
Teresa E. MacGillivray

UNIT 107

WE HAVE READ THE FOREGOING RELEASE AND VOLUNTARILY AGREE
TO ITS TERMS. SIGNED THIS 24 DAY OF October, 2013.

WITNESSES:

Barbara Lucare
Ellen Coby

Mattison J. MacGillivray
Mattison J. MacGillivray

Teresa E. MacGillivray
Teresa E. MacGillivray

UNIT 208

*Partial Settlement and Release By & Between All Plaintiffs
And Superior Const. Corp. and Safeco Ins. Co.
Concord & Cumberland Litigation*

I HAVE READ THE FOREGOING RELEASE AND VOLUNTARILY AGREE
TO ITS TERMS. SIGNED THIS 20th DAY OF October, 2013.

WITNESSES:

Jessica Gibson
Jessica Gibson

Pamela Queen
Pamela Queen

Lisa Waycaster
Lisa Waycaster

Partial Settlement and Release By & Between All Plaintiffs
And Superior Const. Corp. and Safeco Ins. Co.
Concord & Cumberland Litigation

I HAVE READ THE FOREGOING RELEASE AND VOLUNTARILY AGREE
TO ITS TERMS. SIGNED THIS 04 DAY OF November, 2013.

WITNESSES:

Gertrude Schmitt
James M. King

Stuart Reeves

*Partial Settlement and Release By & Between All Plaintiffs
And Superior Const. Corp. and Safeco Ins. Co.
Concord & Cumberland Litigation*

EACH REPRESENTATIVE EXECUTING THIS AGREEMENT HAS READ
THE FOREGOING MUTAL RELEASE AND VOLUNTARILY AGREES TO
ITS TERMS. SIGNED THIS 1 DAY OF September, 2013.

WITNESSES:

[Signature]
[Signature]

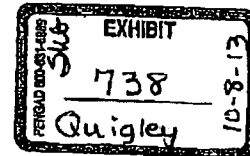
SUPERIOR CONSTRUCTION
CORPORATION

BY:

ITS:

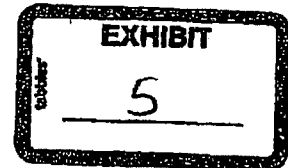
[Signature]
Attorney

*Partial Settlement and Release By & Between All Plaintiffs
And Superior Const. Corp. and Safeco Ins. Co.
Concord & Cumberland Litigation*



2020 Starita Road, Suite E, Charlotte, NC 28206
p. 704.597.9000 f. 704.597.5262

October 3, 2013 (Revised)
Project No. FH136880



Subject: Concord & Cumberland
Window Investigation
Charleston, South Carolina

To: Mr. Chris Majure
Murphy & Grantland, P.A.
Post Office Box 6648
Columbia, South Carolina 29260

OBJECTIVE

To verify whether or not windows are leaking as previously reported by others experts.

BACKGROUND AND CONSTRUCTION

The Concord & Cumberland Condominium project was constructed in 2007 at the corner of Concord and Cumberland Streets in Charleston South Carolina. Plans were prepared by JDavis Architects of Raleigh North Carolina. Architectural plans provided are dated 07-06-2006 and are titled Construction Set. Structural drawings are dated 07-06-06. Both architectural drawings and structural drawings indicate that the building code was the 2003 International Building Code. The building was constructed by Superior Construction of Charlotte, North Carolina.

Stafford Consulting Engineers was contracted to perform water testing and observations of windows currently installed on the building. Windows and doors are installed on the north, east and south sides of the structure. A parking deck is constructed on the west side of the structure that was not constructed as part of this project. Concord and Cumberland Condominiums are located in close proximity to the coastline. Building height is approximately 60 feet. The building faces east.

Windows consist of Weathershield Legacy Premium aluminum clad casement windows. Per window shop drawings, units are configured of various field and factory stacked and mullied units. Windows are primed and painted on the interior. Most units are configured with a combination of operable and fixed units.

Numerous reports of field observations and testing have been prepared in association with the construction and post construction phases of this project. Continued water leakage issues led to an investigation being conducted by Mr. Myles Glick, AIA of Charleston, South Carolina.

Previous reports were issued by other consulting/testing firms that performed water testing to windows and doors. These consist of the following:

1. 2-22-07 to 1-18-08: Sutton Kennerly Associates (SKA) of Charlotte, North Carolina performed water testing on window units. A total of nineteen test results were reported in

writing. Additional tests were performed on November 12-15, November 26-28, December 6, and December 10-11, 2007 but no written reports were provided.

Of the reports reviewed, seventeen tests failed due to water infiltration due to window units with one additional test unclear as to the reason of failure. Only one of the nineteen tests passed. It should be noted that test pressures for the tests were as follows:

4.0 psf:	1 test
5.5 psf	12 tests
6.3 psf	1 test
7.4 psf	2 tests
8.25 psf	3 tests

2. September 15, 2008: Metro Waterproofing of Scottdale, Georgia Issued a Water Intrusion Inspection report. The report indicates that 64 locations at or near windows leaked. The report does not identify the cause of leaks at each location. Proposed repairs in that report included wet sealing of the exterior of windows.
3. Architectural Testing (ATI) of Tampa, Florida was retained on six separate occasions to test windows for water resistance. Forty two tests were performed on thirteen specimens consisting of eleven windows and two doors. Dates below refer to the Report Date as listed on cover page of reports Issues.

- a. 04/05/07: Four (4) tests were performed on one (1) specimen. Four tests failed. Test pressures were as follows:

4.0 psf:	2 tests
5.5 psf:	2 tests

- b. 05/08/07: Two (2) tests were performed on one (1) specimen. Specimen is the same as that tested in 04/05/07 report. Two tests failed. Tests were performed at 5.5 psf.
- c. 07/08/07: Two (2) tests were performed on one (1) specimen. Two tests passed. Tests were performed at 5.5 psf.
- d. 01/02/09: Nineteen (19) tests were performed on nine (9) windows and two (2) doors. Ten (10) of eleven (11) specimens tested failed. Remedial repairs were performed prior to seven of the tests prior to them being run (and still failed). Test pressures were as follows:

4.0 psf:	3 tests
5.5 psf:	16 tests

- e. 03/03/09: Eight (8) tests were performed on two (2) specimens. Seven (7) of the eight (8) tests performed failed. The test that passed was performed with 0 pressure. Five (5) tests failed after remedial repairs were performed. Test pressures were as follows:

0 psf:	1 test
5.5 psf:	7 tests

- f. 05/07/09: Seven (7) tests were performed on two (2) specimens. Six (6) of the seven (7) tests failed. Extensive remedial repairs were performed prior to and between testing. Specimen 1 was tested, repaired and retested an additional four times with repeated water infiltration resulting in test failure. Window No. 2 was tested, failed, repaired and retested the following day with no visible leakage (passed).
4. Mr. Myles Glick, AIA, located in Charleston, South Carolina, performed a building envelope investigation of the existing building related to ongoing water infiltration. Mr. Glick performed site visits which included visual observations and destructive testing of various exterior building components. Associated reports identify numerous locations of water infiltration related to the construction of cladding, underlayment, flashing and sealant conditions at the perimeter of the windows. Reports include:
 - a. August 17, 2009: Interior site observations
 - b. October 23 – 24, 2009: Destructive testing
 - c. February 26, 2010: Destructive testing
 - d. December 15, 2009: Preliminary Report Phase I and Phase II Services
 - e. March 11, 2010: Supplemental Report #1

THE INSPECTION

Field work related to the project was performed as follows.

- February 20 - 21, 2012: Preliminary walkthrough was conducted to observe interior conditions and determine windows to be tested. Performed by Christine M. Quigley, PE and Stuart W. Sutton PE. Preliminary test set up.
- February 22 – 23, 2012: Window testing of Units 101 and 401. Performed by Christine M. Quigley, PE, Alex T. Sutton, James B. Wiggins, and Stuart W. Sutton, PE. Temperatures ranged from approximately 60 – 75° F.
- July 11 – 13, 2012: Window testing of Unit 307. Performed by Alex T. Sutton and Robby L. Helms of Stafford Consulting Engineers. Temperatures ranged from approximately 75 – 90° F. Rain occurred on July 12, 2012 delaying testing until July 13.

Labor and materials to provide demolition and replacement of interior finishes were provided by Visual Consulting, Inc. of Mount Pleasant, South Carolina.

DOCUMENTATION

The following documentation was provided to Stafford Consulting Engineers prior to, during or subsequent to fieldwork.

1. Architectural Drawings dated 07-06-2006
2. Structural Drawings dated 07-06-06
3. Myles Glick report dated December 15, 2009

4. Myles Glick report dated March 11, 2010
5. Photographic documentation per Myles Glick dated 8/17/09, 10/23/09, 10/24/09, 2/26/10
6. Weathershield Installation Instructions including Impact IG Energy Sash Casement Installation Instructions
7. Various window details by J Davis
8. Window Shop Drawings dated 7/12/06 by Weathershield (Approved as noted by J Davis 9-29-06)
9. List of reported window leakage by unit owners dated 7/15/11 by John Oakley (Property Manager)
10. Sutton Kennerly window testing reports dated 2-22-07 through 1-18-08.

GENERAL OBSERVATIONS

1. At Unit 101, several locations of water staining were observed at window frames. See Photographs 1, 2, 3, 4 and 5.
2. At Unit 401, temporary repairs to damaged flooring were observed. See Photograph 6. Areas of water staining were also observed. See Photographs 7, 8 and 9.

WATER TESTING AND RESULTS

Units selected for testing are located in Units 101, 401, and 307. See Photographs 10 through 18 for elevations of units and specific windows tested.

1. Test Location 1 (Unit 101)

- a. Window selected is located on the north side of the building, first floor of living space. According to the Owner of the unit, there has not been any water infiltration observed at this window unit. See Photograph 19.
- b. Gaps between window frame and rough opening framing at right jamb range from 0 at bottom right to 1/4" at top right. Gaps at left jamb range from 1/4" to 3/8". Window is not set plumb in opening. See Photographs 20 and 21. Window is not set on shims. See Photograph 22.
- c. Shims are present at five locations at left jamb. Spacing ranges from 13" to 18". No fasteners or shims are present on right side of opening. At one location on left side, fastener is installed without shim.
- d. Sealant is visible on the inside face of the nailing fin. The amount of sealant that protrudes into the opening is not consistent and ranges from none to approximately 1/4".
- e. Drywall fasteners penetrate the metal sill flashing near the bottom of the back vertical leg of the flashing. See Photograph 23.
- f. Width of window varies from 64" at base of window frame to 64 3/8" at 28" and 56" above the sill.
- g. Sealant has been applied to numerous locations at corners of frame. Sealant appears to be face applied as remedial repair to correct gaps at weatherstripping and seal interface at frame corners. See Photographs 24, 25, 26 and 27.

2. Test Location 2 (Unit 101):

- a. Window selected is on the east side of the building, first floor bedroom. See Photograph 28.
- b. Peel and stick flashing installed at termination of sill flashing end dams. Flashing is loose and not adhered to concrete opening. Unit is not shimmed at sill. See Photograph 29.
- c. Sealant has been applied to inside corners on exterior frame. Sealant appears to be face applied as remedial repair to correct gaps in weatherstripping and seal interface at frame corners. See Photographs 30, 31 and 32.
- d. Width of window frame varies from 64" to 64 3/8".

3. Test Location 3 (Unit 401):

- a. Window selected is on the north side of the building, fourth floor bedroom. See Photograph 33.
- b. Apparent mold is present behind the trim boards removed by the contractor. Mold is present at both bottom corners.
- c. Water stains were observed on wood blocking at beneath window sill.

4. Test Location 4 (Unit 401):

- a. Window selected is on the east side of the building, fourth floor library. See Photograph 34.
- b. Water stains were observed at both the wood blocking at the sill and the jamb behind the trim boards and gypsum sheathing. See Photographs 35 and 36. Window unit is not set on shims.
- c. Gaps between the rough opening framing and window frame are in excess of 1/2".
- d. Joint between sash and frame is wider on the left side of sash than the right side. See Photograph 37.
- e. Sealant joint on exterior perimeter of the window is open. See Photographs 38 and 39.

