

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jean H. Toal, Circuit Court Judge

RECEIVED

JAN 09 2018

SC Court of Appeals

Case No. 2016-CP-10-1833
Appellate Case No. 2017-001270

Andrew and Kimberly McIntire..... Appellants,

v.

Sequest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a/ Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a/ Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC, Defendants,

Of which Sequest Development Company, Inc. Respondent.

RECORD ON APPEAL

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ATTORNEYS FOR RESPONDENT

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

FORM 4

JUDGMENT IN A CIVIL CASE

Andrew and Kimberly McIntire,

2017 MAY -1 AM 11: 52

JULIE J. ARMSTRONG
CLERK OF COURT

CASE NO. 2016 CP-10-1833

Seaquest Development Company, Inc.; Red Bay Constructors, Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork — Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Jean H. Toal

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☒ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

*order attached Dismissing
this action*

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

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

Circuit Court Judge

2758

Judge Code

1-17-17
Date

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-10-1833

ANDREW and KIMBERLY McINTIRE,
Plaintiffs,

v.

SEAQUEST DEVELOPMENT COMPANY,
INC.; RED BAY CONSTRUCTORS CORP.;
BENZENBERG CUSTOM CABINETS, INC.;
JONATHAN MARSHALL
CONSTRUCTION; COASTAL WINDOW &
DOOR CENTER OF CHARLESTON, LLC;
CAROLINA WINDOW & MILLWORK, LLC
n/k/a CAROLINA WINDOW & MILLWORK
- OMNI GLASS INDUSTRIES, LLC;
SOUTHCOAST EXTERIORS, INC.;
MICHAEL CASTEEN d/b/a CASTEEN
CUSTOM CABINETS; QUALITY CEDAR
PRODUCTS, INC. OF MICHIGAN d/b/a
MICHIGAN PRESTAIN CO.; COASTAL
PLUMBING & GAS, LLC; FOAM
INSULATION CO. INC.; JERRY COMER
d/b/a JERRY'S TILE & MARBLE, LLC;
LOWCOUNTRY FIREPLACES, INC.;
CAROLINA PEST SOLUTIONS, INC.; NEW
SOUTH CONSTRUCTION SUPPLY, LLC,

Defendants.

#1
SEAQUEST DEVELOPMENT COMPANY,
INC.,

Third-Party Plaintiff,

v.

ARCHITECTURAL PRODUCTS OF
CHARLESTON, LLC; SEALTIGHT OF
SOUTH CAROLINA, LLC,

Third-Party Defendants.

FILED
2017 MAY -1 AM 11:53
JULIE J. ARISTARONG
CLERK OF COURT

ORDER OF DISMISSAL

This residential construction-defect case is before the Court on the following four motions, all of them heard October 13, 2016:

- (1) Seaquest's¹ **Motion to Dismiss or Stay Proceedings** filed June 17, 2016 ("Seaquest's Motion to Dismiss");
- (2) Red Bay's² **Motion to Dismiss or for Stay of Proceedings** filed June 23, 2016 ("Red Bay's Motion to Dismiss");
- (3) The McIntires'³ **Motion to Stay and to Compel Arbitration** filed July 27, 2016 (the "Motion to Compel Arbitration"); and
- (4) The McIntires' **Motion for Protective Order as to Requests for Admissions of Seaquest Development Company** filed August 15, 2016 (the "Motion for Protective Order").

For the reasons below, Seaquest's Motion to Dismiss, which calls for a complete dismissal of the case, is GRANTED; the Motion to Compel Arbitration is DENIED; and the remaining motions (Red Bay's Motion to Dismiss and the McIntires' Motion for Protective Order) are MOOT as this case is DISMISSED in its entirety.

BACKGROUND

In August of 2007, the McIntires entered into a written contract with general contractor Seaquest for the construction of a home in Mount Pleasant. The work was performed by various subcontractors (the majority of whom are defendants or third-party defendants), and a certificate of occupancy was issued on September 25, 2008.

On April 8, 2016, the McIntires filed this lawsuit alleging defects in the home's construction and asserting the following causes of action against Seaquest: Negligence/Gross Negligence, Breach of Warranty of Habitability, Negligent Misrepresentation and Constructive

¹ "Seaquest" refers to Defendant Seaquest Development Company, Inc.

² "Red Bay" refers to Defendant Red Bay Constructors Corp.

³ The "McIntires" refers to Plaintiffs Andrew and Kimberly McIntire.

Fraud, and Breach of Warranty of Good and Workmanlike Work. Though their contract with Seaquest contains an arbitration clause, the McIntires have not asserted a cause of action for breach of contract.

Prior to filing this suit, the McIntires had discovered a number of alleged construction defects in the home and, without notifying Seaquest, had hired experts and begun repairs. The repairs had been substantially completed before suit was filed, or were so soon thereafter.

DISCUSSION

I. Seaquest's Motion to Dismiss

Seaquest contends this case should be dismissed because the McIntires filed this action before first complying with the requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §§ 40-59-810 to -860 (the "Right to Cure Act"), and under the circumstances, it is not possible for the McIntires to comply with the requirements of the Right to Cure Act, nor is it possible for Seaquest to be afforded its rights thereunder. The Court agrees.

#3
JST
The Right to Cure Act grants contractors like Seaquest (as well as subcontractors) the right to notice of, and an opportunity to inspect and cure, alleged "construction defect[s]"⁴ in a

⁴ As used in the Right to Cure Act,

"Construction defect" means a deficiency in or a deficiency arising out of the design, specifications, surveying, planning, supervision, or observation of construction or construction of residential improvements that results from any of the following:

- (a) defective material, products, or components used in the construction of residential improvements;
- (b) violation of the applicable codes in effect at the time of construction of residential improvements;
- (c) failure of the design of residential improvements to meet the applicable professional standards of care at the time of

"dwelling."⁵ It requires a "claimant"⁶ to "serve"⁷, no less than ninety days before filing an "action"⁸ against a contractor or subcontractor arising out of the construction of a dwelling, "a written notice of claim on the contractor" containing certain required information about the

governmental approval of the design of residential improvements; or

(d) failure to construct residential improvements in accordance with accepted trade standards for good and workmanlike construction at the time of construction. Compliance with the applicable codes in effect at the time of construction conclusively establishes construction in accordance with accepted trade standards for good and workmanlike construction, with respect to all matters specified in those codes.

§ 40-59-820(3).

⁵ As used in the Right to Cure Act,

"Dwelling" means a single-family house or duplex or a multifamily unit not to exceed sixteen units and not to exceed three stories in height, and which is intended for residential use. A dwelling includes the systems and other components and improvements that are part of a single or multifamily unit at the time of construction.

§ 40-59-820(4).

⁶ As used in the Right to Cure Act,

"Claimant" means a homeowner, including a subsequent purchaser, who asserts a claim against a contractor, subcontractor, supplier, or design professional concerning a defect in the design, construction, condition, or sale of a dwelling or in the remodel of a dwelling.

§ 40-59-820(2).

⁷ As used in the Act, "Serve or 'service' means personal service or delivery by certified mail to the last known address of the addressee." § 40-59-820(5).

⁸ As used in the Right to Cure Act,

"Action" means *any* civil lawsuit or action or *arbitration proceeding* for damages or indemnity asserting a claim for injury or loss to a dwelling or personal property caused by an alleged defect arising out of or related to the design, construction, condition, or sale of the dwelling or a remodel of a dwelling.

§ 40-59-820(1) (emphasis added).

claim. § 40-59-840(A); see also § 40-59-840(B) (providing, "The contractor or subcontractor shall advise the claimant within fifteen days of receipt of the claim if the construction defect is not sufficiently stated and shall request clarification."). It also establishes a mandatory pre-suit inspection/opportunity-to-cure procedure and the related rights/obligations of the respective parties. See § 40-59-850; see also § 40-59-850(C) ("If the parties cannot settle the dispute pursuant to [the Right to Cure Act], the claimant *may* proceed with a civil action or other remedy provided by contract or by law.") (emphasis added); § 40-59-830 ("If the claimant files an action in court before first complying with the requirements of this article, on motion of a party to the action, the court *shall* stay the action *until the claimant has complied* with the requirements of this article.") (emphasis added).

Our Supreme Court was called upon to construe the Right to Cure Act in Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010). In so doing, the Court endorsed the view that § 40-59-840 "encompasses civil lawsuits filed against a contractor or subcontractor," "imposes an absolute condition precedent to the filing of lawsuits that qualify under the Right to Cure Act[.]" and "*requires* the claimant to serve written notice no later than ninety days before filing the action." Id. at 570, 703 S.E.2d 200-01 (emphasis in original). Further, regarding the legislative intent underlying the Right to Cure Act, the Court stated as follows:

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The Right to Cure Act has an express public policy intent of: (1) addressing the need for an alternative dispute resolution method to promote settlement of construction disputes without litigation, while adequately protecting the rights of homeowners; and (2) requiring a would-be plaintiff in certain construction defect matters to file a notice of claim with the would-be defendant and provide an opportunity to resolve the claim without litigation. The stated public policy, therefore, is not abridged when a court, on motion, is required to stay a proceeding in order to *require compliance* with the Right to Cure Act's notice provisions.

Id. at 572-73, 703 S.E.2d at 202 (emphasis in original) (internal citation omitted).

Without question, the Right to Cure Act applies here; the McIntires filed this action before first complying with its requirements; and under the circumstances, it is not possible for the McIntires to comply with its requirements, nor indeed is it possible for Seaquest to be afforded its rights thereunder. Wherefore, consistent with the Court's directive to ascertain and effectuate the intention of the legislature,⁹ based on the statutory language and in view of Grazia, I find that this case should be dismissed.

While, as referenced above, the Right to Cure Act expressly calls for a "stay" when a claimant files an action before compliance, it also expressly calls for the stay to remain in effect "until the claimant has complied" § 40-59-830 (emphasis added). Moreover, as also referenced above, the language of the Right to Cure Act makes plain the legislature's intent that no "civil action or other remedy provided by contract or by law" proceed until there has been compliance. See § 40-59-850(C) ("If the parties cannot settle the dispute pursuant to [the Right to Cure Act], the claimant *may* proceed with a civil action or other remedy provided by contract or by law.") (emphasis added). Here, the McIntires have made compliance with the Right to Cure Act impossible. They have substantially repaired and remodeled their home, in the process

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⁹ "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007); see also id. ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."); id. at 499, 640 S.E.2d at 459 (In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation."); S.C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) ("[T]he statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect."); Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citation omitted) ("If the statute is ambiguous . . . courts must construe the terms of the statute."); id. (statutory language must be construed in light of the intended purpose of the statute); id. (a statute should not be construed in a way which leads to an absurd result or renders it meaningless).

destroying the alleged defects without giving Seaquest any notice of those alleged defects and without giving Seaquest an opportunity to inspect/cure them. Because the McIntires have not complied with the Right to Cure Act, the act plainly requires a stay; because they foreclosed even the possibility of compliance with the Right to Cure Act, the stay must be permanent; as a practical matter, a permanent stay is a dismissal, which this Court now orders.

II. The Motion to Compel Arbitration

The McIntires contend the case should be stayed and the dispute compelled to arbitration. The Court disagrees, concluding that the McIntires are barred from arbitrating this dispute due to waiver as well as by the terms of their contract.