5. Test Location 5 (Unit 307):

- a. Window selected is located in an interior courtyard at the third story living level. See Photograph 40. Window unit is not set on shims at sill. See Photograph 41.
- b. Gap between rough opening framing and window frame at right jamb is 5/16". Gap between rough opening at head and left jamb is 1/2" - 5/8". See Photographs 42 and 43.
- c. No fasteners are present between window frame and rough opening.
- d. Nailing fin was observed between rough opening and window frame.
- e. Frame is not level. See Photograph 44.

6. Test Location 6 (Unit 307):

- a. Window is located on third level in den.
- b. Gap between rough opening and window frame at left jamb is 1/2". Gap at top of window frame ranges from 0 to 3/16". See Photographs 45, 46 and 47.

c. Sill is skimmed approximately 1/4". See Photograph 48.

7. Test Location 7 (Unit 307):

- a. Door was selected at this location to test a different type of unit installed and for access to area to be tested. See Photograph 49 (middle unit).
- b. Gap between window and rough opening is 5/16" at left jamb. See Photograph 50.
- c. Weeps are located above the door threshold. See Photograph 51.
- d. Threshold is installed over metal sill flashing.
- e. Sealant has been applied to the exterior of the glazing. It is not adhered in places. See Photograph 52.
- f. Sealant has been applied to the lower left side of glazing at interface with bottom rail. See Photograph 53.

TESTING PROCEDURE

Coordination for units to be tested was provided by the law offices of Moore and Van Allen and Thurmond Kirchner Timbes & Yelverton based on agreement by individual unit owners to allow testing in their personal residences. Locations within units were chosen randomly but in locations that were reasonably accessible from the exterior.

Water testing at windows was performed in general accordance with AAMA 502 'Voluntary Specification for Field Testing of Windows and Sliding Glass Doors.' This test method meets the requirements of ASTM E1105 'Field Determination of Water Penetration of Installed Exterior Windows, Curtain Walls and Doors by Uniform or Cyclic Static Air Pressure Difference,' a similar procedure with testing requirements established by American Society of Testing and Materials. AAMA 502 states that "Water penetration resistance tests shall be conducted at a static test pressure equal to 2/3 (0.667) of the test pressure specified for the applicable product designation in ANSI/AAMA/NWDA 101/I.S." Positive design pressure for components and cladding is listed as 52.9 psf on the structural drawings (Drawing S0.1). For residential (R), commercial (C) and Light Commercial (LC) windows, water resistance test pressure is established as 15% of the positive design pressure. Therefore, AAMA 502 testing requirements for field testing of a 52.9 psf positive DP is 5.29 psf (52.9×0.15) or 0.253 kPa. Window testing in February, 2012 was performed to a testing pressure consistent with these parameters.

Window shop drawings were received subsequent to testing performed in February, 2012. Window shop drawings indicate positive design pressures of 55 psf, which equate to 5.5 psf (55×0.15) or 0.263 kPa. Window testing in July, 2012 was performed to a testing pressure meeting the positive design pressure performance indicated on the approved window shop drawings.

Prior to testing, visual observation of the test area was performed. Windows were measured onsite and were generally found out-of-square by approximately 1/8" to 3/8". All operable units were opened and closed five times. Window frames were wiped down of dust, debris and water, if present. The exterior of each location had plastic sheeting taped to the exterior of the window frame to isolate the unit from perimeter sealant joints, flashing, brick masonry, or other cladding components.

Test chambers were constructed and sealed to the interior side of rough opening framing at each unit tested. Chambers were constructed to view window unit and perimeter opening around frame from interior side. Chambers were pressurized to create an air pressure differential of 5.29 psf or 5.5 psf per previous discussion. Both uniform static and cyclic periods were utilized during testing. During testing visual observations were made to inspect for water leakage within the chamber. Water was applied to the exterior of the windows at the rate of 5 gal/sf/hr utilizing a calibrated spray rack.

A total of 22 tests were performed on six (6) windows and one (1) door. All tests performed resulted in water penetration except for one test (Test Location 6).

Test results are summarized in Appendix A.

DISCUSSION

The information in this section is based upon a review of the file documents made available to us by Moore and Van Allen and Thurmond Kirchner Timbes & Yelverton law firms and our field testing. To the best of our knowledge, no other plans, specifications, shop drawings, submittals, manufacturer's literature, requests for information (RFIs), responses to RFIs, correspondence or change orders exist which are applicable to the existing system and none were therefore considered.

The window units installed on the Concord and Cumberland condominiums have had water intrusion issues since originally installed. SKA performed 19 tests during construction and 18 failed. While six of these tests were performed over the 5.5 psf pressure for this window, twelve of the remaining thirteen tests failed. Metro Waterproofing was contracted and identified 64 locations of leaks and recommended numerous repairs, including wet sealing windows.

Architectural Testing was contracted on six separate occasions by different parties to test windows. Forty-two tests were conducted on fifteen (15) specimens including thirteen (13) windows and two (2) doors. Specimens failed at thirty-six (36) tests including one failure at 0 psf and five failures at 4 psf, both under the required testing pressure. Twenty one (21) of those failed tests were performed after remedial repairs to the windows had been accomplished.

The windows installed on this building consistently failed, including testing performed after repairs had been made to mitigate water infiltration.

Stafford Consulting Engineers was contracted to duplicate testing previously performed by others, including SKA and ATI, to verify watertightness of the windows. The design pressure utilized by those companies equaled 5.5 psf, which is the appropriate design pressure as discussed above. These tests were performed in 2007, 2008 and 2009. The tests conducted at the latter dates, which were contracted by multiple parties, continued to use the 5.5 psf pressure. AAMA 502 states that, for water penetration testing, "If water leakage is observed and the source of water leakage cannot be determined, a forensic evaluation using the procedures outlined in AAMA 511 shall be performed while maintaining the test pressures defined in the field testing specifications, and employing the test methods defined in AAMA 502."

SCE tested units at seven locations. A total of 22 tests were performed in general accordance with ASTM E 1105. Window units leaked at 21 of the tests performed. Leaks occurred directly

Concord & Cumberland
Page 8 of 8
October 3, 2013
Project No. FH136880

through the window assembly indicative that failure is attributable to the window manufacturer. Leaks also occurred between the interface of the window unit to the rough opening framing indicative that failure is attributable to window and flashing installation. The test results attached to this report indicate the locations of leakage during each test.

Window units continue to fail after numerous attempts at repair of the windows have been performed.

The manufacturer's installation instructions have specific requirements related to precise tolerances for installation, including placement of sealant and building wrap, fastening patterns for attachment to the structure, shims and placement of the unit within the rough opening. In at least some of the locations we observed the tolerances or spacings required by the installation instructions were not met by the framing and/or window installation trades. Determination of whether or not infringement of these tolerances caused the unit to fail is beyond the scope of Stafford Consulting Engineer's services. In any event, installation tolerances should be reasonable recognizing that buildings will move over time due to deflection and expansion and contraction of building materials and components. In our opinion, windows should be manufactured and tested to allow reasonable tolerances in installation dimensions to account for these factors.

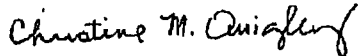
The installation of the windows is not acceptable. Installed windows have consistently failed for over five years and should be replaced utilizing appropriate methods. Existing frame openings may need to be modified to install new windows depending on the size of the replacement windows, the size of the existing rough opening and the requirements of the window manufacturer. Modifications may include adding additional framing to the interior of the rough opening, shims, etc. At the time of window replacement, building components including wood and metal framing, flooring, etc. should be inspected for damage and those found, if any, should be removed and replaced or repaired, including interior and exterior finishes and cladding components.

CLOSING

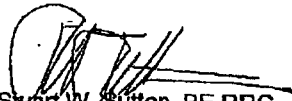
We trust this provides you with the information you require at this time. If we can be of further assistance, please do not hesitate to contact us.

Respectfully,

Stafford Consulting Engineers



Christine M. Quigley, PE RRC LEED AP
Senior Project Engineer



Stuart W. Sutton, PE RRC
Regional Manager

CMQ:cb

Enclosures: Testing Results
Photographs

AIA® Document A101™ - 1997

Standard Form of Agreement Between Owner and Contractor
where the basis of payment is a STIPULATED SUM

AGREEMENT made as of the 28th day of February in the year of 2006
(In words, indicate day, month and year)

BETWEEN the Owner:
(Name, address and other information)

Concord & Cumberland, LLC
1401 Main Street, Suite 650
Columbia, SC 29201
Attn: Bob Mundy
Phone: 803.779.1400

and the Contractor:
(Name, address and other information)

Superior Construction
3712-C Forestbrook Road
Myrtle Beach, SC 29588
Attn: Larry Taylor
Phone: 843.236.0660

The Project is:
(Name and location)

Concord & Cumberland Condominiums (27 Unit Development)
Concord & Cumberland St.
Charleston, SC

The Architect is:
(Name, address and other information)

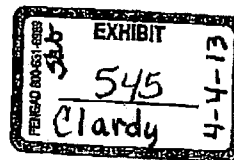
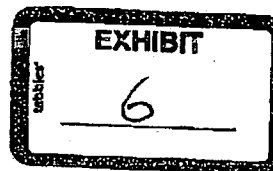
Davis Architects, PLLC
510 Glenwood Ave., Suite 201
Raleigh, NC 27603

The Owner and Contractor agree as follows.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

AIA Document A201-1997, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

This document has been approved and endorsed by The Associated General Contractors of America.



Int.

AIA Document A101™ - 1997, Copyright © 1915, 1918, 1925, 1937, 1951, 1958, 1981, 1983, 1987, 1974, 1977, 1987, 1991 and 1997 by The American Institute of Architects. All rights reserved. WARNING: This AIA® Document is protected by U.S. Copyright Law and International Treaties. Unauthorized reproduction or distribution of this AIA® Document, or any portion of it, may result in severe civil and criminal penalties, and will be prosecuted to the maximum extent possible under the law. This document was produced by AIA software at 10:00:43 on 02/29/2006 under Order No. 100077904.4 which expires on 5/5/2006, and is not for resale.

User Notes:

ARTICLE 1 THE CONTRACT DOCUMENTS

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement; these form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than Modifications, appears in Article 8.

ARTICLE 2 THE WORK OF THIS CONTRACT

The Contractor shall fully execute the Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others.

ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 3.1 The date of commencement of the Work shall be the date of this Agreement unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

(Insert the date of commencement if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)

March 1, 2006

~~RETURNS OWNER OR ISSUE OF BUILDING PERMIT.~~
~~ABOVE HAND WRITTEN WARNING TO BE OMITTED JUL 3/06~~
 If, prior to the commencement of the Work, the Owner requires time to file mortgages, mechanic's liens and other security interests, the Owner's time requirement shall be as follows:

NA

§ 3.2 The Contract Time shall be measured from the date of commencement,

248 DAYS

§ 3.3 The Contractor shall achieve Substantial Completion of the entire Work not later than days 248 months from the date of commencement, or as follows:

(Insert number of calendar days. Alternatively, a calendar date may be used when coordinated with the date of commencement. Unless stated elsewhere in the Contract Documents, insert any requirements for earlier Substantial Completion of certain portions of the Work.)

NA

Portion of Work

Substantial Completion Date

, subject to adjustments of this Contract Time as provided in the Contract Documents.
(Insert provisions, if any, for liquidated damages relating to failure to complete on time or for bonus payments for early completion of the Work.)

§ 3.3.1 If the Contractor delays completion of the Work and, as a result, fails to achieve Substantial Completion within the time stated in Paragraph 3.3 or as adjusted by Change Order, the Contractor shall pay the Owner actual damages for each day the Work is late beyond the date of Substantial Completion. The damages described in this Paragraph are assessed for the Contractor's failure to meet the Substantial Completion deadline and are the Owner's sole remedy for delay in completion of the Work.

§ 3.3.2 Substantial Completion will be achieved as follows: (1) all requirements for Substantial Completion described in the General Conditions, AIA Document A201-1997, as amended for this Project, are met; and (2) upon the issuance of a Certificate of Occupancy allowing beneficial occupancy of the Project. The Owner's failure to obtain a Certificate of Occupancy for reasons not attributable to the Contractor's negligence or failure to fulfill any of its obligations under the Contract Documents shall not prevent Substantial Completion.

Int.