Whether a claim is subject to arbitration is a matter for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001). Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Like other contracts, arbitration clauses are to be enforced in accordance with their terms. Zabinski, 346 S.C. at 592.

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The McIntires have waived any right they may have had to demand arbitration. Although South Carolina favors arbitration, the right to enforce an arbitration clause may be waived. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). "[T]o establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." Gen. Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). No set rule exists "as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)

(quoting Hyload, Inc. v. Pre-Engineered Prods., Inc., 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992)). Our courts consider the following three factors when determining whether a party has waived its right to compel arbitration:

(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

Rhodes, 374 S.C. at 126, 647 S.E.2d at 251.

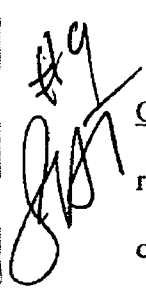
“To establish prejudice, the non-moving party must show something more than ‘mere inconvenience.’” Id. at 127, 647 S.E.2d at 251 (quoting Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003)). “Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts.” Id., 647 S.E.2d at 251-52 (internal citation omitted). The particular and peculiar facts of this case lead the Court to the inescapable conclusion that the McIntires waived any right to arbitrate.

#8
JW
Prior to filing the Motion to Compel Arbitration, the McIntires engaged in extensive discovery in that they retained forensic and construction liability and repair experts to investigate, document, and repair the alleged defects at their home. They undertook these actions related to litigation without demanding arbitration and, as noted above, without complying with the Right to Cure Act. The repairs to the home were substantially completed prior to the filing of the Motion to Compel Arbitration. The resulting material prejudice to Seaquest is clear and irreparable.

A substantial amount of time transpired between the time the McIntires engaged their experts and the time they moved to compel arbitration. By the time of the Motion to Compel Arbitration, the repairs to the alleged defects were substantially completed, the alleged defective conditions eliminated, precluding Seaquest from investigating, inspecting, and/or challenging the McIntires' claims. In a residential construction case, the most important evidence may in fact be the home itself. Here, the home Seaquest constructed, in its allegedly defective condition, no longer exists, with Seaquest left to rely on the McIntires' inspections and investigations and the evidence they chose to preserve.

Had the McIntires demanded arbitration when they first discovered the alleged defects, or when they first engaged liability or construction experts to perform their investigation, or at any time prior to repairing them, Seaquest would have had the opportunity to inspect, investigate, and/or test the alleged defects. Their delay in demanding arbitration does not constitute a mere inconvenience; rather, it amounts to a denial of Seaquest's right to fairly defend itself.

Additionally, the McIntires are contractually barred from demanding arbitration. The McIntires are attempting to invoke provisions in their contract¹⁰ with Seaquest to compel arbitration. Specifically, they claim that Section 4.6 of that contract requires arbitration.

The interpretation of a written contract is a matter of law to be decided by the court. Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991) (providing, "As a general rule, written contracts are to be construed by the Court" except where a contract is ambiguous or capable of more than one construction.). The McIntires have failed to demand arbitration in accordance with the very section they are attempting to enforce. Paragraph 4.6.2 states that a

¹⁰ The contract is a standard form AIA Document A101-1997, including AIA Document A201-1997 – General Conditions of the Contract for Construction. The Court has noted that the Plaintiffs have not sued for breach of contract, the very contract which Plaintiffs now contend requires arbitration of this dispute.

demand for arbitration must be filed in writing with the opposing party and with the American Arbitration Association. The McIntires have not done so; indeed, though they would like it stayed in favor in arbitration, they filed this lawsuit.

Paragraph 4.6.3 of the contract states that a "demand for arbitration shall be made . . . within a reasonable time after the claim has arisen" As previously stated, the McIntires have not made a demand for arbitration pursuant to the contract. They could not possibly comply with the "reasonable time" requirement in their contract. Having discovered alleged defects that would have given rise to a "Claim," they investigated that claim, retained counsel, retained experts, and substantially repaired and eliminated the alleged defects underlying the claim they wish to arbitrate. Accordingly, they are barred from demanding arbitration. The determination of a "reasonable time" for performance of one's obligations under a contract must be determined upon examination of the facts and circumstances of each particular case. And while generally the question of "reasonable time" would be one of fact for a jury, this case is different. As a matter of law, I find that an attempt to compel arbitration (without any prior demand therefor and, indeed, in the context of court proceedings that the moving parties themselves commenced) after the party seeking arbitration destroyed all or most of the physical evidence to support or refute the claim is manifestly unreasonable. Cf. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001) ("If the evidence as a whole is susceptible of only one reasonable inference, no jury issue is created and a directed verdict motion is properly granted.").

Paragraph 4.6.3 of the contract goes on to reference statutes of limitations for demanding arbitration. Specifically, Paragraph 4.6.3 states that "in no event shall [an arbitration demand] be made after the date when the institution of legal or equitable proceedings based on such Claim

would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.” The applicable statute of limitations for the claims brought by the McIntires is three years as set forth in S.C. Code Ann. § 15-3-510, *et seq.* Paragraph 13.7.1.3 states, “As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued” Accordingly, the McIntires’ demand for arbitration had to have been made sometime prior to 2012.¹¹ The statute of limitations to demand arbitration, as calculated by the contract and by the arbitration clause contained therein, has run.

Wherefore, I find the Motion to Compel Arbitration should be denied.

#11
JMT

¹¹ The Certificate of Occupancy was issued on September 25, 2008 and it is doubtless that the final Certificate of Payment was issued soon thereafter. Therefore, the statute of limitations would have run during 2009, 2010, and 2011.

CONCLUSION

NOW, THEREFORE, for the foregoing reasons, it is hereby

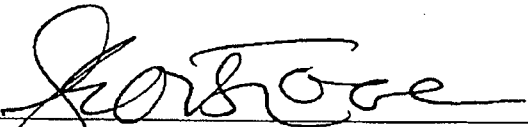
ORDERED, ADJUDGED AND DECREED that Seaquest's Motion to Dismiss is
GRANTED; it is

ORDERED, ADJUDGED AND DECREED that the Motion to Compel Arbitration is
DENIED; it is

ORDERED, ADJUDGED AND DECREED that all remaining motions in this case are
MOOT; and it is

FURTHER ORDERED that this case shall be and is hereby DISMISSED.

AND IT IS SO ORDERED.



Jean Hofer Toal
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina

Jan. 17, 2017

#12

STATE OF SOUTH CAROLINA

COUNTY

OF

CHARLESTON

IN THE COURT OF COMMON PLEAS

ANDREW AND KIMBERLY

MCINTIRE,

Plaintiff(s)

vs.

SEAQUEST DEVELOPMENT COMPANY, INC.;
ET AL.

Defendant(s)

Submitted By: Andrew K. Epting, Jr.,

Address: 46 A State Street

Charleston, SC 29401

CIVIL ACTION COVERSHEET

2016 -CP- 10

1833

SC Bar #: 1908

Telephone #: 8433771871

Fax #: 8433771310

Other:

E-mail: ake@epting-law.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

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

NATURE OF ACTION (Check One Box Below)

- Contracts**
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199)

- Torts - Professional Malpractice**
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- Previous Notice of Intent Case # 20 -NI- -
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

- Torts - Personal Injury**
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399)

- Real Property**
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

- Inmate Petitions**
- ☐ PCR (500)
- ☐ Maudamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

- Administrative Law/Relief**
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture-Consent Order (850)
- ☐ Other (899)

- Judgments/Settlements**
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)

- Appeals**
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)

Special/Complex/Other

- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)

- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799) Construction

Other (999)

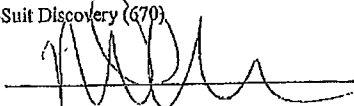
SCCA / 234 (03/2016)

015

Page 1 of 3

- ☐ Sexual Predator (510) ☐ Pre-Suit Discovery (670)
☐ Permanent Restraining Order (680)

Date: 4/4/16

Submitting Party Signature: 

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

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

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

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

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

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

IN THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

SEAQUEST DEVELOPMENT COMPANY,
INC.; RED BAY CONSTRUCTORS CORP.;
BENZENBERG CUSTOM CABINETS,
INC.; JONATHAN MARSHALL
CONSTRUCTION; COASTAL WINDOW &
DOOR CENTER OF CHARLESTON, LLC;
CAROLINA WINDOW & MILLWORK,
LLC n/k/a CAROLINA WINDOW &
MILLWORK – OMNI GLASS
INDUSTRIES, LLC; SOUTHCOAST
EXTERIORS, INC.; MICHAEL CASTEEN
d/b/a CASTEEN CUSTOM CABINETS;
QUALITY CEDAR PRODUCTS, INC. OF
MICHIGAN d/b/a MICHIGAN PRESTAIN
CO.; COASTAL PLUMBING & GAS, LLC;
FOAM INSULATION CO. INC.; JERRY
COMER d/b/a JERRY'S TILE & MARBLE,
LLC; LOWCOUNTRY FIREPLACES, INC.;
CAROLINA PEST SOLUTIONS, INC.;
NEW SOUTH CONSTRUCTION SUPPLY,
LLC.

Defendants.

TO: THE DEFENDANTS NAMED ABOVE:

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-10-

2016 APR -8 PM 11:33
CLERK OF COURT
JUDICIAL CIRCUIT
NINTH

SUMMONS

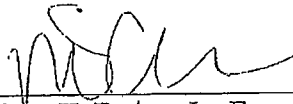
(JURY TRIAL REQUESTED)

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is served upon you, and to serve a copy of your written response to the said Complaint on the subscribers at the law office of Andrew K. Epting, Jr., LLC, 46A State Street, Charleston, South Carolina 29401, within thirty (30) days after the date of service hereof, exclusive of the

day of service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr., Esq.

Michelle N. Endemann, Esq.

46A State Street, Charleston, SC 29401

P: 843.377.1871

F: 843.377.1310

ake@epting-law.com

mne@epting-law.com

ATTORNEYS FOR PLAINTIFFS

DATED: April 1, 2016
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

SEAQUEST DEVELOPMENT COMPANY,
INC.; RED BAY CONSTRUCTORS CORP.;
BENZENBERG CUSTOM CABINETS, INC.;
JONATHAN MARSHALL
CONSTRUCTION; COASTAL WINDOW &
DOOR CENTER OF CHARLESTON, LLC;
CAROLINA WINDOW & MILLWORK, LLC
n/k/a CAROLINA WINDOW & MILLWORK
— OMNI GLASS INDUSTRIES, LLC;
SOUTHCOAST EXTERIORS, INC.;
MICHAEL CASTEEN d/b/a CASTEEN
CUSTOM CABINETS; QUALITY CEDAR
PRODUCTS, INC. OF MICHIGAN d/b/a
MICHIGAN PRESTAIN CO.; COASTAL
PLUMBING & GAS, LLC; FOAM
INSULATION CO. INC.; JERRY COMER
d/b/a JERRY'S TILE & MARBLE, LLC;
LOWCOUNTRY FIREPLACES, INC.;
CAROLINA PEST SOLUTIONS, INC.; NEW
SOUTH CONSTRUCTION SUPPLY, LLC.

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-10-

COMPLAINT

(JURY TRIAL REQUESTED)

2016 FEB -9 PM 4:33

Plaintiffs, complaining of Defendants herein, would allege and show as follows:

1. Plaintiffs, Andrew and Kimberly McIntire ("Owners" or "Plaintiffs"), are individuals residing in Charleston County, South Carolina and own the property ("the Residence") located at 821 Bridgetown Pass in the Town of Mt. Pleasant, in the County of Charleston, State of South Carolina.

2. Defendant, SeaQuest Development Company, Inc. ("SeaQuest"), is upon information and belief, a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina, and was at all times hereinafter mentioned a duly licensed general contractor in the State of South Carolina. Pursuant to custom and usage and the terms of its contract with the Owners, SeaQuest agreed to construct the project in accordance with the applicable standards of workmanship, contract documents, including, but not limited to, the plans and specifications prepared by Architects. All references to SeaQuest shall include all of SeaQuest's subcontractors and material suppliers, including, but not limited to, those subcontractors and material suppliers named herein.

3. Defendant, Red Bay Constructors Corp. ("Red Bay"), is upon information and belief a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina. Upon information and belief, Red Bay was a subcontractor hired by SeaQuest that performed work on all hardscapes, brick, stucco work, including the chimneys, the 200 foot wall between Plaintiff's home and the property next door, and the HVAC stand the foundation and house slab on the Residence.

4. Defendant, Benzenberg Custom Cabinets, Inc. ("Benzenberg"), is upon information and belief a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina and was a subcontractor hired by SeaQuest to provide cabinet work.

5. Defendant, Jonathan Marshall Construction ("Marshall"), is upon information and belief a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina. Upon information and belief, at

all times relevant hereto, Marshall, as a subcontractor to SeaQuest, was the framer at the Residence, and installed the siding and interior trim and windows.

6. Defendant, Coastal Window & Door Center of Charleston, LLC ("Coastal Window"), is upon information and belief a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina. Upon information and belief, Coastal was a subcontractor hired by SeaQuest that installed windows and doors.

7. Defendant, Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork -- Omni Glass Industries, LLC ("Carolina Window"), is upon information and belief a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina and was a subcontractor hired by SeaQuest to provide trim and door work.

8. Defendant, Southcoast Exteriors, Inc. ("Southcoast"), is upon information and belief a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina. Upon information and belief, Southcoast was a subcontractor hired by SeaQuest that performed metal roofing on the Residence.

9. Defendant, Michael Casteen d/b/a Casteen Custom Cabinets a/k/a Casteen Custom Cabinets & Trim ("Casteen"), is upon information and belief a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina and was a subcontractor hired by SeaQuest to install interior trim.

10. Defendant, Quality Cedar Products, Inc. of Michigan d/b/a/ Michigan Prestain Co. ("Michigan Prestain"), is upon information and belief a duly organized Michigan corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South

Carolina and was a material supplier or subcontractor hired by SeaQuest to provide and install cedar siding shakes.

11. Defendant, Coastal Plumbing & Gas, LLC ("Coastal Plumbing"), is upon information and belief a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina. Upon information and belief, at all times relevant hereto, Coastal Plumbing, as a subcontractor to SeaQuest, was the plumber and performed rough-in, sewer, and gas work for the Residence.

12. Defendant, Foam Insulation Co. Inc. ("Foam Insulation"), is upon information and belief a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina and was a subcontractor hired by SeaQuest to provide foam insulation work.

13. Defendant, Jerry Comer d/b/a Jerry's Tile & Marble, LLC ("Comer"), is upon information and belief a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina and was a subcontractor hired by SeaQuest for tile installation work.

14. Defendant, Lowcountry Fireplaces, Inc. ("Lowcountry Fireplaces"), is upon information and belief a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina and was a subcontractor hired by SeaQuest for fireplace and chimney work.

15. Defendant, Carolina Pest Solutions, Inc. ("Pest Solutions"), is upon information and belief a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina. Upon information and belief, Pest Solutions was a subcontractor hired by SeaQuest for termite pretreatment and treatment work.

16. Defendant, New South Construction Supply, LLC ("New South"), is upon information and belief a duly organized South Carolina corporation, which at all times hereinafter mentioned did business in the County of Charleston, State of South Carolina. Upon information and belief, New South was a subcontractor or material supplier hired by SeaQuest for water proofing work and/or materials.

17. Upon information and belief, Defendants Red Bay, Benzenberg, Marshall, Coastal Window, Carolina Window, Southcoast, Casteen, Michigan Prestain, Coastal Plumbing, Foam Insulation, Comer, Lowcountry Fireplaces, Pest Solutions, and New South provided services, labor and material for the Residence as set forth above as subcontractors to SeaQuest and may hereinafter be referred to collectively as "Subcontractors."

18. SeaQuest entered into a contract with Owners on August 22, 2007 to construct the Residence at 821 Bridgetown Pass.

19. Work commenced with site work on or about August 29, 2007, under permit number RN-07-070268.

20. The errors and omissions of the Defendants and the Defendants' subcontractors and materials suppliers have given rise to the property damage to the home, and consequential loss, which damages were first manifested and first discovered by Plaintiff after occupancy.

21. The damages caused by the errors and omissions of the Defendants, their subcontractors and material suppliers, were unexpected and accidental.

22. As a direct and proximate result of the harmful conditions hereinafter referenced, property damage has been caused to the structure by continuous and repeated exposure to same or similar harmful conditions.

23. The Owners, after Defendants had completed their work, through the use of subcontractors, suffered physical injury and loss of use to tangible property. The Owners likewise have suffered physical injury to tangible property that it owns, which was not worked on by Defendants, or the subcontractors. These injuries stated above resulted from negligent and grossly negligent acts by Defendants. The Plaintiffs' injuries are a result of occurrences in each year after Defendants performed work on the property.

24. Defendants, including *inter alia*, their subcontractors and material suppliers including *inter alia*, their sub-consultants, were negligent, and reckless in one or more of the following particulars, to-wit:

**FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence as to SeaQuest and Subcontractors)**

25. Plaintiffs hereby incorporate the allegations of the foregoing paragraphs as if fully restated herein.

26. SeaQuest and Subcontractors owed a duty to the Plaintiffs to exercise due care in the construction of the Residence, and to build the Residence free from defects and in conformity with local building codes of the County of Charleston, Town of Mt. Pleasant and the State of South Carolina, design documents, plans and specifications, using good construction practices.

27. At all times relevant hereto, SeaQuest and Subcontractors, their agents, servants, employees, and/or subcontractors undertook and were under a duty to construct the Residence 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. The Defendants failed to meet their contractual and common law duties.

28. SeaQuest and Subcontractors breached these duties in the following particulars:

- a) In failing to follow the plans and specifications;
- b) In failing to properly construct the roof;
- c) In installing defective or improperly installing shakes;
- d) In installing defective window/door units or installing them improperly;
- e) In failing to properly install flashing;
- f) In installing a defective plumbing system or installing it improperly;
- g) In installing defective cabinets or installing them improperly;
- h) In installing defective trim or installing it improperly;
- i) In installing defective foam insulation or installing it improperly;
- j) In installing defective tiles or installing them improperly;
- k) In installing defective framing;
- l) In installing defective chimneys/fireplaces or installing them improperly;
- m) In installing defective foundation/slab and hardscape or installing them improperly;
- n) In failing to properly pre-treat and treat for termites;
- o) In failing to do good and workmanlike work;
- p) In failing to follow the local building codes of the County of Charleston, Town of Mt. Pleasant and the State of South Carolina;
- q) In failing to use due care;
- r) In failing to properly oversee the construction, including the selection of subcontractors, of the Residence when it planned to sell the home to Owners for profit;
- s) In failing to properly investigate the physical condition of the building and make necessary repairs;
- t) In negligently misrepresenting the physical condition of the building to the Plaintiffs;

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

29. SeaQuest and Subcontractors, their agents, servants, employees, and/or subcontractors were negligent, careless, reckless, willful and wanton in failing to construct the Residence in accordance with the local building codes of the County of Charleston, Town of Mt.

Pleasant and the State of South Carolina, 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.

30. As a direct, foreseeable and proximate result of the negligence and gross negligence of SeaQuest and its Subcontractors, Plaintiffs have spent and will continue to expend substantial sums of money in order to renovate and restore the Residence to make it safe and habitable, and in addition thereto, the Residence has suffered a loss in value and depreciation by virtue of the defects and damages. In addition, Plaintiffs 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 Plaintiffs' damage in an amount to be determined.

31. Additionally, Plaintiffs have, and will continue to, suffer loss of use of their Residence. Such loss continued during the time in which construction repairs were undertaken to the Residence.

32. The violation of applicable building codes constitutes negligence per se and is evidence of gross negligence.

33. The breach of duty, code violations, and deviations from industry standards on the part of SeaQuest and Subcontractors constitute gross negligence, entitling Plaintiffs to an award of all actual, consequential, and punitive damages.

34. As a result of the negligence and gross negligence of SeaQuest and its Subcontractors, the Plaintiffs are entitled to a judgment in an amount to be determined at the trial of this case.

**FOR A SECOND CAUSE OF ACTION
(Breach of Warranty of Habitability as to SeaQuest)**

35. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully restated herein.

36. By placing the Residence into the stream of commerce, SeaQuest, by operation of law, impliedly warranted that the Residence would be habitable and free from all defects.

37. SeaQuest has breached the implied warranty of habitability by constructing and selling the defective Residence.

38. As a direct, foreseeable and proximate result of SeaQuest's breach of the implied warranty of habitability, Plaintiffs have suffered significant physical damages to the Residence, including water intrusion, termite infestation, loss of use, as well as diminution in its value. The Plaintiffs have further been damaged in that they have spent, and will continue to expend, large sums of money to repair it and incurring consequential loss during the repairs.

39. Plaintiffs are entitled to a judgment against SeaQuest in an amount to be proven at trial for all damages proximately caused by SeaQuest's breach of the warranty of habitability.

**FOR A THIRD CAUSE OF ACTION
(Negligent Misrepresentation & Constructive Fraud as to SeaQuest and Subcontractors)**

40. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully restated herein.

41. By reason of their special expertise and superior knowledge, Seaquest and its Subcontractors had a duty to communicate truthful information and not to mislead Plaintiffs.
42. Seaquest and its Subcontractors represented that they had completed the work per the Agreement and that all work was up to code.
43. Said representations made by SeaQuest and its Subcontractors were false when made in that SeaQuest and its Subcontractors carelessly and negligently performed inspections, observations, and work and carelessly and negligently approved the defective work.
44. SeaQuest and its Subcontractors either knew or should have known the work was defective at the time the work was approved and that their failure to disclose to Owners the existence of the defective work in place would mislead Owners
45. SeaQuest and its Subcontractors had a pecuniary interest in making the misrepresentations to Plaintiffs.
46. SeaQuest and its Subcontractors made said representations and/or said non-disclosures, with the intent to induce Owners' reliance thereon.
47. Owners justifiably relied upon said misrepresentations and non-disclosures.
48. As a direct and proximate result of the misrepresentations and non-disclosures, Owners have incurred the damages hereinabove alleged and, in addition thereto, are entitled to punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Breach of Warranty of Good and Workmanlike Work as to SeaQuest and Subcontractors)

49. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully restated herein.

50. SeaQuest and its Subcontractors, including their subcontractors and material suppliers, impliedly warranted to Owners that the work they provided and materials they supplied would be good and workmanlike.

51. SeaQuest and its Subcontractors have breached the aforesaid warranty of good and workmanlike work.

52. As a direct and proximate result thereof Owners have been damaged as aforesaid in an amount to be determined at trial.