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ARTICLE 4 CONTRACT SUM

§ 4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum shall be (\$ ~~7~~ Seven Million Six Hundred Fifty Thousand Five Hundred Seventy and 00/100 Dollars (\$7,650,570.00)), subject to additions and deductions as provided in the Contract Documents. The Contract Sum is based on bid drawings provided to the Contractor by the Owner. The Contract Sum is detailed in attached Exhibit D. The Contract Sum is subject to further clarification, including the issuance of final construction drawings by the Architect. A list of clarifications is attached as Exhibit C. The Contractor has included in the Contract Sum all amounts necessary to complete the Work as generally described by the bid documents and as clarified in Exhibit C, including the completion of all systems in accordance with industry standards.

§ 4.2 The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and alternates which are hereby accepted by the Owner:
(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date when that amount expires)

Alternate	Amount	Acceptance Date
NA		

§ 4.3 Unit prices, if any, are as follows:

Description	Units	Price (\$ 0.00)
NA		

ARTICLE 5 PAYMENTS

§ 5.1 PROGRESS PAYMENTS

§ 5.1.1 Based upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.

§ 5.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, month, or as follows:

§ 5.1.3 Provided that an Application for Payment is received by the Architect not later than the last day of a month, the Owner shall make payment of the amounts approved by the Architect and Lender to the Contractor not later than the 30th day of the following month. If an Application for Payment is received by the Architect after the application date fixed above, payment of the approved amounts shall be made by the Owner not later than () days after the 30th day of the month following the month in which the Architect receives the Application for Payment.

§ 5.1.4 Each Application for Payment shall be based on the most recent schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire Contract Sum among the various portions of the Work. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect and Owner's representative may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

§ 5.1.5 Applications for Payment shall indicate the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment.

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§ 5.1.6 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

- .1 Take that portion of the Contract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Contract Sum allocated to that portion of the Work in the schedule of values, less retainage of ~~(—) ten percent (10%)~~. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.8 of AIA Document A201-1997;
- .2 Add that portion of the Contract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction (or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing), less retainage of ~~(—) ten percent (10%)~~;
- .3 Subtract the aggregate of previous payments made by the Owner; and
- .4 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document A201-1997.

§ 5.1.7 The progress payment amount determined in accordance with Section 5.1.6 shall be further modified under the following circumstances:

- .1 Add, upon Substantial Completion of the Work, a sum sufficient to increase the total payments to the full amount of the Contract Sum, less ~~150%~~ of such amounts as the Architect shall determine for incomplete Work, retainage applicable to such work and unsettled claims; and ~~(Section 9.8.5 of AIA Document A201-1997 requires release of applicable retainage upon Substantial Completion of Work with consent of surety, if any.)~~
- .2 Add, if final completion of the Work is thereafter materially delayed through no fault of the Contractor, any additional amounts payable in accordance with Section 9.10.3 of AIA Document A201-1997.

§ 5.1.8 Reduction or limitation of retainage, if any, shall be as follows:

~~(If it is intended prior to Substantial Completion of the entire Work, to reduce or limit the retainage resulting from the percentages inserted in Sections 5.1.6.1 and 5.1.6.2 above, and this is not explained elsewhere in the Contract Documents, insert here provisions for such reduction or limitation.)~~

In the Owner's sole discretion, when the Project is 50% complete, retainage may be reduced to 0% on Applications for Payment submitted after 50% completion. Retainage may be reduced only if the progress and quality of the Work is satisfactory to the Owner and Architect and the Surety consents to such retainage reduction. However, in no event shall the total amount of retainage be reduced below 5% before Substantial Completion.

§ 5.1.9 Except with the Owner's prior approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 5.2 FINAL PAYMENT

§ 5.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when:

- .1 the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as provided ~~found, at any time, not to be in Section 12.2.2 of AIA Document A201-1997,~~ compliance with the Contract Documents, and to satisfy other requirements, if any, which extend beyond final payment; and
- .2 a final Certificate for Payment has been issued by the Architect-Architect, consent of Surety has been issued, as applicable, and the Lender's Inspector has approved the payment.

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§ 5.2.2 The Owner's final payment to the Contractor shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

NA

ARTICLE 6 TERMINATION OR SUSPENSION

§ 6.1 The Contract may be terminated by the Owner or the Contractor as provided in Article 14 of AIA Document A201-1997.

§ 6.2 The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201-1997.

ARTICLE 7 MISCELLANEOUS PROVISIONS

§ 7.1 Where reference is made in this Agreement to a provision of AIA Document A201-1997 or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

§ 7.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.)

(-)

One (1) point above the Federal Reserve prime interest rate for the date on which payment becomes due and is unpaid.

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

§ 7.3 The Owner's representative is:
(Name, address and other information)

Bob Mundy
1401 Main Street, Suite 650
Columbia, SC 29201
Phone: 803.779.1400
Fax: 803.765.9427
Cell: 803.609.8700
E-mail: Bmundy@estatesinc.com

§ 7.4 The Contractor's representative is:
(Name, address and other information)

Larry Taylor
Wally Bayne
3723-C Foresbrook Road
Myrtle Beach, SC 29588
Phone: 843.236.0660
Fax: 843.236.1601

WITH COPY TO: CARLTON S. "CHIP" CLARDY
134 W. MATTHEWS ST.
MATTHEWS, NC 28105

§ 7.5 Neither the Owner's nor the Contractor's representative shall be changed without ten days written notice to the other party.

Inf.

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§ 7.6 Other provisions:

NA

ARTICLE 8 ENUMERATION OF CONTRACT DOCUMENTS

§ 8.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated as follows:

§ 8.1.1 The Agreement is this executed 1997 edition of the Standard Form of Agreement Between Owner and Contractor, AIA Document A101-1997, A101-1997, as amended for this Project.

§ 8.1.2 The General Conditions are the 1997 edition of the General Conditions of the Contract for Construction, AIA Document A201-1997, A201-1997, as amended for this Project.

§ 8.1.3 The Supplementary and other Conditions of the Contract are those contained in the Project Manual, dated and are as follows:

Document	Title	Pages
----------	-------	-------

§ 8.1.4 The Specifications are those contained in the Project Manual dated as in Section 8.1.3, Manual, and are as follows:
(Either list the Specifications here or refer to an exhibit attached to this Agreement.)
See Exhibit A.

Section	Title	Pages
---------	-------	-------

§ 8.1.5 The Drawings are as follows, and are dated unless a different date is shown below follows:
(Either list the Drawings here or refer to an exhibit attached to this Agreement.)
See Exhibit B.

The Drawings applicable to this Contract and upon which the Contractor's price is based are identified as a set entitled "Concord & Cumberland Condominiums," 175 Concord Street, Charleston, South Carolina. They are further identified as "Bid Set" with a printed date of January 23, 2006. These are not issued for construction, but constitute a Contract Document, as defined by the terms and conditions of this Contract.

Number	Title	Date
--------	-------	------

The Drawings have been used as the baseline for the Contractor's price and to define, to the extent set forth therein, the requirements of the Contractor's scope of work, subject to any further amendments or clarifications thereto that are issued hereafter. Any amended scope of work and amended price based on subsequent drawings issued for construction shall be handled as a Change Order to this Contract as defined in the applicable provisions of this AIA Document A101, and the A201-1997, as amended for this Project and incorporated herein.

Representatives of the Owner and the Contractor have jointly identified clarifications and assumptions upon which the price herein is based by noting such clarifications and assumptions in red on each page of the Drawings, and dating each page "2/24/06" by handwritten note.

The following statement appears on the left hand margin of the title page of these drawings: "GC & Developer agree to hand written notes in "red" on these plans. Clarifications to contract will supersede these notes. GC reserves the right to review for cost impact." The Contract Sum, as stated herein, incorporates and is governed by these assumptions and clarifications and is subject to adjustment by Change Order.

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Upon the issuance hereafter of a set of design documents marked for construction and designated to govern the Work under this Contract, the Contract Sum will be reviewed, and any changes to the scope of the Work will be adjusted up or down, as appropriate, by Change Order issued pursuant to this Contract.

§ 8.1.6 The Addenda, if any, are as follows:

Number	Date	Pages
NA		

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 8.

§ 8.1.7 Other documents, if any, forming part of the Contract Documents are as follows:
(List here any additional documents that are intended to form part of the Contract Documents. AIA Document A201-1997 provides that bidding requirements such as advertisement or invitation to bid, instructions to Bidders, sample forms and the Contractor's bid are not part of the Contract Documents unless enumerated in this Agreement. They should be listed here only if intended to be part of the Contract Documents.)

- Exhibit C - Clarifications, dated February 21, 2006, pages 1 - 6.
- Exhibit D - Contract Sum Breakdown and Allowances
- Exhibit E - Letter Agreement with City of Charleston regarding relocation of transformer, dated February 16, 2006

ARTICLE 9 INSURANCE AND BONDS

§ 9.1 INSURANCE REQUIRED OF THE CONTRACTOR

The Contractor shall purchase and maintain insurance as set forth in Section 11.1 of A201™-1997, as amended for this Project. Such insurance shall be written for not less than the following limits, or greater if required by law:

§ 9.1.1 Workers' Compensation and Employers' Liability meeting statutory limits mandated by state and federal laws.

§ 9.1.2 Commercial General Liability including coverage for Premises Operations, Independent Contractors' Protective Products-Completed Operations, Contractual Liability, Personal Injury and Broad Form Property Damage (including coverage for Explosion, Collapse and Underground hazards):

- \$2 million Each Occurrence
- \$2 million General Aggregate
- \$1 million Personal and Advertising Injury
- \$2 million Products-Completed Operations Aggregate

1. Products and Completed Operations insurance shall be maintained on all policies carried by the Contractor during construction of the Project and for a period of ten (10) years thereafter.
2. The Owner and the City of Charleston, South Carolina shall be named as additional insureds under the Contractor's CGL policy with respect to this Project using the ISO Additional Insured endorsement (CG 20 10 07 04 and CG 20 37 07 04) or acceptable substitute providing equivalent coverage. The Contractor shall furnish verification of additional insured status to the Owner by providing a copy of the endorsement with the Certificate of Insurance in accordance with Section 11.1 of the A201-1997, as amended for this Project.
3. The Commercial General Liability insurance shall include coverage sufficient to meet the obligations in Section 3.18 of A201-1997, as amended for this Project.
4. The Contractor's Commercial General Liability policy shall not contain a prohibition on claims by named or additional insureds against other named or additional insureds. The Contractor's CGL policy shall provide coverage to the Contractor for claims made by the Owner or the City of Charleston South Carolina on the same basis as if those parties were not additional insureds under the policy.
5. The Contractor's CGL coverage will be Primary and Non-contributory, with no limitation for residential construction activities.

Handwritten initials and date:
JH 2/7/06
PP

WORDING TO BE REINSTATED

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§ 9.1.3 Automobile Liability (owned, non-owned and hired vehicles) for bodily injury and property damage:
\$1 million Each Accident

§ 9.2 INSURANCE REQUIRED OF THE OWNER

The Owner shall purchase and maintain Builder's Risk property insurance, including waivers of subrogation, as set forth in Section 11.4 of A201-1997, as amended for this Project.

§ 9.3 PAYMENT AND PERFORMANCE BONDS

Upon execution of this Agreement, the Contractor shall obtain 100% Payment and Performance Bonds from a surety currently rated "A-" or better by Best Rating. This Agreement is not effective until the Payment and Performance Bonds are in place, with all appropriate parties named on the bonds. The Contractor will also execute subordination agreements with the Owner's Lender for the Project. The cost of the Payment and Performance Bonds is not included in the Contract Sum and will be invoiced and paid separately.

This Agreement is entered into as of the day and year first written above and is executed in at least three original copies, of which one is to be delivered to the Contractor, one to the Architect for use in the administration of the Contract, and the remainder to the Owner.



OWNER (Signature)

Robert M. Mundy, Jr.
 (Printed name and title)



CONTRACTOR (Signature)

LARRY TAYLOR
 (Printed name and title)
 DIVISION MANAGER

SUBJECT TO AND INCORPORATING THE CHANGES
 TO THIS AGREEMENT AS DESCRIBED IN THE COVER
 LETTER DATED MARCH 7, 2006, ATTACHED AS "EXHIBIT F."