WHEREFORE, Plaintiffs pray for judgment against the Defendants for:

- (1) Actual, direct, indirect, incidental, and consequential damages in an amount to be determined at trial;
- (2) Their attorneys' fees and costs;
- (3) Punitive damages; and
- (4) Such further relief as this Court may order.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr., Esquire
Michelle N. Endemann, Esquire
46A State Street, Charleston, SC 29401
P: 843.377.1871
F: 843.377.1310
ake@epting-law.com
mne@epting-law.com

ATTORNEYS FOR PLAINTIFFS

On this 1 day of April 2016

AFFIDAVIT OF SERVICE

State of South Carolina

County of Charleston

Common Pleas Court

Case Number: 2016-CP-10-1833

Plaintiff:

ANDREW AND KIMBERLY MCINTIRE

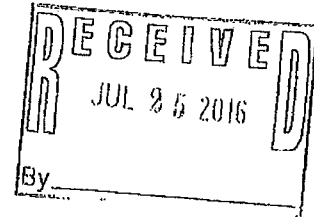
vs.

Defendant:

SEAQUEST DEVELOPMENT COMPANY, INC ET AL

For:

Andrew K. Epting, Jr., Esq.
Andrew K. Epting, Jr., LLC
46-A State Street
Charleston, SC 29401



Received by PROCESS SERVICE, INC. to be served on SOUTHCOAST EXTERIORS, INC, 1275 ABERCORN TRACE, MT PLEASANT, SC 29464.

I, John Gordon, being duly sworn, depose and say that on the 20th day of July, 2016 at 3:00 pm, I:

SERVED the within named CORPORATION by delivering a true copy of the CIVIL ACTION COVERSHEET; SUMMONS; COMPLAINT; with the date and hour of service endorsed hereon by me to JAMES KRAMER, REGISTERED AGENT for SOUTHCOAST EXTERIORS, INC at 1275 ABERCORN TRACE, MT PLEASANT, SC 29464

I am over eighteen and have no interest in the above action.

FILED
2016 JUL 29 PM 1:43
CLERK OF COURT

John Gordon
Process Server

Subscribed and Sworn to before me on the 21st day of July, 2016 by the affiant who is personally known to me.

NOTARY PUBLIC

Commission Expires: 5-6-19

PROCESS SERVICE, INC.
P.O. Box 20097
Charleston, SC 29413
(843) 577-2355

Our Job Serial Number: LEX-2016001629

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CASE NO.: 2016-CP-10-1833

Andrew and Kimberly McIntire

☐

Plaintiff(s)

vs.

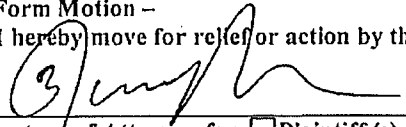
MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

SeaQuest Development Company, Inc.; et al.

☒

Defendant(s)

Check box above indicating submitting party

Name, SC Bar No. and Address of Plaintiff's Attorney Andrew K. Epting, Jr. Address: Andrew K. Epting, Jr., LLC 46A State Street Charleston, SC 29401 Telephone: (843) 377-1871 fax: (843) 377-1310 e-mail: nke@epting-law.com		Name, SC Bar No. and Address of Defendant's Attorney Jason A. Daigle SC Bar #:73308 Address: Young Clement Rivers, LLP Post Office Box 993 Charleston, SC 29402-0993 Telephone: (843) 720-5436 fax: (843) 579-1324 e-mail: jdaigle@ycrlaw.com	
☒ MOTION HEARING REQUESTED (attach <i>written</i> motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (COMPLETE SECTIONS II and III)			
SECTION I: HEARING INFORMATION			
Nature of Motion: Motion to Dismiss or Stay Proceedings Estimated Time Needed: _____ Court Reporter Needed?: ☐ YES ☐ NO			
SECTION II: MOTION TYPE			
☒ Written Motion Attached ☐ Form Motion - I hereby move for relief or action by the Court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff (s) ☒ Defendant(s) Dated: <u>6-17-16</u>			
SECTION III: MOTION FEE			
☒ PAID - AMOUNT \$ <u>25.00</u> ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency w. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the Court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION		JUDGE: _____	
☐ Motion Fee to be paid upon filing of the attached order ☐ Other: _____		CODE: _____ DATE: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ (print name)			
☐ MOTION FEE COLLECTED: _____			
☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

ANDREW AND KIMBERLY) CASE NO. 2016-CP-10-1833

MCINTIRE,)

PLAINTIFFS,)

vs.)

SEAQUEST DEVELOPMENT)

COMPANY, INC.; RED BAY)

CONSTRUCTORS CORP.;)

BENZENBERG CUSTOM CABINETS,)

INC.; JONATHAN MARSHALL)

CONSTRUCTION; COASTAL)

WINDOW & DOOR CENTER OF)

CHARLESTON, LLC; CAROLINA)

WINDOW & MILLWORK, LLC N/K/A)

CAROLINA WINDOW & MILLWORK -)

OMNI GLASS INDUSTRIES, LLC;)

SOUTHCOAST EXTERIORS, INC.;)

MICHAEL CASTEEN D/B/A CASTEEN)

CUSTOM CABINETS; QUALITY)

CEDAR PRODUCTS, INC. OF)

MICHIGAN D/B/A MICHIGAN)

PRESTAIN CO.; COASTAL)

PLUMBING & GAS, LLC; FOAM)

INSULATION CO. INC.; JERRY)

COMER D/B/A JERRY'S TILE &)

MARBLE, LLC; LOWCOUNTRY)

FIREPLACES, INC.; CAROLINA PEST)

SOLUTIONS, INC.; NEW SOUTH)

CONSTRUCTION SUPPLY, LLC,)

DEFENDANTS.)

SEAQUEST DEVELOPMENT)

COMPANY, INC.,)

THIRD PARTY PLAINTIFFS,)

vs.)

ARCHITECTURAL PRODUCTS OF)

**NOTICE OF MOTION AND MOTION TO
DISMISS OR STAY PROCEEDINGS**

CHARLESTON, LLC; SEALTIGHT OF)
SOUTH CAROLINA, LLC,)
)
THIRD PARTY DEFENDANTS.)

PLEASE TAKE NOTICE that Defendant and Third-Party Plaintiff Sequest Development Company, Inc. (hereinafter "Sequest"), by and through its under-signed attorneys, hereby moves to dismiss or stay this action. The basis for this Motion is that Plaintiffs have failed to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. § 40-59-810, *et seq.* Plaintiffs have alleged that Sequest was the general contractor for their residence. Plaintiffs failed to serve a written notice of claim on Sequest prior to bringing this action as required by S.C. Code Ann. § 40-59-840. Plaintiffs have denied Sequest a substantive statutory right and Sequest is therefore entitled to a dismissal of this action.

WHEREFORE, Sequest respectfully requests that the Court dismiss the action, or in the alternative, stay the action pursuant S.C. Code Ann. § 40-59-830.

YOUNG CLEMENT RIVERS, LLP

By: 

Edward D. Buckley, Jr.

Jason A. Daigle

P.O. Box 993, Charleston, SC 29402

(843) 720-5436

ebuckley@ycrlaw.com

jdaigle@ycrlaw.com

Attorneys for Defendant Sequest Development
Company, Inc.

Charleston, South Carolina

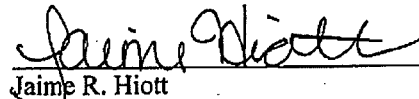
Dated: 6-17-14

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 17th day of June, 2016, served a copy of the above and foregoing document via electronic mail and/or US Mail, postage paid to:

Michelle N. Endemann, Esquire Andrew K. Epting, Jr., Esquire ANDREW K. EPTING, JR., LLC 46A State Street Charleston, SC 29401 ake@epting-law.com mne@epting-law.com <i>Attorney for Plaintiffs</i>	James H. Elliott, Jr., Esquire Samia H. Nettles, Esquire RICHARDSON PLOWDEN & TOBINSONS PA 171 Church Street, Suite 150 Charleston, SC 29401 jelliott@richardsonplowden.com snettlles@richardsonplowden.com -AND- Christopher A. Majure, Esquire MURPHY & GRANTLAND, PA P.O. Box 6648 Columbia, SC 29260 cmajure@murphygrantland.com <i>Attorney for New South Construction Supply LLC</i>
William "Trey" W. Watkins, Jr., Esquire WALL TEMPLETON & HALDRUP, PA P.O. Box 1200 Charleston, SC 29402 Trey.Watkins@WallTempleton.com <i>Attorney for Jerry Comer d/b/a Jerrys Tile & Marble LLC</i>	C. Davi Dyer, Esquire KERNODLE COLEMAN P.O. Box 13897 Charleston, SC 29422 ddyer@kernodlelaw.com <i>Attorney for Carolina Pest Solutions Inc.</i>
Carolina Window & Millwork-Omni Glass Industries LLC William B. Dickert, as Registered Agent 4500 U.S. Highway 176 Pomaria, SC 29126	Red Bay Constructors Corp. Eric I. Labarca, as Registered Agent 5581 Woodbine Avenue North Charleston, SC 29406
Benzenberg Custom Cabinets, Inc. Edwin Benzenberg, as Registered Agent 1103 Bacons Bridge Road Summerville, SC 29485	Coastal Window & Door Center of Charleston LLC Dana E. Rickels, as Registered Agent 70 Colleton Drive Charleston, SC 29407
Coastal Plumbing & Gas LLC Brett A. Ford, as Registered Agent 1514 Wando View Lane Mt. Pleasant, SC 29464	Michael Casteen d/b/a Casteen Custom Cabinets 1063 Orangeburg Rd. Summerville, SC 29483

Foam Insulation Co Inc. Curt Wagner, as Registered Agent 2991 S. Pine Street Spartanburg, SC 29302	Lowcountry Fireplaces, Inc. Richard Burn, as Registered Agent 5611 N Rhett Ave. N. Charleston, SC 29406
Jonathan Marshall Construction LLC Jonathan Marshall, as Owner 242 Nelliefield Creek Dr. Charleston, SC 29492	Quality Cedar Products Inc. of Michigan 3903 Roger B. Chaffee Memorial Drive SE Grand Rapids, Michigan 49548-3479
Southcoast Exteriors, Inc. James Kramer, as Registered Agent 376 Beresford Woods Lane Charleston, SC 29492	Michigan PreStain Co 3903 Roger B. Chaffee Memorial Drive SE Grand Rapids, Michigan 49548-3479
Sealtight of South Carolina, LLC Lawson Stewart, as Registered Agent 1250 Lake Mallard Blvd. Mt. Pleasant, SC 29464	Architectural Products of Charleston, LLC Dana E. Rickels, as Registered Agent 70 Colleton Drive Charleston, SC 29407



Jaime R. Hiott

Paralegal

Young Clement Rivers, LLP
25 Calhoun Street, Suite #400
Charleston, South Carolina 29401

IN THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

SEAQUEST DEVELOPMENT COMPANY,
INC.; RED BAY CONSTRUCTORS CORP.;
BENZENBERG CUSTOM CABINETS,
INC.; JONATHAN MARSHALL
CONSTRUCTION; COASTAL WINDOW &
DOOR CENTER OF CHARLESTON, LLC;
CAROLINA WINDOW & MILLWORK,
LLC n/k/a CAROLINA WINDOW &
MILLWORK – OMNI GLASS
INDUSTRIES, LLC; SOUTHCOAST
EXTERIORS, INC.; MICHAEL CASTEEN
d/b/a CASTEEN CUSTOM CABINETS;
QUALITY CEDAR PRODUCTS, INC. OF
MICHIGAN d/b/a MICHIGAN PRESTAIN
CO.; COASTAL PLUMBING & GAS, LLC;
FOAM INSULATION CO. INC.; JERRY
COMER d/b/a JERRY'S TILE & MARBLE,
LLC; LOWCOUNTRY FIREPLACES, INC.;
CAROLINA PEST SOLUTIONS, INC.;
NEW SOUTH CONSTRUCTION SUPPLY,
LLC.

Defendants.

TO: THE DEFENDANTS NAMED ABOVE:

The Plaintiffs, Andrew and Kimberly McIntire hereby move this Honorable Court for an order staying this matter and compelling mediation and, if necessary, arbitration by the parties to proceed as contractually required by their Agreement. In support thereof, Plaintiffs state as follows:

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-10-1833

**PLAINTIFFS' MOTION TO STAY & TO
COMPEL ARBITRATION**

FILED
2016 JUL 27 AM 11:39
JULIE A. GREGG
CLERK OF COURT

1. Plaintiffs entered into an Agreement (Exhibit A) with the Defendant SeaQuest Development Company, Inc. on or about August, 22, 2007 for the construction of their home in Mt. Pleasant, South Carolina.

2. The Agreement contains a provision requiring the submission of any claim arising out of or related to the agreement to mediation. (§ 15.3 of the General Conditions).

3. Under Section 15.4, any claim not resolved by mediation shall be resolved by binding arbitration.

4. Plaintiffs' allege a dispute has arisen out of and involving the Agreement.

WHEREFORE, Plaintiffs pray that an order of this Court be made directing that the claims asserted be stayed, that mediation, and, if necessary, arbitration proceed in the manner provided for in the Agreement, and for such other and further relief as to the court may seem proper.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC


Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
46A State Street, Charleston, SC 29401
P: 843.377.1871
F: 843.377.1310
ake@epting-law.com
mne@epting-law.com

ATTORNEYS FOR PLAINTIFFS

On this 13 day of July 2015
Charleston, SC

NOTED UPON FILE
I HEREBY CERTIFY that true
and correct copies of the pleading or paper to which
this certificate is affixed were served upon the party(s)
in this action in accord with the applicable Court Rules
by electronic transmission, by hand delivery or by
regular U.S. Mail, postage paid, properly addressed
to the attorney(s) for each party(ies).

Signed this 13 day of JULY 2015 at
Charleston, South Carolina

1997 EDITION

AIA DOCUMENT

A101-1997

WARNING:

THIS AGREEMENT SUBJECT TO BINDING ARBITRATION IN THE STATE OF SOUTH CAROLINA, CITY OF CHARLESTON, UNDER THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (CODE SEC. 15-48-10, ET. SEQ.)

A Revised Version Of The -

Standard Form of Agreement Between Owner and Contractor

Where the basis of payment is a Cost Plus 12.5% with a minimum \$125,000.00

AGREEMENT made as of this 22nd day of August in the year 2007

BETWEEN the Owner: Andrew and Kim McIntire
(Name, address and other information) 407 Barbadian Way, Mt. Pleasant SC, 29464

and the Contractor: SeaQuest Development Company, Inc.
(Name, address and other information) 528 Country Place Rd, Mt. Pleasant, SC, 29464

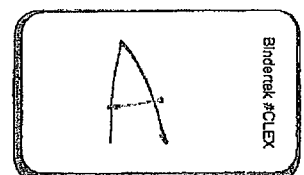
The Project is: The McIntire Residence
(Name and location) Lot 4-30, 821 Bridgetown Pass

The Architect is New Urbanist Design

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 by the Associate General Contractors of America.

The Owner and Contractor agree as follows.

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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 allocated 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 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.)

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:

3.2 The Contract Time shall be measured from the execution of the "Notice to Proceed"

3.3 The Contractor shall achieve Substantial Completion of the entire Work not later than 365 days from the date of commencement, or as follows: 365 Days plus any additional days necessitated by changes. (12 months) Unreasonable delays by the Owner will result in additional days added to the allocated period of time.

(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.)

, subject to adjustments of this Contract Time as provided in the Contract Documents.

1997

AIA DOCUMENT A101-1997

OWNER-CONTRACTOR
AGREEMENT

Interior Trim

- Trim for interior openings
- Crown Molding
- Baseboard
- Closet Shelving
- Interior Stairs

Cabinetry

- Kitchen Cabinetry
- Bath Cabinetry
- Laundry Room, Mudroom Cabinetry
- Other Built-ins

Tile and Glass

- Tile
- Glass shower enclosures and Mirrors

Specialties

- Bath Accessories

Plumbing Finish/Fixtures

Electrical Finish/Fixtures

Kitchen Appliances

Painting

- Interior Painting
- Exterior Painting

Flooring

- Wood Flooring
- Tile

Landscaping

- Final Grade
- Fencing
- Driveways
- Swimming Pool

Trash Removal

- Dumpsters
- Site Clean-up
- Final Clean-up

4.2 The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner: Any changes to the Work priced at the reasonable discretion of the Contractor. Changes for each portion of the Work must be requested at least seven(7) working days prior to the date of such is to begin

(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.)

4.3 Unit prices, if any, are as follows:

ARTICLE 5 PAYMENTS

5.1 PROGRESS PAYMENTS

5.1.1 Based upon Applications for Payment submitted to the Bank by the Contractor, 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 based upon: A limit of seven draws will be made by the Contractor during the construction process and will be in keeping with standard bank policy. Payment will be made to the Contractor in no more than seven (7) working days. Payments will be made directly to the Contractor from bank sources.

5.1.3 Each Application for Payment shall be based on the most recent inspection schedule performed by banking institution providing the construction loan.

5.1.4 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.

5.1.5 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

1. Payments will be made to contractor in conjunction with the completion of key milestones agreed upon by the contractor and the owner. Key milestones are defined as follows, and coincide with the draw schedule determined by the bank construction loan inspections:

1st Payment - Upon completion of Clearing and rough grade, footings, Foundation and slab

2nd Payment - Upon completion of house framing (Flooring/Subflooring, Wall Sheathing, Roof Sheathing, Exterior Doors and Windows)

3rd Payment - Upon completion of Trade Rough-ins (Plumbing, Electrical, HVAC, Fireplaces)

4th Payment - Upon completion of Exterior trim/sheetrock (Exterior Veneer, Cornice & Fasia, Roofing, Exterior Paint, Insulation, Sheetrock)

5th Payment - Upon Completion of Interior finishes (Trim, Interior doors, Tile, Cabinets, Interior Paint, Flooring Install)

6th Payment - Upon Completion of Interior Trim-outs (Plumbing Fixtures, Electrical Fixtures, HVAC, Appliances, Hardware)

Final Draw - This payment will be held until Certificate of Occupancy is issued and contractor and owner are in agreement that home is complete. (Stoops & Decks, Driveways and Walks, Finish Grade, Landscaping, Final Clean)

2. Owner will be invoiced in conjunction with each milestone/payment request. Each invoice will include documentation of expenses for labor and materials, plus 12.5% for project management fee. Payment should be received within 7 days of submitted invoice.

5.1.6 The progress payment amount determined in accordance with Subparagraph 5.1.5 shall be further modified under the following circumstances:

N/A

5.1.7 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 (see final draw above section 5.1.5)

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 identified in a final work agreement. This final work, known as the "punch list", will be assigned a fair value and will be held by a mutually agreed party, and will be released as each item is completed to satisfactory standards by owner and contractor.

2. a final Certificate of Occupancy has been issued by the Town of Mt. Pleasant

AIA DOCUMENT A101-1997

OWNER-CONTRACTOR
AGREEMENT

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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 Contractor's final Certificate for Payment, or as follows:

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.

6.3 All warranties and/or obligations of the Contractor become null and void if final and complete payment is not received within 30 days of completion.

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.) 10%

(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 deviations or in addition to, and also regarding requirements such as written disclosures or waivers.)

7.3 The Owner's representative is: Mr. Andrew Mulvire

7.4 The Contractor's representative is: Mr. Craig Himes

7.5 Neither the Owner's nor the Contractor's representative shall be changed without ten days written notice to the other party.

7.6 Other provisions:

AIA DOCUMENT A101-1997

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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.

8.1.2 The General Conditions are the 1997 edition of the General Conditions of the Contract for Construction, AIA Document A201-1997.

8.1.3 The Supplementary and other Conditions of the Contract are those contained in the Project

Document	Title	Pages
Exhibit A	AIA Document 101-1997	7
AIA Exhibit B	Specifications Part One	10
Exhibit C	Drawings	13
	Site	
	First Floor Plan	
	Second Floor Plan	
	Door and Window Schedule	
	Front Elevations	
	Right Side Elevations	
	Rear Elevations	
	Left Side Elevations	
	Wall Sections	
	Miscellaneous Wall Details	
	Details/Sections	
	First Floor Electrical	
	Second Floor Electrical	

Architectural Drawings as provided by New Urbanist Design
Structural Drawings as provided by B.W. Engineering

16.1.5 The Drawings above are dated 8/22/07 unless a different date is shown below:

16.1.6 [].

16.1.7 Other Documents, if any, forming part of the Contract Documents are as follows:

8.1.6 The Addenda, if any, are as follows:

Addenda No. 1 - Contract Note Date _____ Pages 1

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.)

This Agreement is entered into as of the day and year first written above and is executed in at least three original copies with each page initialed by all parties, of which two are to be delivered to the Contractor, and the remainder to the Owner.