John
 3/8/06

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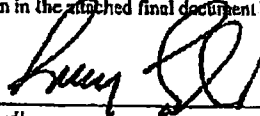
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John
 3/8/06

Certification of Document's Authenticity
AIA® Document D401™ – 2003

I, Brian Autry, hereby certify, to the best of my knowledge, information and belief, that I created the attached final document simultaneously with this certification at 10:00:43 on 02/28/2006 under Order No. 1000177504_4 from AJA Contract Documents software and that in preparing the attached final document I made no changes to the original text of AIA® Document A101™ – 1997 – Standard Form of Agreement Between Owner and Contractor where the basis of payment is a STIPULATED SUM, as published by the AIA in its software, other than changes shown in the attached final document by underscoring added text and striking over deleted text.


 (Signed)

DIVISION MANAGER
 (Title)

3/1/06
 (Dated)

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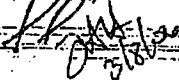


EXHIBIT 1 A

Superior-C&C-18429

Concord & Cumberland Condominiums

175 Concord Street
Charleston, South Carolina

Concord & Cumberland, LLC

JDA PROJECT NO. 05112

REVIEW DOCUMENTS
PROJECT MANUAL

December 9, 2005



J DAVIS ARCHITECTS

510 Glenwood Ave., Suite 210
Raleigh, North Carolina 27603
(919) 835-1500
(919) 835-1510 (fax)

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03/18/06

List of Missing Specifications

DIVISION 1-MISSING 01112 AND 01451
DIVISION 2-ALL MISSING EXCEPT 02620 AND 02667
DIVISION 3-MISSING 03300 AND 03381
DIVISION 5-MISSING-05120 AND 05310 AND 05400
DIVISION 7-MISSING 07552
DIVISION 8-MISSING 08212 AND 08710
DIVISION 9-MISSING 09310, 09651, 09653, 09680
DIVISION 12-ONLY SPEC IS 12484
DIVISION 15-ALL MISSING
DIVISION 16-ALL MISSING

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CONCORD & CUMBERLAND CONDOMINIUMS, CHARLESTON, SC
CONCORD & CUMBERLAND, LLC, COLUMBIA, NC
JDAVIS ARCHITECTS - PROJECT # 05J12 - REVIEW DOCUMENTS

12/9/2005

Superior-C&C18431

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CONCORD & CUMBERLAND, LLC, COLUMBIA, NC
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2/18/06

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Section 09653 - Resilient Wall Base and Accessories	Pages
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Section 10522 - Fire Extinguisher Cabinets	3 Pages
Section 10523 - Fire Extinguishers	2 Pages
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Section 15057 - Common Motor Requirements for Plumbing Equipment Pages
Section 15058 - Common Motor Requirements for HVAC Equipment Pages
Section 15061 - Hangers and Supports for Plumbing Piping and Equipment Pages
Section 15062 - Hangers and Supports for HVAC Piping and Equipment Pages
Section 15072 - Vibration and Seismic Controls for Fire-Suppression Piping & Equipment Pages
Section 15073 - Vibration and Seismic Controls for Plumbing Piping & Equipment Pages
Section 15074 - Vibration and Seismic Controls for HVAC Piping & Equipment Pages
Section 15076 - Identification for HVAC Piping and Equipment Pages
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Section 15082 - Plumbing Insulation Pages
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**Concord and Cumberland Condominiums
Exhibit B**

No.	Document Title	Date
	Cover Page	
	Building Code Summary	
A0.02	UL Assemblies and General Information	1/23/2006
A2.01	First Floor/Garage Floor Plan	1/23/2006
A2.02	Second Floor/ Third Floor Plan	1/23/2006
A2.03	Fourth Floor Rated Plan	1/23/2006
A2.04	First Floor/Garage Floor Rated Plan	1/23/2006
A2.05	Second Floor/Third Floor Rated Plan	1/23/2006
A2.06	Fourth Floor Rated Plan	1/23/2006
A3.01	East/North/South Elevation	1/23/2006
A3.02	Enlarged Elevations	1/23/2006
A3.03	Building Sections	1/23/2006
A3.04	Rated Building Sections	1/23/2006
A7.01	Enlarged Stair and Elevator Plans	1/23/2006
A7.02	Stair and Elevator Sections	1/23/2006
A8.01	Wall Section	1/23/2006
A8.02	Wall Sections	1/23/2006
A8.03	Wall Sections	1/23/2006
A8.04	Wall Sections	1/23/2006
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A9.02	Enlarged Details	1/23/2006
A9.03	Enlarged Details	1/23/2006
A9.04	Partition Wall Types	1/23/2006
A11.01	Window Schedule	1/23/2006
A11.02	Door Schedule	1/23/2006
A11.02	Door Schedule	1/23/2006
E1	Electrical Notes and Schedules	Bar Review Date 10/31/2005 Preliminary 1/18/2006
E2	Electrical Details	Bar Review Date 10/31/2005 1/18/2006
E3	Electrical Floor Plans	Bar Review Date 10/31/2005 1/18/2006
E4	Electrical Floor Plans	Bar Review Date 10/31/2005 not for 1/18/2006
E5	Electrical Floor Plans	Bar Review Date 10/31/2005 1/18/2006
E6	Electrical Floor Plans	Bar Review Date 10/31/2005 1/18/2006
E7	Electrical Floor Plans	Bar Review Date 10/31/2005 construction 1/18/2006
E8	Electrical Roof Plan	Bar Review Date 10/31/2005 1/18/2006
E9	Electrical Riser Diagrams & Panel Schedules	Bar Review Date 10/31/2005 1/18/2006
M1	Mechanical Floor Plan	BAR Review Date 10/31/2005 plot 1/18/2006
M2	Mechanical Floor Plan	BAR Review Date 10/31/2005 1/18/2006
M3	Mechanical Floor Plan	BAR Review Date 10/31/2005 date 1/18/2006
M4	Mechanical Floor Plan	BAR Review Date 10/31/2005 1/18/2006
M5	Mechanical Floor Plan	BAR Review Date 10/31/2005 1/18/2006

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M6	Mechanical Floor Plan	BAR Review Date	10/31/2005	Preliminary	1/18/2006
M7	Mechanical Floor Plan	BAR Review Date	10/31/2005		1/18/2006
P1	Plumbing Legend, Schedule and Notes	BAR Review Date	10/31/2005	not for	1/18/2006
P2	Plumbing Floor Plans	BAR Review Date	10/31/2005		1/18/2006
P3	Plumbing Floor Plans	BAR Review Date	10/31/2005		1/18/2006
P4	Plumbing Floor Plans	BAR Review Date	10/31/2005	construction	1/18/2006
P5	Plumbing Floor Plans	BAR Review Date	10/31/2005		1/18/2006
P6	Plumbing Floor Plans	BAR Review Date	10/31/2005		1/18/2006
P7	Plumbing Floor Plans	BAR Review Date	10/31/2005	plot	1/18/2006
P8	Plumbing Waste Risers	BAR Review Date	10/31/2005		1/18/2006
P9	Plumbing Waste Risers	BAR Review Date	10/31/2005		1/18/2006
P10	Plumbing, Gas, and Water Risers	BAR Review Date	10/31/2005	date	1/18/2006
S0.1	General Construction Specifications				1/18/2006
S1.1	Foundation				1/18/2006
S1.2	Slab on Grade Plan				1/18/2006
S2.1	First Floor Framing Plan				1/18/2006
S2.2	Second Floor Slab				1/18/2006
S2.3	Third Floor Slab				1/18/2006
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S4.1	Concrete Schedules				1/18/2006
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S4.3	Post Tension Details				1/18/2006
S4.4	Typical Masonry and Light Fage Details				1/18/2006
S4.5	Roof Framing Details				1/18/2006
S5.1	Shearwall Elevations				1/18/2006
S5.2	Shearwall Elevations				1/18/2006
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SF1.02	Details				12/31/2005
SF1.03	Details				12/31/2005
SF2.01	First Floor Walls and Framing				12/31/2005
SF2.02	Second Floor Plan				12/31/2005
SF2.03	Third Floor Plan				12/31/2005
SF2.04	Fourth Floor Plan				12/31/2005



EXHIBIT 1

Concord and Cumberland Condominiums

CLARIFICATIONS

Date: February 21, 2006

The clarifications listed below are not intended to limit the scope of the Work described by the Project plans and specifications. The clarifications are intended to describe the general understanding of the agreement made between the Owner and the Contractor. It is the intention of both the Owner and Contractor to incorporate the future "For Construction" plans by change order to the Contract after review by the Contractor and their trade contractors.

The Contract Sum stated in the Agreement includes all requirements and clarifications stated herein and in all other exhibits to the Agreement.

DIVISION ONE

- Concord and Cumberland Condominiums (27 unit condominium development) refers to the construction of the 27 unit condominium building over a parking structure at 175 Concord Street.
- Construction materials will be shipped and unloaded at the site as required by the City of Charleston.
- Temporary security fencing is included.
- If necessary for construction activities, night security will be provided to secure the site. Superior Construction site personnel can be used to provide security.
- Project clean-up and proper waste disposal is included, during construction and including the final clean up.
- The Contractor has all logistics included to build the project without any special access to the site needed from the Owner for general construction purposes. The Owner will provide easement agreements from the City of Charleston and Harborview Inn. No other easements are included to be provided by the Owner.
- Permit fees, Impact fees and testing fees will be paid by the Owner. Any inspection costs incurred will be paid by the Contractor.
- The Contractor will coordinate and schedule the testing work in a timely manner to facilitate this work by the respective testing company.
- The Contractor will provide traffic control and temporary measures related to working on Concord and Cumberland Streets, in compliance with the City requirements.
- The Contractor will construct the required mock-up panels to obtain the approval of Charleston's B.A.R. Mock-up panels will be maintained as required by the BAR and removed upon gaining final approval.
- The Contractor will punch the units prior to the punch walks with the Owner.
- The Owner will provide the Builder's Risk Insurance.
- The Owner will provide Architectural and Engineering fees.

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- The Contractor will provide accurate As-Built plans at the appropriate time(s) to facilitate the Certificate of Occupancy(s) and properly closings.
- Plan review remarks made to the bid plans that were priced are included in scope of work. See Exhibits A and B to the Contract.
- The Contractor and/or electrical subcontractor will coordinate closely with SCE&G, Comcast Cable, and BellSouth Telephone for providing temporary and permanent service to the development. All power and gas meters, power distribution, and related equipment will be installed per SCE&G requirements. The Contractor will contact SCE&G, Comcast Cable, and BellSouth to schedule their work to tie-in with the work provided by the Contractor.

DIVISION TWO

- The Owner is providing the pre-condition survey. The Contractor will comply with the recommendations of the testing company to safely demolish the existing improvements and construct the new building.
- The site is located in historic Charleston, SC and the Contractor does anticipate excavating with a backhoe, including small debris.
- The Contractor will coordinate the removal of the existing electrical power lines and other utilities as needed to facilitate the continuous construction activities. The Owner will pay the costs required by SCE&G.
- The Contractor will provide normally expected protection to any existing nearby buildings during excavation and foundation or utility work and give proper neighbor notification.
- The Contractor has included all tie-ins, vaults, apparatuses, back flow preventers, valves and valve boxes, backboards, cans, and enclosures required to connect all utilities to the provider's service lines.
- Site work is included as an allowance of \$120,000 which includes utilities, sidewalks, landscaping, storm drainage, and site irrigation. Stormwater piping from the roof is included in Division 15.
- Termite protection and renewable bonds will be provided by the Contractor. The cost of renewing the bonds is the responsibility of the Owner.
- Contractor will provide slope to drain garage slab, balconies, sprinkler room, and trash room.

DIVISION THREE

- Concrete pilings are per the plan layout. Installation methods to minimize the vibrations are included. The plans show 14" piles. The Contractor has priced 12" piles. S&ME and the Project architects are currently reviewing.
- Vibration monitoring and pile driving records will be provided by the Owner's testing company.
- Concrete testing will be provided by the Owner's testing company, the Contractor will coordinate normal testing activities.
- Thickness of concrete walls are as a minimum as shown on the structural plans. Concrete shear walls are included as shown on the structural plans, whether shown on the architectural plans or not.
- All floors to receive floor drains will be properly sloped to the drains whether indicated on the architectural plans or not.

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- All concrete floors to be cleaned and prepped, with no residue at unit interiors until completion of the unit walks.
- Shear walls 4W25 and 4W26 are too long. Structural is being coordinated and load transfers may affect the post-tensioned slab and, in turn, the footings. This adjustment will not affect pricing if handled properly. Any adjustment in the contract price due to this issue will be made by change order, if necessary.