OWNER

CONTRACTOR

Andrew R. McIntire 8/22/07
(Signature and date)

(Signature and date)

ANDREW R. McINTIRE
(Printed name and title)

8/22/07
Craig Hines President Seabest Development
(Signature and date) Company Inc.
PRESIDENT CRAIG HINES
(Printed name and title)

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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 is a cost estimate of \$1,600,000. This estimate and contract are based on a cost plus arrangement. The ultimate contract price will be based on cost plus 12.5%, with a minimum fee of \$125,000. Costs will be determined by any and all costs associated with the construction of the residence as defined by the approved plans at 821 Bridgetown Pass including the following:

General Conditions

- Architectural and engineering
- Permits and fees
- Insurance (General liability, Builders risk, Flood, Workman's compensation policies associated with or allocated to this project)
- Legal
- Professional/Field Services (Survey, Soil testing)

- Temporaries (toilet facilities)
- Equipment rental if necessary

Site Preparation

- Termite Pre-treatment
- Site Clearing (including unsatisfactory dirt and replacement with compacted soil)

Excavation

- Site Drainage/Grading

Concrete

- Batterboards/footings/Steel
- Concrete footings
- Rebar

Masonry

- Block walls/piers
- Brickwork or Stucco
- Lintels, Sand, Mortar

Framing

- Beams/Girders
- Exterior & Interior Walls
- Roof Assemblies
- Stair Framing
- Porch Framing
- Frame Labor
- Framing Hardware

Roofing

- Roofing material and Labor

Windows and Exterior Doors

Plumbing Rough

- Water & Sewer Lines
- Plumbing Rough -in

HVAC

- Heat and AC
- HVAC Venting

Electrical Rough

Exterior Trim

Siding

Insulation

- Floor Insulation
- Wall Insulation
- Roof Insulation
- Other Insulation (soundproofing)

Wall and Ceiling Finish

Drywall

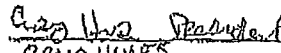
Interior Doors and Hardware

- Interior Pre-hung Doors
- Door Hardware

* ANY COSTS ABOVE ESTIMATED COST OF \$1,623,377.30
WILL BE RESPONSIBILITY OF OWNER 9/21/07


ANDREW MCINTIRE

9/21/07


CRAIG HIMES

9/21/07

0/21/2007

Trade/Category	Budget	Supplier/Comments	Unit	Rate	Quantity	Amount
Backfill and grade lot	1000					
Gas	3000					
Stonework, driveway	12000					
Concrete Driveway	6000					
Handrails						
Door handle/lock set	4500	East Coast Lock and Set - 4 units 843-881-2044				
Exterior hardware	500					
Glass/Mirrors						
Shower door	4000					
Mirrors	200					
Towel bars, etc	200					
Glass	3800					
Punch out	2000					
Misc Lamps	2000					
Nails	2500					
Painting	1000					
Shutters	0					
HOA Dues	450					
Builder's Risk Insurance	3000					
General Liability Insurance	2000					
Pop	115000					
COST OF CONSTRUCTION	1080051.78	Interest to date on lot			221,121.24	1125000
Lot purchase + Interest to date	840000					838000
Sub Total	\$ 1,459,861.78					
18% @	198,232.72					
Total	\$ 1,670,084.47					
Interest Expense	\$					
Commission/closing costs	\$ 47,202.84					
Grand Total	\$ 1,623,977.30					

Andrew McIntire 9/21/07
ANDREW MCINTIRE 04/08

Carol Ann Resch 9/21/07
CAROL ANN RESCH 04/08



EXHIBIT B - SPECIFICATIONS

This exhibit, dated 8/22/07, is a part of the agreement between

the Owner:	Name	Mr. & Mrs. Andrew McIntire
	Address	407 Barbadian Way
	City, State, Zip	Mt Pleasant, S.C. 29464
the Contractor:	Name	SeaQuest Development Company Inc.
	Address	528 Country Place Rd.
	City, State, Zip	Mt Pleasant, S.C. 29464
the Project is:	Name	McIntire Residence
	Address	Lot 4-30, 821 Bridgetown Pass
	City, State, Zip	Mt Pleasant, S.C. 29464

These Specifications, although not signed by the parties, shall be as binding as if they were.

These specifications, Part One and Two, detail under what guidelines the Work is to be performed on the project. The work has been divided into 29 divisions. There are two parts to the specifications: "Part One" which is an explanation of the Work to be performed under each division, and "Part Two" which is the quantitative cost of each division of the Work.

Although not specifically mentioned in each division, the Work shall be performed to comply with local building codes and shall also comply with the manufacturers recommendations. When, or if, the requirements of local building codes is contrary with the manufacturers recommendations, the Owner and Contractor shall reach an agreement as to the performance of that portion of the work in conflict.

The quantities listed in Part Two of the Specifications are taken from the drawings, Exhibit C of the agreement. Naturally any change in the drawings or Exhibits shall cause a change in the quantity of materials or services listed in Part Two.

Allowances

Explanation of Allowance Items:

Selected materials and their installation are included in this bid as allowances and are specified below. Allowances have been established in lieu of additional requirements and to defer the selection of actual materials and equipment to a later date when additional information is available for evaluation. Additional requirements, if necessary, will be issued by change order. Upon selection of actual materials or equipment, the contractor shall investigate and provide the owner with the actual costs. Any changes in the contract sum, and any expenditure over the allowance amount allotted; whether paid by the Contractor or Owner, will be handled by change order. The contractor shall be responsible for providing accurate cost information for the purchase of allowance items. Unless specifically mentioned otherwise, allowance amounts must cover the cost of all labor, cost of materials, sales taxes, freight and delivery charges. It is

understood that the Owner is responsible for the accounting of all allowance items and any cost overruns over the "total" of allowances is the responsibility of the Owner. It is understood there will be no refunds on the amount that may be left in the allowance total. Contractor will, from time to time or upon owners request, advise the owner of current status of allowances.

Schedule of Allowance Items:

The following specifications, finishes and allowances are proposed for the McIntire residence in Hibben, lot 4-30.

Exterior:

Item	Manufacturer	Description	Finish/Color
Siding		Cedar Shakes	Natural
Exterior Trim		P.T. Wood or hardy trim, Hardy soffit, 5/4 x 6 ipca decking	
Foundation		8" CMU	
Shutters		NA	NA
Roof		Shingle or Metal	TBD
Exterior Doors		Mahogany custom doors	Natural
Windows	Andersen "Eagle" or Built-best or equivalent	Double Hung - SDL low E Vinyl or aluminum clad, wood interior	TBD

Kitchen:

Item	Manufacturer	Description	Finish/Color
Cabinetry	Tbd		TBD
Counter Tops		Granite	TBD
Island Cabinetry	See above		
Sink	TBD	Double Bowl Under mount	Stainless

Appliances:

Item	Manufacturer	Description	Finish/Color
Gas Range/Hood	Wolf or French equivalent	Cook-top and hood	Stainless
Refrigerator	Sub Zero	42" built-in	Stainless
Dishwasher	Pfister Pykel	Double drawer	Stainless
Disposal	Insinkerator	1/2 horsepower	
Microwave	TBD		Stainless

Floor Finishes:

Item	Location	Description	Finish/Color
Hardwood Floor	Entire first floor, second floor MB and hallway	Heart Pine	Natural
Tile	Bathrooms, laundry room	TBD	TBD
Pine	Children's/Guest bedrooms	TBD	

Trim:

Base	First floor	10" with cap	TBD
	Second Floor	10" with cap	TBD
Crown	1 st - two piece 2 nd - 1 piece	Poplar casing, crown, MDF base	TBD
Doors		Solid Core	TBD
Wainscot	TBD	Painted	TBD

Plumbing Fixtures

Item	Location	Description	Finish/Color
Toilets/Sinks	Bathrooms	Toto	White
Tub	MB	TBD - Jacuzzi style air tub	White
	Guest bath's	cast iron	White
Shower	Master	Custom Tile with 3/8" Glass shower door	
Water Heater		instant hot-water unit	
Faucets		Kohl or equivalent	Tbd

HVAC

Item	Location	Description	Finish/Color
Heating/Air units	1 st and 2 nd floor	Geo-Thermal	na

Allowances:

Tile	◦ \$5.00 per square foot plus labor ◦ \$15 per linear foot for shower borders in Master Bath
Wood	◦ 4.00 per square foot plus labor
Carpet	◦ \$30 Yd
Granite	◦ \$12,000
Plumbing Fixtures	◦ \$20,000 (Toilets, sinks, faucets, shower valves, Disposal, Tub/Shower inserts)
Lighting Fixtures	◦ \$7000 (Interior and Exterior Lighting Fixtures)
Appliances	◦ \$25,000 (Refrigerator, ovens, cook-top/range, range-hood, microwave, dishwasher)
Structured Wiring	◦ 1 Cat5, 1 Cable each room with a central SMC panel
Landscaping	◦ \$19,500 Landscaping plus irrigation and sod, grading
Trim	◦ 2 Piece Crown 1st floor, 1 Piece crown 2nd floor, windows/casings 4 1/2" ◦ 8" or 10" base with cap - outlets in the base boards when appropriate
Cabinets	◦ \$55,000 - Kitchen, bath, mudroom, laundry, built-ins includes cabinet knobs
Locks	◦ \$4,200 - interior and exterior lock sets, towel bars, tp holders, etc

EXHIBIT B - SPECIFICATIONS - PART ONE

Division A - General Conditions

A.1 Architectural The contractor shall pay, and has included in the contract estimate all necessary fees to purchase building plan copies.

A.2 Permits and Fees The Contractor shall pay, and has included in the contract estimate, all necessary business license fees due either at the project site or the contractor's office.

A.3 Insurance/Legal The Contractor shall pay, and has included in the contract estimate, all necessary fees to maintain general liability, and workman's compensation insurance through the duration of the Work. Copies of policy to be provided before work commences.

A.4 Professional Fees The Contractor shall pay, and has included in the contract estimate, all necessary fees to provide surveys as required by the owner's lender and local building department officials.

A.5 Temporaries The Contractor shall pay, and has included in the contract estimate, all necessary fees to provide temporary toilet facilities, and other necessary utilities at the project site, throughout the duration of the Work.

A.6 Equipment Rental The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the rental of equipment not owned by the Contractor or his subcontractors.

Division B - Site Preparation

B.1 Termite Pretreatment The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of termite soil treatment.

B.2 Site Clearing The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense to clear necessary trees and to scrape the building area and dispose of the debris.

Division C - Excavation

C.1 Site Drainage/Grading The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of backfilling footing areas after foundation and block work and providing adequate drainage as per code.

Division D Concrete

D.1 Batterboards/Footings/Steel The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of excavating, forming, laying and tying horizontal and vertical steel reinforcement, and the installation of necessary straps and bolts as per plans and specifications.

D.2 Concrete Footings The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of labor and materials to pour the concrete footings.

D.3 Rebar The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of labor and materials for the reinforcement of the footings. Reinforcement will be in accordance with drawings.

Division E Masonry

E.1 Masonry Walls The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to construct the concrete block foundation walls, as shown on the drawings.

E.2 Brickwork or Stucco The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install a three layer, smooth, masonry coating on the exterior of the foundation walls, piers, and house as per the drawings. The finish layer will consist of a pigmented, synthetic or conventional coat of the Owners color choice. Conventional color beyond those readily available will require an upcharge.

E.3 Lintels, Sand, Mortar The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials for sand, mortar, lintels, wire reinforcement, etc., necessary for the masonry process.

Division F Framing

F.1 Beams/Girders/Trusses The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials necessary to construct a 1st floor systems of 12" TJI 16" on center, and a 2nd floor system of 12" TJI at 16" on center, covered with 11/16" "Advantech" sheathing nailed and glued, per the drawings.

F.2 Exterior & Interior Walls The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials necessary to construct 1st and 2nd floor exterior walls of 2x6 studs with 7/16" O.S.B sheathing over the entire exterior. All interior walls of 2 x 4 construction, per the drawings.

F.3 Roof Assemblies The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials necessary to construct the roof system per plan.

F.4 Stair Framing The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of all labor and materials to cover the construction of the exterior and interior stairs as per drawings.

F.5 Porch Framing The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials necessary to construct the rough framing for the exterior porches and decks as per the architect's drawings.

F.6 Frame Labor The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of labor to frame the entire structure per the architects drawings.

F.7 Framing Hardware The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of framing hardware, nails, hangers, tie-down straps, etc.

Division F. Roofing

F.1 Roofing The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install a shingle, 5-V crimp metal, or standing seam (all TBD) with all necessary drip edge, flashing, and ridge vent.

Division X. Windows and Exterior Doors

X.1 Windows/Ext Drs The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install windows per the following specifications: double-hung or casement, as noted, aluminum clad, Low E, white, full screen, simulated divided light, windows as per the drawings. All exterior doors TBD.