DIVISION FOUR

- Face brick for the project is Boral "Woodward Blend", size to be modular.
- Mortar color is white based. To be chosen by SWA.
- CMU is as per plans- structural plans before architectural plans. Damp proofing is included per the plans and specifications.
- Contractor will provide material and labor necessary for installation of architectural stone at tower. The entire tower will be built out of stone per BAR final review. This is shown incorrectly as brick on JDavis plans. The Contractor has priced the tower according to the plans.

DIVISION FIVE

- All steel is per the plans, steel exposed to the elements in hot dipped galvanized. All exposed steel will be properly painted as a minimum.
- All steel lintels will be coordinated with the window installation prior to ordering.
- Prior to ordering all wrought iron work (including shop drawings), the Contractor is to verify with the Owner that the Owner does not want to change the style and supplier.

DIVISION SIX

- Corridor upfit package including paint and trim will be coordinated through a change order.

DIVISION SEVEN

- Dillon Construction has included two layers of fifteen pound felt at a minimum behind all Venetian stucco. The Contractor has priced Ferst Exteriors in its Contract Sum. The Contractor will make a good faith effort to negotiate with Dillon Construction for this scope of work. The Owner has the opportunity to direct the Contractor to use Dillon at the completion of negotiations, but the Owner assumes the risk of any increase in the price above Ferst Exterior.
- Flash and make watertight all penetrations.
- SBS-Modified Bituminous Membrane Roofing provided by Johns Manville International, Inc. The roofer's required 2 year labor and material warranty is included. The manufacturer's 20-year warranty is included. All work will be in accordance with the manufacturer's recommendations.
- All protective coverings on flashings will be removed to allow proper bonding of adjoining materials.
- The Contractor includes copper sill pans at all exterior windows and doors, properly installed and tied in to building envelope finished. Weep holes and sealants are to be coordinated with envelope drainage.

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- Metal roof is true copper roof at the entries only. Installer will protect the copper from stains and/or marks associated with installation for an even color at project completion. Scratched roof panels will be replaced.

DIVISION EIGHT

- Interior wood doors at unit entry are Champion Design Gallery model A-3 size is 3' 0" x 8' 0", paint grade, pre-primed.
- Weathershield Lifeguard aluminum clad windows and doors are included and will be installed in accordance with the manufacturer's installation instructions. Per Weathershield quote dated January 10, 2008, shop drawings to be submitted and approved, windows and supplied and installed by Muhler Company.
- Unit entry door hardware is included as a material allowance of \$250.00 per condominium entry.
- Contractor is to verify a 24 hour response time from Weathershield for window and door operation and water tightness issues.

DIVISION NINE

- All exposed sheetrock in corridors will be prepped for finish painting.
- Contractor's price includes material and labor for stacking appropriate type sheetrock (white or green board) in units for lump sum of \$60,000. This includes finishing out all walls per JDavis interior wall plans. Sheetrock to be properly stacked, kept clean, well ventilated, and kept in conditioned environment to prevent any moisture damage or mold and mildew. No drywall will be installed inside an individual unit on the back side of the corridor wall. The party walls will be hung and taped to meet fire code.
- Ceramic tile will be provided at all balcony floors and includes Schluter (or equal) waterproofing system beneath all tiles. The Contractor's price includes an allowance of \$3.00 per square foot for the installation of ceramic tiles on the balconies.
- Contractor includes tele/data room at floors 2, 3, and 4 to balance with trash room, including doors and hardware.
- Acoustical measures are included at all areas per the plans and specifications.
- Garage exposed piping, ceiling, walls, and columns are painted.
- Elevator lobby and raised walk will have blue stone finish at garage level with ADA ramp.

DIVISION TEN

- Shutters will be solid PVC type, not hollow vinyl.

DIVISION ELEVEN

- The automatic garage security gates are included by the Contractor. The 54 fobs are not included in the Contract Sum.

DIVISION TWELVE

DIVISION THIRTEEN

DIVISION FOURTEEN

- Elevators 1 and 2 doors are per architectural plans. The elevator speed may be upgraded to 200 FPM from 150 FPM. Contractor to coordinate with Owner for upgrading cab interiors. Elevator 2 is 3,500 lb. Rated load. Contractor has priced 150 FPM, 2500 lb. car, and 3500 lb. car, with standard finishes per the plans and specifications.
- Elevator speed and room size will be determined by JDavis Architects. Model, size, and speed may be different from current plans and specifications.

DIVISION FIFTEEN

- The electric fire pump will be designed and provided by the sprinkler subcontractor, coordinated with the city water supply available and the power supply available from SCE&G's transformer and including metering.
- All roof mounted HVAC equipment will be permanently labeled - magic marker labels are not considered permanent.
- Roof drain and sanitary sewer piping will be cast iron.
- Fire sprinkler system will be installed to meet NFPA 13 or 13R. Architect may change from NFPA 13 to 13R. Contractor has priced NFPA 13. If 13R is used, price will decrease.
- A domestic water booster pump is included as shown on the plumbing drawings.
- Hose bibs to be provided near each stairwell.
- Site utility contractor is to provide any structures for tie in to civil storm drain lines.
- Contractor has included gutters and drains at the Concord stairwells.
- Fire pump is to be located in the sprinkler room.
- HVAC-roof top mounted equipment will be tied down to the structure and be isolated for vibration.

DIVISION SIXTEEN

- The Contractor will provide a complete and operating smoke and fire alarm system per all local, state, and federal code requirements.
- Contractor will coordinate all electrical requirements for the elevations during the shop drawing preparation and review, including verifying and providing as necessary all smoke guard requirements.
- If required, the Contractor will provide an individual connection point inside each condominium for tie into the fire alarm system by change order.
- Electric meters are to be located in the garage at either the north or south ends.
- The transformer location for the existing garage is included as per attached February 18, 2006 property closing documents. The Contractor has not included relocating and connecting the power to the existing city garage since it is not shown on the plans. SCE&G will perform this scope of work.
- The condominium building's transformer location is at 5 Cumberland according to the electrical plans and SCE&G plans.
- Light fixtures are included as a material allowance. Labor to install the lights is not part of the allowance.

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- Garage lighting is included in the light fixture allowance.
- Balcony lights (sconces) and receptacles at each unit balcony are roughed in to allow completion of exterior wall finishes.
- The Contractor has not included access control to the building exterior doors and including the elevator control panel. Contractor will coordinate this work with the Owner as required and the cost of the same will be adjusted by change order.
- The Contractor's scope excludes security system, alarm system, and telephone and data wiring. Risers to punch down boards are included.

MISCELLANEOUS

- Combined Unit #301 will be built according to BAR instead of JDavis plans. Combined Unit Design #301 at porch with window opening versus heated space as originally designed. Porch area to be changed back to original space as heated. The Contractor has priced this item according to the plans and specifications. Any increase in price will be adjusted by change order, if necessary.

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Jan 18-Concord_Cumberland_Cost_Sheet_Jan_18_2006

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DIV		Vendor	Notes	
SEC			Shell Construction Only	SQ. FT. Total
				87,120
				SQ. FT. SOO
				17,271
				SQ. FT. El. Slab
				17,081
Div 2	Site Work	Allowance		120,700
	Utilities	Inc. in site allowance		
	Connection & Capacity Fees	Paid by Owner		
	Water/Sewer Connection Fees	Paid by Owner		
	Mailbox Unit	Excluded		
	Submittals	Inc. in site allowance		
	Site Grading	Inc. in site allowance		
	Site Erosion Control	Inc. in site allowance		
	Concrete Piles	Parker Marine		387,684
	Pile Price			
	Sewer Lines	Inc. in site allowance		
	Termite Control	Estimated Item	\$ 0.10	1,727
	Pool/Hot Tub	Excluded		
	Pool Deck	Excluded		
	Pool Treads	Excluded		
	Pool Enclosure	Excluded		
	Aluminum Fence	Excluded		
	Parking Strip/Bumpers	Estimated Item		
Div 3	Concrete/SOG/Elevated Slab		Also includes formed shear walls-Deck concrete excluded	996,000
	Structural Slab			
	Gypcrete/Lightweight	Estimated Item	57,057 sf x 4.00-Deck concrete	228,228
Div 4	Masonry	Weatherholtz	CMU and Brick	683,384
	Masonry-Block Infill	Weatherholtz	Block Infill at Parking Deck- No steel or Grout included	83,394
	Stone	Architectural Stone	Notes: Cast stone for some areas = \$98,007 w/ no installation	113,060
	Stone Installation Labor	Architectural Stone	75% of stone price for Architectural Stone Company	85,000
	Additional Stone			
	Concrete Test	Excluded		
Div 5	Testing	Excluded		
	Structural Steel	AC Hall	Included in Renaissance Price	
	Steel Imbeds/Anchors	Estimated Item		8,360
	Misc. Steel	AC Hall		9,700
	Misc. Wall Flashings	Estimated Item		10,000
	Steel Beams/Columns			
	Blocking	Estimated Item		
	Handrails-Aluminum	AC Hall		43,257
	Handrails-Wrought Iron	AC Hall		17,700
	Additional Wrought Iron			
	Copper Awnings w/ brackets	AC Hall	Does not include roof-Roof b included in Roof Estimate	18,553
	Al. Awnings w/ brackets	AC Hall	Does not include roof-Roof b included in Roof Estimate	26,400
	Copper planter/window box	AC Hall		8,000
	Metal Stairs-Steel Pan	AC Hall		52,305
	Metal Trusses-Roof	Renaissance	Includes metal deck on flat roof and roof trusses	
	LT Gge Structural Metal Framing	Renaissance		1,248,820
	LT Gge Roof Framing	Renaissance	Included in roof truss price	

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2/18/06

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Superior-C&C18447

	Roof Framing			
Div 6	Framing Materials	Estimated Item		10,256
	Framing Labor	Estimated Item		5,000
	Framing Hardware			-
	Wood Trusses-Roof			-
	Interior Trim-Matwork-Material	Estimated Item	Excluded	-
	Interior Trim Labor	Estimated Item	Excluded	-
	Wood Cabinets			-
	Tops			-
	Fiberglass Columns		Material & Labor = \$175 ea. x 26	-
	Shutters-Wood	Estimated Item		13,650
Div 7	Waterproofing	Estimated Item	Elevator pits	5,000
	Waterproofing	Estimated Item	Balconies = 7,018sf x \$1.50	10,527
	Building Insulation	Estimated Item	Roof area only-Wall insulation included in DW	14,890
	Metal Roof G&D sub		Included in Roofing Sub	-
	Roofing	Anderson	Includes aluminum and copper roofs & modified	238,180
	EIFS/Stucco	Forst Exterior		224,763
	Venetian Stucco			-
	Fire Siding	Estimated Item		7,500
	Gutters	Estimated Item		6,500
	Roof Accessories			-
Div 8	Exterior Doors	Estimated Item	Solid doors not French Doors	26,301
	Metal Doors		Unit Doors Allowance \$15,597	-
	Metal Frames		Included in Exterior Door Price	-
	Door Install Labor	Estimated Item	Included in Exterior Door Price	8,250
	2hr. Fire Rated Doors		Included in Finish Hardware Price	-
	Rated Door Hardware		Allowance for unit door hardware \$260	12,000
	Finish Hardware	Estimated Item		6,850
	Garage Door	Estimated Item		-
	Windows-Material	Pella	Clad Wood-Non Impact on 1st Budget, Impact 2nd estimate	-
	Windows & Glass Doors-Mat	WeatherShield		638,355
	Windows-Install Labor	Pella		-
	Windows-Install Labor	WeatherShield		65,000
	Doors-Glass-Material	Pella	French doors	-
	Doors-Glass-Install Labor	Pella		-
	Storefront Doors			-
Div 9	Metal Studs & Drywall	G & L Contracting		265,000
	Stock DW materials in Units		Includes stocking units with drywall	60,000
	Tub Sanound			-
	Flooring			-
	Carpet	Estimated Item	Common area hallway only-\$18 per yd x 816yds	14,690
	Ceramic Tile	Estimated Item	Tile material allowance of \$3.00 per sf is included- 7,018sf	42,108
	Interior Column Wraps			-
	Exterior Column Wraps			-
	Painting-Garage		Paint Ceiling, Columns, Pping Duckwork	19,832
	Painting-Interior	Estimated Item	Excluded	-
	Painting-Exterior	Estimated Item		5,000
	Seal Rear Wall	Estimated Item	16,844sf x \$.50	-
	Misc. Architectural Trim			-
	Fypon Balustrade			-
Div 10	Toilet Accessories			-
	Wire Shelving			-
	Shower Curtain Rods			-
	Mirrors			-

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3/3/06

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Superior-C&C-18448

	Fire Extinguishers	Estimated Item		1,198
	Fire Ext. Cabinets	Estimated Item		2,208
	Fire Alarm system			
Div 11	Appliances	Excluded		
Div 14	Elevators	Schindler		122,880
	Trash Chutes	Estimated Item		17,800
	Trash Compactor			6,000
Div 15	Plumbing	ML Pleasant	Rough in Only-Includes roof drains	236,250
	Plumbing Fixtures		Rough in Only	
	Booster Pump	ML Pleasant		23,482
	Heating & A/C	SMI	13 SEER York Equipmnt Inc.	124,940
	Coastal Coating for AC	SMI		17,442
	Security Alarm	Excluded		
	Fire Protection	Century	NFPA 13 for shed bldg and NFPA 14 wet standpipe system	134,000
	Fire pump	Century		35,000
	Backflow-RP	Excluded		
Div 18	Electrical	Turner	Wiring to be MC cable Shed light fixture allowance of \$18,000 is included	279,000
	General Conditions			428,000
	SUB TOTAL			7,273,714
	Sales Tax			
			SUB TOTAL	7,273,714
	Miscellaneous/Contingency		0.00%	
				7,273,714
	Profit		5.00%	363,686
	TOTAL			7,637,400
	Permits & Inspections		Exclude	
	Business License			13,170
	Builders Risk		0.0000%	
	TOTAL			7,650,570
	Payment & Performance Bond		0.67%	51,259
	TOTAL			7,701,829

[Signature]
3/18/06

EXHIBIT E

CONCORD & CUMBERLAND, LLC
1401 MAIN STREET, SUITE 650
COLUMBIA, SC 29201

City of Charleston
75 Calhoun Street
Charleston, SC 29401

Re: Parcel B located at Concord and Cumberland Street, Charleston, SC
TMS # 458-09-02-068 (Portion) (the "Property")

This letter is to set forth the various agreements between the City of Charleston (the "City") and Concord & Cumberland, LLC ("Concord & Cumberland") regarding the certain electric transformer relocations necessary for the contemplated development of the Property. There is currently a transformer located on the Property which services a parking garage located immediately behind the Property and owned by the City. At Concord & Cumberland's expense, the transformer shall be relocated. The City and Concord & Cumberland shall first attempt to relocate the transformer next to an existing transformer (or exchanged for a larger transformer on the same foundation pad as the current transformer) across Concord Street from the Property on property owned by the City known as Waterfront Park. If the Waterfront Park location cannot be worked out with all involved parties including SCE&G and the South Carolina State Port's Authority within 30 days of the Closing on the Property, the transformer shall be located on the alternative location. Alternatively, the transformer will be relocated to a location between two existing 500 KVA transformers on the far western edge of the surface parking lot and to the west of the City garage. If any existing palmetto tree(s) has to be relocated to locate a transformer at this location, Concord & Cumberland agrees to pay \$2,500 to the City for re-landscaping as determined by the City plus the cost of relocating the tree(s) which shall also be the responsibility of Concord & Cumberland.

The City agrees that the garage shall receive temporary power from a temporary pole transformer to be erected adjacent to the City Garage on Concord & Cumberland until such time as the relocation of the subject transformer after which the temporary pole shall be removed. Concord & Cumberland will be responsible for the removal of the temporary pole and repairing any damage caused by the installation and removal of such pole. Concord & Cumberland shall remove the temporary pole and make repairs as quickly as possible.

The parties agree as set forth above.

[SIGNATURE PAGE ATTACHED]

02/16/2006 THU 12:36 [TX/RX NO 8510] 2006/02/16

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General Conditions of the Contract for Construction

For the following PROJECT:
(Name and location or address):

Concord & Cumberland Condominiums
Charleston, SC

THE OWNER:
(Name and address):

Concord & Cumberland, LLC
1401 Main Street, Suite 650
Columbia, SC 29201

THE ARCHITECT:
(Name and address):

J Davis Architects, PLLC
510 Glenwood Ave., Suite 201
Raleigh, NC 27603

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

This document has been approved and endorsed by The Associated General Contractors of America

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- 1 GENERAL PROVISIONS
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- 3 CONTRACTOR
- 4 ADMINISTRATION OF THE CONTRACT
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- 11 INSURANCE AND BONDS
- 12 UNCOVERING AND CORRECTION OF WORK
- 13 MISCELLANEOUS PROVISIONS
- 14 TERMINATION OR SUSPENSION OF THE CONTRACT

INT.

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ARTICLE 1 GENERAL PROVISIONS

§ 1.1 BASIC DEFINITIONS

§ 1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents consist of the Agreement between Owner and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents such as bidding requirements (advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of Addenda relating to bidding requirements).

§ 1.1.2 THE CONTRACT

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties, hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor, (3) between the Owner and Architect or (4) between any persons or entities other than the Owner and Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

§ 1.1.3 THE WORK

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

§ 1.1.4 THE PROJECT

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors.

§ 1.1.5 THE DRAWINGS

The Drawings are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

§ 1.1.6 THE SPECIFICATIONS

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

§ 1.1.7 THE PROJECT MANUAL

The Project Manual is a volume assembled for the Work which may include the bidding requirements, sample forms, Conditions of the Contract and Specifications.

§ 1.2 CORRELATION AND INTENT OF THE CONTRACT DOCUMENTS

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

§ 1.2.2 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

§ 1.2.3 Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

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§ 1.3 CAPITALIZATION

§ 1.3.1 Terms capitalized in these General Conditions include those which are (1) specifically defined, (2) the titles of numbered articles or (3) the titles of other documents published by the American Institute of Architects.

§ 1.4 INTERPRETATION

§ 1.4.1 In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

§ 1.5 EXECUTION OF CONTRACT DOCUMENTS

§ 1.5.1 The Contract Documents shall be signed by the Owner and Contractor. If either the Owner or Contractor or both do not sign all the Contract Documents, the Architect shall identify such unsigned Documents upon request.

§ 1.5.2 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

§ 1.6 OWNERSHIP AND USE OF DRAWINGS, SPECIFICATIONS AND OTHER INSTRUMENTS OF SERVICE

§ 1.6.1 The Drawings, Specifications and other documents, including those in electronic form, prepared by the Architect and the Architect's consultants are Instruments of Service through which the Work to be executed by the Contractor is described. The Contractor may retain one record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by the Architect or the Architect's consultants, and unless otherwise indicated the Architect and the Architect's consultants shall be deemed the authors of them and will retain all common law, statutory and other reserved rights, in addition to the copyrights. All copies of Instruments of Service, except the Contractor's record set, shall be returned or suitably accounted for to the Architect, on request, upon completion of the Work. The Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants, and copies thereof furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor or any Subcontractor, Sub-subcontractor or material or equipment supplier on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner, Architect and the Architect's consultants. The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are authorized to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants appropriate to and for use in the execution of their Work under the Contract Documents. All copies made under this authorization shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' copyrights or other reserved rights.

ARTICLE 2 OWNER**§ 2.1 GENERAL**

§ 2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority in kind the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Section 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

§ 2.1.2 The Owner shall furnish to the Contractor within fifteen days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

§ 2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

§ 2.2.1 The Owner shall, at the written request of the Contractor, prior to commencement of the Work and thereafter, furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or

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continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

§ 2.2.2 Except for permits and fees, including those required under Section 3.7.1, which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

§ 2.2.3 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

§ 2.2.4 Information or services required of the Owner by the Contract Documents shall be furnished by the Owner with reasonable promptness. Any other information or services relevant to the Contractor's performance of the Work under the Owner's control shall be furnished by the Owner after receipt from the Contractor of a written request for such information or services.

§ 2.2.5 Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, such copies of Drawings and Project Manuals as are reasonably necessary for execution of the Work.

§ 2.3 OWNER'S RIGHT TO STOP THE WORK

§ 2.3.1 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents as required by Section 12.2 or persistently fails to carry out Work in accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Section 6.1.3. ~~encl. 12~~

§ 2.4 OWNER'S RIGHT TO CARRY OUT THE WORK

§ 2.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period give the Contractor a second written notice to correct such deficiencies within a three-day period. If the Contractor within such three-day period after receipt of such second notice fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

ARTICLE 3 CONTRACTOR

§ 3.1 GENERAL

§ 3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Contractor" means the Contractor or the Contractor's authorized representative.

§ 3.1.2 The Contractor shall perform the Work in accordance with the Contract Documents.

§ 3.1.3 The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor.

§ 3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

§ 3.2.1 Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the

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Work, as well as the information furnished by the Owner pursuant to Section 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, any errors, inconsistencies or omissions discovered by the Contractor shall be reported promptly to the Architect as a request for information in such form as the Architect may require.

§ 3.2.2 Any design errors or omissions noted by the Contractor during this review shall be reported promptly to the Architect, but it is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents. The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Architect.

§ 3.2.3 If the Contractor believes that additional cost or time is involved because of clarifications or instructions issued by the Architect in response to the Contractor's notices or requests for information pursuant to Sections 3.2.1 and 3.2.2, the Contractor shall make Claims as provided in Sections 4.3.6 and 4.3.7. If the Contractor fails to perform the obligations of Sections 3.2.1 and 3.2.2, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. The Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents unless the Contractor recognized such error, inconsistency, omission or difference and knowingly failed to report it to the Architect.

§ 3.2.4 The Contractor acknowledges that its obligation to complete the Work in accordance with the Contract Documents shall not be amended as a result of any act or failure to act by the Architect or any of the Owner's other consultants, or as a consequence of any field inspections or observations, or approval of pay requests, or in regard to any other duty performed by the Architect or other Owner's consultant for the benefit of the Owner, unless the Owner shall expressly approve Contractor's action in writing specifically identifying the action approved. Any representative of the Owner shall promptly notify the Contractor, in writing, of any known deviation from the requirements of the Contract Documents.

§ 3.2.5 The Contractor shall not be relieved of any responsibility to complete the Work in conformity with the Contract Documents as a consequence of any knowledge of non-conformity obtained by any Owner's representative, including the Architect. The Contractor acknowledges and agrees that any representative retained by the Owner to act for the Owner's benefit, including the Architect, shall have no duty or responsibility to the Contractor except when specifically stated herein, and no act or failure to act by such Owner's representative shall relieve the Contractor of his obligation to perform all requirements under this Contract, except as specifically approved in writing otherwise.

§ 3.2.5 The Contractor's obligation to perform the Work according to the requirements of the Contract Documents may be amended only by a writing signed by either the Owner or the Architect.

§ 3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

§ 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any resulting loss or damage.

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§ 2.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

§ 3.4 LABOR AND MATERIALS

§ 34.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

§ 3.4.2 The Contractor may make substitutions only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order.

§ 3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

\$3.5 WARRANTY

§ 3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 3.5.2 The Contractor includes in this warranty materials or equipment specified by the Architect by brand name or as a sole source. The warranty provided in this Section and in Section 3.5.1 shall be in addition to and not in limitation of any other warranty required by the Contract Documents or otherwise prescribed by law and shall be in addition to all other rights and remedies available to the Owner. All warranty obligations are cumulative to and in addition to all remedies available to the Owner pursuant to the Contract Documents and applicable law.

§ 3.6 TAXES

§ 3.6.1 The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

§ 3.7 PERMITS, FEES AND NOTICES

§ 3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work which are customarily secured after execution of the Contract and which are legally required when bids are received or negotiations concluded. The Owner will pay for the general building permit. All trade contractors will pay for their respective permits.

§ 3.7.2 The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities applicable to performance of the Work.

§ 3.7.3 It is not the Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations. However, if the Contractor observes that portions of the Contract Documents are at variance therewith, the Contractor shall promptly notify the Architect and Owner in writing, and necessary changes shall be accomplished by appropriate Modification.

§ 3.7.4 If the Contractor performs Work knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations without such notice to the Architect and Owner, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

§ 3.8 ALLOWANCES

§ 3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

§ 3.8.2 Unless otherwise provided in the Contract Documents:

1. allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;
2. Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances;
3. whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.8.2.1 and (2) changes in Contractor's costs under Section 3.8.2.2.