Division J. Plumbing Rough.

J.1 Water & Sewer Lines The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of materials and labor to install a sewer line from the residence to the sewer system and a water line from the meter to the residence.

J.2 Pline Rough The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install all rough plumbing ready to accept finished fixtures, as shown on the drawings. Plumbing fixtures and fittings are not included in this cost category, but are included in Division W - Plumbing Finish.

Division K HVAC

K.1 Heat and AC The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install a Geothermal heating and air condition system.

K.2 HVAC - Venting The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install dryer vents for the laundry area and standard downdraft venting for the main level cooktop.

Division L Electrical Rough

L.1 Elect Rough The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install all rough electrical and hook-ups ready for installation of finished fixtures as shown on the drawings. The cost to furnish electrical fixtures are not included in this cost category, but are included in Division X - Electrical Finish.

Division M Exterior Trim

M.1 Ext. Trim The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install, handrails, porch columns, stairs, railings, porch screening, soffits, etc. as shown on the current drawings

Division N Siding

N.1 Siding The Contractor shall pay and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install Cedar Shake siding to all the sided areas of the house as per drawings.

Division O Insulation

O.1 Floor Insulation The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install R-19 insulation in each floor system.

O.2 Wall Insulation The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install R-13 insulation in all exterior walls.

O.3 Roof Insulation The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install R-30 insulation in all roof and ceiling areas.

O.4 Other Insulation The Contractor shall pay, and has included in the contract estimate and the schedule of values, the amount necessary to cover the expense of materials and labor to install R-11 Soundproofing insulation around all baths and in common walls that exist between bedrooms and "public" areas or hallways.

Division P Wall and Ceiling Finish

P.1 Drywall The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install ½" drywall on all walls and ceilings. All surfaces shall have a smooth finish.

Division Q Interior Doors and Hardware

Q.1 Int. Prehung Doors The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install interior prehung doors. Doors shall be solid core "Safe and Sound" or equal, 8-0", style T&D, solid masonite, and 1 3/8" thick on all doors except those to closets.

Q.2 Door Hardware The Contractor shall pay, and has included in the contract estimate, an allowance amount necessary to cover the expense of materials and labor to install interior and exterior door and miscellaneous hardware. This allowance amount is intended for the purchase of: deadbolts, locksets, slidebolts, doorstops, etc.

Division R Interior Trim

R.1 Trim for Int. Opngs The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install casing on all windows and doors, as shown on the current drawings.

R.2 Crown Molding The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install a 4 1/2" (1) part crown throughout the 1st floor. The laundry room and closets on the 1st floor will not receive any crown.

R.3 Baseboard The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install 10" base and cap type interior baseboard moldings on the first floor and second floor.

R.4 Closet Shelving The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of materials and labor to install custom wood or custom closet systems for bedroom closets.

R.5 Interior Stairs The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install interior stairs, treads, and handrails, as shown on the current drawings

Division S Cabinetry

S.1 Kitchen Cabinetry The Contractor shall pay, and has included in the contract estimate, an allowance amount to cover the expense of materials and labor to install cabinetry in the kitchen and bathrooms as per the drawings. This allowance amount is intended for the purchase and installation of all cabinetry, knobs, and accessories. Counter tops will be Granite or Marble of owners choice based on the counter top allowance.

Division T Tile and Glass

T.1 Ceramic Tile The Contractor shall pay, and has included in the contract estimate, an allowance amount to cover the expense of materials, to install ceramic tile in all bathrooms, and walk-in pantry room.

T.3 Glass and Mirrors The Contractor shall pay, and has included in the contract estimate, an amount to cover the expense of materials and labor to install plate vanity mirrors and Glass Shower enclosures in all baths except the powder room.

Division U Specialties

U.1 Bath Accessories The Contractor shall pay, and has included in the contract estimate, an allowance amount to cover the expense of materials to install bath accessories in all baths. The term bath accessories shall mean towel rods, tissue holders, robe hooks, soap holders, etc.

Division W Plumbing Finish

W.1 Plumbing Fixtures The Contractor shall pay, and has included in the contract estimate, an allowance amount to cover the expense of all plumbing fixtures and fittings, to include all showers, faucets, etc Hot water heaters and tub shower bases are part of this allowance.

Division X Electrical Finish

X.1 Electrical Fixtures The Contractor shall pay, and has included in the contract estimate, an allowance amount to cover the expense of all lighting fixtures, to include all fixtures, fans, exterior lights, etc, Recessed cans and smoke detectors are not part of this allowance.

Division Y Kitchen Appliances

Y.1 Kitchen Appliances The Contractor shall pay, and has included in the contract estimate, an allowance amount necessary to cover the expense of supplying and installing all kitchen appliances.

Division Z Painting

Z.1 Interior Painting The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of materials and labor to paint the interior of the residence pursuant to the following guidelines: apply one coat of top quality primer and two coats of top quality finish paint on all surfaces to receive paint. Interior walls to receive flat latex paint, interior wood trim and doors to receive semi-gloss oil paint. Top quality paint shall mean products manufactured by Glidden, Sherwin Williams, or equal, as approved by the Contractor. This contract does not include the amount necessary for the application of any type of wall finish that is not a standard flat finish paint. Owner will be permitted a total of four(4) color selections for wall paint and one(1) color selection for trim. Ceilings will be in white unless a change order is issued.

Z.2 Exterior Painting The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of materials and labor to paint the exterior of the residence pursuant to the following guidelines: apply one coat of top quality primer and two coats of top quality latex finish paint on all surfaces to receive paint. Top quality paint shall mean products manufactured by Glidden, Sherwin Williams, or equal, as approved by the Contractor.

Division AA Flooring

AA.1 Wood Flooring The Contractor shall pay, and has included in the contract estimate, an allowance to cover the expense of labor and materials to install and finish wood floors, finished with (3) coats of clear gloss polyurethane, on the entire first floor, up the stairs and the second floor.

Division BB Landscaping

BB.1 Final Grade The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of final grading at the site.

BB.2 Fencing The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of installing a temporary silt fence as necessary.

BB.3 Driveways A standard concrete drive will be poured as shown on the drawings.

Division CC Trash Removal

CC.1 Dumpsters The Contractor shall pay, and has included in the contract estimate and the schedule of values, an amount necessary to cover the expense of materials and labor to remove all construction debris from the project site.

CC.2 Interim Cleanup The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of materials and labor to keep the project site and residence clean during the performance of the work.

CC.3 Final Cleanup The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of materials and labor to clean the project site and residence when all work is completed.

IN THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

SEAQUEST DEVELOPMENT COMPANY,
INC.; RED BAY CONSTRUCTORS CORP.;
BENZENBERG CUSTOM CABINETS, INC.;
JONATHAN MARSHALL
CONSTRUCTION; COASTAL WINDOW &
DOOR CENTER OF CHARLESTON, LLC;
CAROLINA WINDOW & MILLWORK, LLC
n/k/a CAROLINA WINDOW & MILLWORK
- OMNI GLASS INDUSTRIES, LLC;
SOUTHCOAST EXTERIORS, INC.;
MICHAEL CASTEEN d/b/a CASTEEN
CUSTOM CABINETS; QUALITY CEDAR
PRODUCTS, INC. OF MICHIGAN d/b/a
MICHIGAN PRESTAIN CO.; COASTAL
PLUMBING & GAS, LLC; FOAM
INSULATION CO. INC.; JERRY COMER
d/b/a JERRY'S TILE & MARBLE, LLC;
LOWCOUNTRY FIREPLACES, INC.;
CAROLINA PEST SOLUTIONS, INC.; NEW
SOUTH CONSTRUCTION SUPPLY, LLC.

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-10-1833 BY

FILED
2016 AUG 15 PM 3:51
CLIE J. ARMSTRONG
CLERK OF COURT

**MOTION FOR PROTECTIVE ORDER
AS TO REQUESTS FOR ADMISSIONS
OF SEAQUEST DEVELOPMENT
COMPANY**

TO: THE DEFENDANTS NAMED ABOVE:

The Plaintiffs, Andrew and Kimberly McIntire hereby move this Honorable Court to enter an order staying Responses to Requests for Admission with responses due July 22, 2016 in the above action, based on the following:

1. On July 15, 2016, plaintiffs' filed a Motion to Stay and Compel Arbitration, as this

matter is subject to arbitration under plaintiffs' contract with defendant, Sequest Development Company, Inc. ("SEAQUEST")

2. Sequest served Requests for Admission on with answers due on July 22, 2016.
3. The issues raised by Sequest's Requests for Admission are themselves for the arbitration panel.
4. Further, responding to defendant's Request for Admissions may cause plaintiffs' to waive their arbitration rights under its contract with Sequest.
5. Until this court rules on defendant's motion, plaintiffs should not be required to respond to the Requests for Admission.

Wherefore plaintiffs ask this Court to grant this Protective Order.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

THE UNDERSIGNED HEREBY CERTIFY that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 22 day of JULY, 2016 at
Charleston, South Carolina

DATED: July 22, 2016
Charleston, South Carolina

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ATTORNEYS FOR PLAINTIFFS

IN THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

SEAQUEST DEVELOPMENT COMPANY,
INC.; RED BAY CONSTRUCTORS CORP.;
BENZENBERG CUSTOM CABINETS, INC.;
JONATHAN MARSHALL
CONSTRUCTION; COASTAL WINDOW &
DOOR CENTER OF CHARLESTON, LLC;
CAROLINA WINDOW & MILLWORK, LLC
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MICHAEL CASTEEN d/b/a CASTEEN
CUSTOM CABINETS; QUALITY CEDAR
PRODUCTS, INC. OF MICHIGAN d/b/a
MICHIGAN PRESTAIN CO.; COASTAL
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INSULATION CO. INC.; JERRY COMER
d/b/a JERRY'S TILE & MARBLE, LLC;
LOWCOUNTRY FIREPLACES, INC.;
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IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2016-CP-10-1833

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CLERK OF COURT
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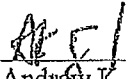
Respectfully submitted:

ANDREW K. EPTING, JR., LLC

THE UNDERSIGNED, A JURY, has read and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 22 day of July 2016 at Charleston, South Carolina

DATED: July 22, 2016
Charleston, South Carolina


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ATTORNEYS FOR PLAINTIFFS

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON 2016-CP-10-1833
3
4
5

6 ANDREW MCINTIRE,)
7 PLAINTIFF,) TRANSCRIPT OF RECORD
8 VS.)
9) OCTOBER 13, 2016
10 SEAQUEST DEVELOPMENT) CHARLESTON, SC
11 COMPANY, ET AL.,)
12 DEFENDANTS.)

13 B E F O R E:

14 HONORABLE (RET) CHIEF JUSTICE TOAL, JUDGE
15

16 A P P E A R A N C E S:

17 ANDREW EPTING, ESQUIRE
Attorney for the Plaintiff

18 JASON DAIGLE, ESQUIRE
19 EDWARD BUCKLEY, ESQUIRE
20 SAMIA NETTLES, ESQUIRE
21 WILLIAM WATKINS, ESQUIRE
22 CATHERINE DYER, ESQUIRE
SHANNA STEPHENS, ESQUIRE
MATTHEW JOHNSON, ESQUIRE
BLAKE MCKIE, ESQUIRE
ALBERT LACOUR, ESQUIRE
Attorneys for the Defendants

23 * * * * *

24 Ruth C. Weese, RDR
25 Official Court Reporter
Ninth Judicial Circuit

1 (The following proceedings were held
2 October 13, 2016, Charleston County, South
3 Carolina, @ 10:25 a.m.)