§ 3.8.3 Materials and equipment under an allowance shall be selected by the Owner in sufficient time to avoid delay in the Work.

§ 3.9 SUPERINTENDENT

§ 3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

§ 3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

§ 3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

§ 3.10.2 The Contractor shall prepare and keep current, for the Architect's approval, a schedule of submittals which is coordinated with the Contractor's construction schedule and allows the Architect reasonable time to review submittals.

§ 3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Architect.

§ 3.10.4 The Contractor will be required to comply with the following as they relate to the planning and scheduling of the Work:

§ 3.10.4.1 The Contractor shall include in its price adequate time to properly schedule all aspects of the Contract Documents. The Contractor shall deliver to the Owner and Architect an "Initial Overall Construction Schedule", in bar chart format, within fourteen (14) days of the Notice to Proceed or at such time as may be mutually agreed upon by the Owner, Architect and Contractor. Once all data needed by the Contractor is obtained, the Contractor will then develop an "Overall Construction Schedule" (the "Schedule") that, when complete, will be the guide against which the Contractor's performance and progress of the Work will be measured. When the Schedule is complete, the Contractor, after consultation with all Subcontractors and material suppliers shall confirm in writing to the Architect that the Schedule is reasonable and achievable by the Contractor, subject to any extensions of time as provided for elsewhere in the Contract Documents. The Contractor shall thereafter give prompt specific notice to

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the Owner and the Architect of any change in the logic of the Schedule or any part thereof, the removal of any restraints, or the reduction of any durations.

§ 3.10.4.2 The Schedule shall be a Critical Path Method (CPM) type of schedule, consisting of: (1) a single critical path delineation; (2) designations of detailed activities and their restraining relationships; and (3) milestones and restraints for all activities, including Owner-awarded contracts through the date of Project completion.

§ 3.10.4.3 The Contractor shall account for four (4) "Rain Days" per month in the Schedule. A Rain Day is defined as 0.10 inches of accumulation within a 24-hour period as determined by the closest monitoring station and occurring on a date when work is scheduled to be performed.

§ 3.10.4.4 The Contractor shall meet with the Architect after creation of the Initial Overall Construction Schedule and will work, in good faith, with the Architect to establish a schedule for turn-around times for Shop Drawings and other submittals and times for responses to RFIs.

§ 3.10.4.5 Periodic meetings will be held at least once per month to assess the state of completion of the Project and to update the Schedule as necessary. Based on observations and assessments made at these meetings, the Contractor shall take, or, in the event the delay in question is not the responsibility of the Contractor, propose, the necessary and appropriate actions to resolve the issues that could delay the Work and to outline and implement plans to remedy Work behind schedule. The Owner and Architect will promptly review and approve the Schedule and will promptly review and execute appropriate change orders so as not to further delay the Work.

§ 3.10.4.6 The Architect and Owner shall be provided copies of the Schedule as periodically updated and in electronic format, as maintained by the Contractor.

§ 3.10.4.7 The Contractor is solely responsible for its obligations regarding the Schedule. Review of the Initial Overall Construction Schedule and subsequent reviews of the Schedule by the Architect and Owner do not operate to imply agreement by the Architect or Owner that the means and methods of planning of the Work utilized by the Contractor are adequate or will accomplish the Work in the time shown on the Schedule. The Contractor shall take all actions necessary to ensure the Work's success. Additionally, review of the Schedule by the Owner or its consultants shall not make the Owner or Architect responsible for Contractor's scheduling obligations or the accuracy of the Schedule prepared by the Contractor.

§ 3.10.4.8 The Contractor represents to the Owner that the Initial Overall Construction Schedule and all subsequent Schedules (including updates and amendments) have been prepared in good faith and are accurate to the best of the Contractor's knowledge. The Contractor acknowledges that the Owner and Architect will rely on the Schedule in regard to any and all decisions or actions by either in regard to the Project.

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§ 3.11 DOCUMENTS AND SAMPLES AT THE SITE

§ 3.11.1 The Contractor shall maintain at the site for the Owner one record copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to record field changes and selections made during construction, and one record copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work.

§ 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES

§ 3.12.1 Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

§ 3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

§ 3.12.3 Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

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the Owner and the Architect of any change in the logic of the Schedule or any part thereof, the removal of any restraints, or the reduction of any durations.

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§ 3.10.4.8 The Contractor represents to the Owner that the Initial Overall Construction Schedule and all subsequent Schedules (including updates and amendments) have been prepared in good faith and are accurate to the best of the Contractor's knowledge. The Contractor acknowledges that the Owner and Architect will rely on the Schedule in regard to any and all decisions or actions by either in regard to the Project.

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§ 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES

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§ 3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

§ 3.12.3 Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

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§ 3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. The purpose of their submittal is to demonstrate for those portions of the Work for which submittals are required by the Contract Documents the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by the Architect is subject to the limitations of Section 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals which are not required by the Contract Documents may be returned by the Architect without action.

§ 3.12.5 The Contractor shall review for compliance with the Contract Documents, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors, contractors and will, at a minimum, comply with the schedule for submission of and responses to Shop Drawings and submittals as agreed to between the Contractor and the Architect and made part of the Schedule pursuant to Section 3.10, above. Submittals which are not marked as reviewed for compliance with the Contract Documents and approved by the Contractor may be returned by the Architect without action. The Architect will review and return submittals in accordance with the schedule for submission and responses to submittals agreed to between the Contractor and Architect. The Contractor will maintain a submittal log, updated at least monthly, for periodic meetings.

§ 3.12.6 By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents. By approving and submitting the same, the Contractor also represents and warrants that all information set forth in such submittals is, to the best of the Contractor's knowledge and belief, based upon the exercise of reasonable diligence in reviewing the Subcontractor's submittals, accurate and complete, and that the Contractor shall, subject to the provisions of Section 3.12.8, comply with and utilize such approved Shop Drawings, Product Data, Samples, and other submittals in performing the Work.

§ 3.12.7 The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect. The Contractor will provide a mock-up panel for the Charleston Board of Architectural Review (B.A.R.). The mock-up panel will be maintained until final B.A.R. approval.

§ 3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's review and approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, deviation, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's review and approval thereof, and the Contractor shall remain liable to the Owner for any and all such errors or omissions.

§ 3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Architect on previous submittals. In the absence of such written notice the Architect's approval of a resubmission shall not apply to such revisions.

§ 3.12.10 The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings

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and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.

§ 3.13 USE OF SITE

§ 3.13.1 The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

§ 3.14 CUTTING AND PATCHING

§ 3.14.1 The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly.

§ 3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

§ 3.15 CLEANING UP

§ 3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

§ 3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the cost thereof shall be charged to the Contractor.

§ 3.16 ACCESS TO WORK

§ 3.16.1 The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

§ 3.17 ROYALTIES, PATENTS AND COPYRIGHTS

§ 3.17.1 The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Architect. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.

§ 3.18 INDEMNIFICATION

§ 3.18.1 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Section 11.3, the Contractor shall indemnify and hold harmless the Owner, 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, 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), but only to the extent 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.

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Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 3.18.

§ 3.18.2 In claims against any person or entity indemnified under this Section 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

§ 3.18.3 The Contractor acknowledges that the Owner has entered into an agreement with the City of Charleston, South Carolina (the "City") whereby the City created the (Owner) a construction easement for a period of time beginning February 16, 2006 and ending 30 months thereafter or upon final completion of the Project, whichever occurs first. 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 attorneys' fees, arising out of or resulting from bodily injury, sickness, disease or death, or to injury to 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.

ARTICLE 4 ADMINISTRATION OF THE CONTRACT

§ 4.1 ARCHITECT

§ 4.1.1 The Architect is the person lawfully licensed to practice architecture or an entity lawfully practicing architecture identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Architect" means the Architect or the Architect's authorized representative.

§ 4.1.2 Duties, responsibilities and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor and Architect. Consent shall not be unreasonably withheld.

§ 4.1.3 If the employment of the Architect is terminated, the Owner shall employ a new Architect against whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the former Architect.

§ 4.2 ARCHITECT'S ADMINISTRATION OF THE CONTRACT

§ 4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents, and will be an Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the one-year period for correction of Work described in Section 12.2. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified in writing in accordance with other provisions of the Contract.

§ 4.2.2 The Architect, as a representative of the Owner, will visit the site at intervals appropriate to the stage of the Contractor's operations (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Section 3.3.1.

§ 4.2.3 The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

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§ 4.2.4 Communications Facilitating Contract Administration. Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other through the Architect about matters arising out of or relating to the Contract. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

§ 4.2.5 Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

§ 4.2.6 The Architect will have authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Sections 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§ 4.2.7 The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review, review and, at a minimum, comply with the schedule for submittals and responses agreed to pursuant to Section 3.10. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Sections 3.3, 3.5 and 3.12. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 4.2.8 The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor changes in the Work as provided in Section 7.4.

§ 4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion, will receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor, and will issue a final Certificate for Payment upon compliance with the requirements of the Contract Documents.

§ 4.2.10 If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

§ 4.2.11 The Architect will interpret and decide matters concerning performance under and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If no agreement is made concerning the time within which interpretations required of the Architect shall be furnished in compliance with this Section 4.2, then delay shall not be recognized on account of failure by the Architect to furnish such interpretations until 15 days after written request is made for them.

§ 4.2.12 Interpretations and decisions of the Architect will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and initial decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith.

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§ 4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

§ 4.3 CLAIMS AND DISPUTES

§ 4.3.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

§ 4.3.1.1 The Contractor's notice of a Claim shall be by written request reciting a Change Order and specifying the grounds thereof and the relief sought.

§ 4.3.1.2 The Contractor shall attach to each Application for Payment a schedule of all known outstanding and unresolved requests for Change Orders, which shall include Change Orders dealing with a change in scope, requesting an extension of time, or asserting a Claim. This attachment shall certify that the only outstanding requests for Change Orders, either for a scope change, extension of time, or Claim, shall be those identified in the schedule attached to the Application for Payment. A schedule of outstanding Change Orders and Claims shall be required of each Subcontractor submitting an Application for Payment to the Contractor that is to be included in Contractor's Application for Payment to the Owner. The Owner and Architect shall each rely upon the attached schedule as inclusive of the Claims of which the Contractor then on notice and for which the Contractor intends to seek compensation.

§ 4.3.1.3 The Contractor's acceptance of payment in response to an Application for Payment shall constitute a release and waiver of any Claim or request for Change Order (then known and able to be asserted by the Contractor) not identified in the schedule accompanying such Application for Payment. Contractor shall require that each Subcontractor release and waive all known claims for any scope change or a Claim, as defined herein, by acceptance of payment from Contractor.

§ 4.3.1.4 The Contractor acknowledges that its obligation to complete the Work in accordance with the Contract Documents shall not be affected or amended as a result of any unresolved, outstanding, or asserted Claims submitted to Owner. The Contractor shall proceed with all Work required under the Contract Documents or directed to be performed by the Owner, regardless of any unresolved Claims or proceedings to assert a Claim. However, the Owner shall have no right to withhold undisputed amounts and shall pay any undisputed amounts due to the Contractor.

§ 4.3.2 Time Limits on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

§ 4.3.3 Continuing Contract Performance. Pending final resolution of a Claim except as otherwise agreed in writing or as provided in Section 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

§ 4.3.4 Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 31 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted.

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but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Section 4.4.

§ 4.3.5 Claims for Additional Cost. If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.6

§ 4.3.6 If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with this Section 4.3.

§ 4.3.7 Claims for Additional Time

§ 4.3.7.1 If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.

§ 4.3.7.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction.

§ 4.3.8 Injury or Damage to Person or Property. If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

§ 4.3.9 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

§ 4.3.10 Claims for Consequential Damages. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

- 1—damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such personnel; and
- 2—damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.

§ 4.4 RESOLUTION OF CLAIMS AND DISPUTES

§ 4.4.1 Decision of Architect. Claims, including those alleging an error or omission by the Architect but excluding those arising under Sections 10.3 through 10.5, shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. The Architect will not decide disputes between the Contractor and persons or entities other than the Owner.

§ 4.4.2 The Architect will review Claims and within ten days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from

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the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Architect is unable to resolve the Claim if the Architect lacks sufficient information to evaluate the merits of the Claim or if the Architect concludes that, in the Architect's sole discretion, it would be inappropriate for the Architect to resolve the Claim.

§ 4.4.3 In evaluating Claims, the Architect may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Architect in rendering a decision. The Architect may request the Owner to authorize retention of such persons at the Owner's expense.

§ 4.4.4 If the Architect requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either provide a response on the requested supporting data, advise the Architect when the response or supporting data will be furnished or advise the Architect that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Architect will either reject or approve the Claim in whole or in part.

§ 4.4.5 The Architect will approve or reject Claims by written decision, which shall state the reasons therefor and which shall notify the parties of any change in the Contract Sum or Contract Time or both. The approval or rejection of a Claim by the Architect shall be final and binding on the parties but subject to mediation and arbitration.

§ 4.4.6 When a written decision of the Architect states that (1) the decision is final but subject to mediation and arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

§ 4.4.7 Upon receipt of a Claim against the Contractor or at any time thereafter, the Architect or the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Architect or the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

§ 4.4.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the Claim by the Architect, by mediation or by arbitration.

§ 4.5 MEDIATION

§ 4.5.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Sections 4.3.10, 9.10.4 and 9.10.5 shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

§ 4.5.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to the Contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

§ 4.5.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 4.6 ARBITRATION

§ 4.6.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Sections 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after

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submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Section 4.5.

§ 4.6.2 Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect.

§ 4.6.3 A demand for arbitration shall be made within the time limits specified in Sections 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Section 13.7.

§ 4.6.4 Limitation on Consolidation or Joinder. No Any arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific references to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No joined who may be necessary for the complete adjudication of all issues raised by the demand for arbitration. Any arbitration shall also include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, including a separate contractor as described in Article 6-6, and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

§ 4.6.5 Claims and Timely Assertion of Claims. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

§ 4.6.6 Judgment on Final Award. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

§ 4.6.7 Neither the Owner nor the Contractor shall be required to arbitrate claims against the other that arise out of this Contract and the Work performed hereunder if the following circumstances are present:

1. A third party asserts a claim against both the Owner and the Contractor and that third party is not obligated to arbitrate with either the Owner or the Contractor. In such event, any claims asserted by the Owner and the Contractor against the other relating to the third party's claim shall not be subject to arbitration and may be pursued in the forum in which the third party's claims are initiated or heard.
2. A third party initiates a claim against either the Owner and the Contractor alone and that third party is not obligated to arbitrate with either the Owner or the Contractor. In such event, the party initially joined may join the other party to this Contract to protect its interests, either by way of a third-party complaint or other appropriate process. If such joinder occurs, claims between the Owner and Contractor relating to the third party's claim shall not be subject to arbitration and shall be heard in the initial forum in conjunction with all other claims or as determined in such forum.
3. Either the Owner or the Contractor initiates a claim against the other and either party determines, pursuant to the original or amended claim or original or amended counterclaims, that other parties are necessary to adjudicate all rights and protect all interests that are affected by such claims or counterclaims. If such other party or parties are subject to arbitration agreements and can be joined in a single arbitration, such arbitration proceeding shall be binding and enforceable as a means of resolving such dispute, and the resolution of the dispute through arbitration shall be binding and enforceable. If any necessary party cannot be joined into the pending or proposed arbitration proceeding but can be made a party to a proceeding in a judicial forum, the Owner and Contractor both

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waive their respective rights to demand arbitration. Neither the Owner nor the Contractor shall be compelled to arbitrate disputes in which a party necessary to the resolution of all claims cannot be joined. If a necessary third party cannot be joined in any pending arbitration proceeding, then that arbitration will be terminated and will no longer be enforceable against the parties. The parties may then proceed in the available judicial forum.

ARTICLE 5 SUBCONTRACTORS

§ 5.1 DEFINITIONS

§ 5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

§ 5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

§ 5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

§ 5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect will promptly reply to the Contractor in writing stating whether or not the Owner or the Architect, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection. Not later than 30 days following the date of issuance of a Notice to Proceed or commencement of the Work, whichever occurs first, the Contractor shall furnish, in writing, to the Owner through the Architect the Manufacturer/Subcontractor List consisting of a complete list of names of persons or entities proposed as manufacturers, fabricators, or material suppliers for the products, equipment, and systems proposed for the Work and, where applicable, the name of the installing Subcontractor.

§ 5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

§ 5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor met the specified qualifications and was reasonably demonstrably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

§ 5.2.4 The Contractor shall not change a Subcontractor, person or entity previously selected if the Owner or Architect makes reasonable objection to such substitute.

§ 5.3 SUBCONTRACTUAL RELATIONS

§ 5.3.1 By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The

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Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

§ 5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

§ 5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner provided that:

- 1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.2 and only for those subcontract agreements which the Owner accepts by notifying the Subcontractor and Contractor in writing; and
- 2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

§ 5.4.2 Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

§ 6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

§ 6.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to those including those portions related to Insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Section 4.3.

§ 6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

§ 6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules when directed to do so. The Contractor shall make any revisions to the construction schedule Schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised. The Contractor shall promptly notify the Architect of any unresolved conflict between the several contractors with respect to the Schedule and of any delay among the work of any contractor that may have the effect of delaying the work of any contractor. The assignment of the aforementioned responsibility to the Contractor does not alter any other provisions of the Contract, including the responsibility of the Contractor with respect to Contract Time, the Schedule, or the management and coordination of the Work.

§ 6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

§ 6.2 MUTUAL RESPONSIBILITY

§ 6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

§ 6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that

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the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

§ 6.2.3 The Owner shall be reimbursed by the Contractor for costs incurred by the Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of the Contractor. The Owner shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.

§ 6.2.4 The Contractor shall promptly remedy damage wrongfully caused by the Contractor to completed or partially completed construction or to property of the Owner or separate contractors as provided in Section 10.2.5.

§ 6.2.5 The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Section 3.14.

§ 6.3 OWNER'S RIGHT TO CLEAN UP

§ 6.3.1 If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

ARTICLE 7 CHANGES IN THE WORK

§ 7.1 GENERAL

§ 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

§ 7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

§ 7.2 CHANGE ORDERS

§ 7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

- 1 change in the Work;
- 2 the amount of the adjustment, if any, in the Contract Sum; and
- 3 the extent of the adjustment, if any, in the Contract Time.

§ 7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in Section 7.3.3.

§ 7.3 CONSTRUCTION CHANGE DIRECTIVES

§ 7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

§ 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- 1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- 2 unit prices stated in the Contract Documents or subsequently agreed upon;

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- 3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- 4 as provided in Section 7.3.6.

§ 7.3.4 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

§ 7.3.5 A Construction Change Directive signed by the Contractor indicates the agreement of the Contractor therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 7.3.6 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Architect on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Section 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.6 shall be limited to the following:

- 1 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- 2 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- 3 rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
- 4 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- 5 additional costs of supervision and field office personnel directly attributable to the change.

§ 7.3.7 The amount of credit to be allowed by the Contractor to the Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§ 7.3.8 Pending final determination of the total cost of a Construction Change Directive to the Owner, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs. For any portion of such cost that remains in dispute, the Architect will make an interim determination for purposes of monthly certification for payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a claim in accordance with Article 4.

§ 7.3.9 When the Owner and Contractor agree with the determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

§ 7.4 MINOR CHANGES IN THE WORK

§ 7.4.1 The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

ARTICLE 8 TIME

§ 8.1 DEFINITIONS

§ 8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

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§ 8.1.2 The date of commencement of the Work is the date established in the Agreement.

§ 8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Section 9.8.

§ 8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

§ 8.2 PROGRESS AND COMPLETION

§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

§ 8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by the Contract Documents or a notice to proceed given by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

§ 8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

§ 8.3 DELAYS AND EXTENSIONS OF TIME

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

§ 8.3.1

The Contractor is not entitled to an extension of time, compensation of any nature, costs, or damages, if the Contractor is delayed by any event or the occurrence of any risk, either of which was within the scope of the Contractor's contractual responsibility to control and manage in order to accomplish the Work required by the Contract Documents. Inclement weather beyond that normally expected shall not be deemed within the control of the Contractor.

§ 8.3.2 A basis may exist for an extension of time if:

1. The Contractor is delayed in performing the Work, but solely to the extent that delays are caused by events that are beyond the control and/or contractual responsibility of the Contractor, its subcontractors, sub-subcontractors, and suppliers at every tier, as defined in Section 8.3.1;
2. Delays directly impact the Contractor's ability to achieve Completion of the Work in accordance with the Contract Time requirements established by the Contract Documents, as amended by executed Change Order;
3. Delays cannot be made up by reasonable efforts otherwise which do not increase the Cost of the Work; and
4. Delays stem from the following causes:
 - a. Class 1 causes: (i) an act or failure to act on the part of the Owner, any consultant or employee of the Owner, or of a separate contractor employed by the Owner that is a breach of this Agreement; (ii) an injunction against Owner or Owner's representatives; or (iii) custom changes made by unit purchasers outside the scope of the Work.

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b. Class 2 causes: A Class 2 cause of delay is any other cause of delay not the responsibility of either the Owner or the Contractor, as defined herein. Such causes include, but are not limited to: Rain Days (as defined in Section 3.10.4.3) in excess of the four Rain Days per month accounted for in the Schedule; acts of God; riots; civil commotions; acts of War; unavoidable casualties to the Work in progress, except where insurance pays the cost of resulting delays or extended General Conditions costs; epidemics; quarantine restrictions; organized labor disputes; freight embargoes; unanticipated and undiscoverable environmental issues (except as to matters addressed in Article 10); abnormal labor and material shortages not customarily encountered or caused by events not reasonably foreseeable; or other cause traditionally defined as "force majeure."

§ 8.3.2 Claims relating to § 8.3.3 If the basis exists for an extension of time shall be made in accordance with applicable provisions under Section 8.3.2 and the Contractor has timely submitted a written claim documenting the basis for such extension, the Owner may exercise one of the following options:

1. For Class 1 causes, the Owner may accept a reasonable and appropriate time extension to cover such delay and grant a corresponding adjustment in the Contract Sum. The Contract Sum will be adjusted only to the extent of those necessary and reasonable on-site costs incurred by the field office and such other job site costs made necessary as a consequence of the delay and as limited and defined by Section 7.3.6;
2. For Class 2 causes, the Owner may accept a reasonable and appropriate time extension to cover such delay and there will be no corresponding adjustment in the Contract Sum. The Contractor's sole recourse will be entitlement to a time extension, regardless of actual sources or causes of delay;
3. The Owner may order the Contractor to accelerate construction activity by working overtime and by adding extra forces in order to overcome such delays, after the Contractor's submission to the Owner of a good faith estimate of the costs of such acceleration. The Owner may then adjust the Contract Sum in accordance with Article 7 to compensate the Contractor for such directed acceleration. The Contractor's direct costs used in determining such adjustment to the Contract Sum are limited to properly substantiated and documented premium or overtime labor costs or other costs necessary to accomplish such acceleration; or
4. The Owner may employ a combination of Section 4.3.4 or above remedies.

§ 8.3.4 Assessment of the existence of the basis for a time extension shall be determined by the Contractor's Schedule.

§ 8.3.5 Neither the Owner nor the Architect will be obligated or liable to Contractor for, and Contractor hereby expressly waives claims against Owner and Architect on account of, damages, costs, expenses, or related impacts that the Contractor, its Subcontractors, sub-subcontractors, suppliers, or other persons may incur as a result of a Class 2 cause enumerated in Section 8.3.2.

§ 8.3.6 The Contractor further waives any claim relating to time that is not made in accordance with applicable provisions of Section 4.3. Extensions of time occasioned by Change Orders shall be implemented in accordance with Article 7. A Change Order, when executed by the Owner, the Architect, and the Contractor shall be a final adjudication of all time or impact related costs associated with such Change Order and shall release and waive any and all claims, costs, or damages resulting from such Change Order, whether or not accounted for in the Change Order as executed.

§ 8.3.7 The Contractor also waives and releases any claim for additional costs of any nature incurred upon the Owner's failure to give an extension of time, unless the Contractor has given to Owner and Architect, within the applicable time limits set forth in the Contract Documents, a written request for an extension of time identifying the causes of delay and the days requested in accordance with the provisions of Section 8.3.3.

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