4 THE COURT: This is Nos. 9, 10, 11, 12
5 all involving McIntire against SeaQuest and many
6 others. There are motions to stay and compel and
7 motions to dismiss or stay proceedings and a motion
8 for protective order. Most of these motions evolve
9 around the issue of arbitration as I understand it.
10 So who wants to begin?

11 MR. DAIGLE: Your Honor, Jason Daigle
12 and Ed Buckley for SeaQuest Development Company.

13 THE COURT: Very good.

14 MR. DAIGLE: There are four motions
15 outstanding. Two of those motions are the motions
16 to stay pending compliance with the Right to Cure
17 Act which requires a mandatory -- statutory
18 mandatory stay. I think it would be easier to hear
19 those first because that stay would then obviate
20 the need to hear the motion for protective order or
21 the motion to compel arbitration because those
22 would stay -- that act would stay the other motions
23 in this case.

24 THE COURT: All right, sir.

25 MR. EPTING: Your Honor, my name is

1 Drew Epting.

2 THE COURT: Yes, sir. Mr. Epting.

3 MR. EPTING: Judge, I hope you won't
4 hold this against me.

5 THE COURT: Wait a minute, Mr. Epting.
6 Hold it. Who is the moving party in the first
7 motion that was just mentioned?

8 MR. EPTING: Well, I took it that Jason
9 was finished and he just basically described his
10 motion in relation to arbitration and I'm the one
11 who moved to compel arbitration, so I thought I
12 should start, but obviously --

13 THE COURT: Well, I want to get an idea
14 all the motions that are here. The motion he
15 described is a motion to stay, right?

16 MR. DAIGLE: Yes, Your Honor. My
17 motion was actually filed a month before Mr.
18 Epting's motion was filed for arbitration. Red Bay
19 Constructors filed a mirror motion to my motion.

20 THE COURT: And the motion to stay is
21 based on the right to cure?

22 MR. DAIGLE: Yes, ma'am.

23 THE COURT: All right. And then --
24 that's SeaQuest.

25 MR. DAIGLE: Yes, ma'am.

1 THE COURT: And then Mr. Epting has a
2 motion to compel arbitration.

3 MR. EPTING: And the motion for
4 protective order, Your Honor.

5 THE COURT: And motion for protective
6 order. What's the fourth one?

7 MR. DAIGLE: Fourth one is Red Bay
8 Constructor's motion. It's a mirror motion to my
9 motion to stay pending compliance with the Right to
10 Cure Act.

11 THE COURT: So SeaQuest is one motion
12 to stay and Red Bay?

13 MR. MCKIE: Your Honor, Blake McKie on
14 behalf of Red Bay Constructors.

15 THE COURT: Here's what we will do.
16 Mr. Epting, let's -- your motion to stay is a
17 motion to stay the arbitration?

18 MR. DAIGLE: My motion is a motion to
19 stay the entire case.

20 THE COURT: The entire case.

21 MR. DAIGLE: Which would include the
22 arbitration.

23 THE COURT: Let's go forward, Mr.
24 Epting, first and hear his motion to stay and then
25 we will get right to you on your motion to compel.

1 MR. DAIGLE: If I may approach, Your
2 Honor, I have got a memorandum.

3 THE COURT: Very good.

4 MR. DAIGLE: Your Honor, just by way of
5 a little background on this case. This case
6 involves a single family residence in Bell Hall.
7 The case -- the house was built or the permits were
8 pulled in August of 2007. There's actually a
9 contract between the Plaintiffs, the McIntires, and
10 SeaQuest Development dated August 22nd, 2007.
11 SeaQuest acted as general contractor, but they did
12 -- all their work was performed through
13 subcontractors, the majority of which are actually
14 named as direct defendants in this case or
15 third-party Defendants in this case.

16 The certificate of occupancy for that
17 home was pulled about 13 months later on September
18 25th, 2008. The Plaintiffs filed suit on
19 April 6th -- April 8th, 2016, so a few months shy
20 of the statute of repose running. They brought
21 actions for negligence, gross negligence, breach of
22 warranty of habitability, negligent
23 misrepresentation, constructive fraud and breach of
24 warranty of good and workmanlike work.

25 On June 17th, 2016, I filed our answer

1 to their complaint and contemporaneously with that
2 filed this motion to stay -- to dismiss or stay the
3 proceedings for the McIntires compliance with the
4 Right to Cure Act.

5 The Right to Cure Act which is
6 Section 40-59-810 and the following code sections
7 require that as a condition precedent before a
8 claimant or Plaintiff can bring a case either in
9 civil court or in arbitration, they have got to
10 give notice that to the builder, to the general
11 contractor or subcontractor for that matter, that
12 includes a statement that the claimant asserts a
13 construction defect, a description of the claim, a
14 description of the result and a resulting defect.
15 They have to serve that, personal service or
16 certified mail, to the last known address of the
17 addressee.

18 And if the claimant files a lawsuit
19 prior to that, prior to complying with the statute,
20 then there's a provision that can fix that which is
21 40-59-830 which states that on motion of a party to
22 the action the Court shall stay the action until a
23 claimant has complied with the requirements of this
24 article, which is the right to cure article.

25 The Supreme Court in South Carolina has

1 recognized that's the cure to afford substantial
2 rights to the builder and to the claimant.

3 The rights that the builder has that we
4 need to take advantage of include the right to
5 request clarification of the alleged defects, the
6 right to inspect the alleged defects, the right to
7 offer remedy for the alleged defects and the right
8 to either settle those claims or deny the claims.
9 Those are all conditions precedent that must be
10 gone through prior to filing a lawsuit or in this
11 case the proceedings must be stayed in order for
12 both the claimant and the builders to comply with
13 the statute.

14 In this case the Plaintiffs have done
15 nothing, nothing even remotely related to trying to
16 comply with the statute. There has been no notice,
17 no notice in writing or proper notice of these
18 alleged defects, no notice for us to cure, no
19 notice for us to inspect the defects.

20 They have denied substantial
21 substantive statutory rights to SeaQuest by filing
22 this lawsuit without first complying with the Right
23 to Cure Statute. The stay in this case is not
24 discretionary. It is a mandatory stay that the
25 Court shall stay the proceedings so that the

1 parties can comply with the statute.

2 What is interesting in this case is
3 that I don't think that the Plaintiffs can ever
4 comply with the statute. It's my understanding
5 that the Plaintiffs have already engaged liability
6 experts and construction experts and are virtually
7 finished with the entire repair to their home and
8 renovations, whatever they have done to it, thereby
9 completely destroying any alleged defects

10 If you look at Section 40-59-850, there
11 is a right of the builder to inspect those defects.
12 We can never inspect those defects because the
13 Plaintiffs destroyed them. I don't think there is
14 any way for them to comply with the statute and
15 that the Court has to stay the statute until they
16 comply with it.

17 So we need either to -- SeaQuest is
18 requesting a stay of at least 90 days to try to get
19 the Plaintiffs to comply with the statute or until
20 they move to lift the stay to prove they have
21 complied with the statute. The dismissal may be an
22 argument for another day because certainly they
23 haven't tried to comply with the statute, maybe I
24 am wrong, maybe they can comply with it, but I
25 don't think there is any way that they can. So we

1 would also like the complaint either be restricted
2 or dismissed without prejudice so they can comply
3 with the statute.

4 THE COURT: Now, Red Bay has a similar
5 motion as I understand it, Mr. Buckley?

6 MR. MCKIE: Mr. McKie.

7 THE COURT: Excuse me.

8 MR. MCKIE: As Mr. Daigle said, it's a
9 mirror motion so I won't rehash his argument, but
10 we maintain a similar position and also request a
11 stay of the litigation.

12 THE COURT: All right. Now, Mr.
13 Epting, to you.

14 MR. EPTING: Thank you.

15 THE COURT: And what you will be doing
16 at this point is arguing against the stay.

17 MR. EPTING: Judge, the argument
18 against the stay commences with the arbitration
19 act.

20 THE COURT: I know you want to argue
21 mandatory arbitration, but explain to me to begin
22 with what the implication is about this statutory
23 notification of right to cure.

24 MR. EPTING: Judge, there is such a
25 statute. It requires the notice be served, they

1 have an opportunity to review. And in this case,
2 let me get the case, Judge, this court and for some
3 reason you weren't sitting on this case, Judge, but
4 it's *Grazia v. South Carolina State Plastering*.

5 THE COURT: Spell that.

6 MR. EPTING: G-R-A-Z-I-A.

7 THE COURT: Against?

8 MR. EPTING: The housing authority.
9 *South Carolina State Plastering*, sorry. You want
10 the cite, Judge?

11 THE COURT: Sure.

12 MR. EPTING: 703 S.E. 2d 197.

13 THE COURT: All right.

14 MR. EPTING: So what the Court says in
15 *Grazia*, Judge, is that it's not appropriate on
16 motion to dismiss to be taking this issue up. And
17 as you sit here, there's nothing before you to show
18 that we didn't comply with the statute.

19 THE COURT: Well, we are going to find
20 that out right now. What happened in that regard?

21 MR. EPTING: Well, what happened in
22 that regard, Judge, is this house started out as a
23 lightening strike. And --

24 THE COURT: Started out as a what?

25 MR. EPTING: A lightening strike.

1 Lightening hit this home. And then they thought
2 they had a plumbing problem. And after some months
3 and at the time, Judge, not even anticipating that
4 there would be a lawsuit, a contractor is brought
5 in because they think there's a problem with the
6 chimney.

7 Well, about this time we realize there
8 is a statute of repose problem. And so it's very
9 difficult, Judge, to discover problems to be a
10 statute of repose problem and engage in review of
11 what are we going to do about these problems and so
12 the client mainly because of the expense simply
13 carried forward and completed the work.

14 And so -- I am fairly sure, Judge, we
15 made all of the statute of repose deadlines. It is
16 not unlike in the Grazia case Judge Pleicones talks
17 about the same problem what do you do when you have
18 got a statute of limitations problem. That's his
19 example.

20 And so in this case what the record
21 would show, Judge, is that the general contractor's
22 sister or sister-in-law owns the property next
23 door. Both principals of Red Bay and SeaQuest were
24 on the site, were asked for assistance, and did
25 nothing. And that went on for a period of months.

1 I don't want to be overly technical about this,
2 Judge, and I would like to go back to the question
3 of arbitration. Not whether or not to compel it,
4 but here's the question that I have got for the
5 Court.

6 In this case in the record there is an
7 out of state Defendant so we know there's
8 interstate commerce which means the Federal
9 Arbitration Act applies. The Federal Arbitration
10 Act, Judge, has no requirement such as this
11 statute, one. But more importantly, Judge, this
12 Court and I think you were sitting on one or two of
13 these cases, say that in the event that there's an
14 arbitration provision the Court's entire obligation
15 is to look and see if there is an agreement to
16 arbitrate. And if there is the Court is to go no
17 further.

18 In the case, Judge, of Housing
19 Authority v. Cornerstone, there was a statute that
20 basically said well, the general contractor
21 couldn't sue because he wasn't properly licensed.
22 The court of appeals in that case relying on the
23 Supreme Court case of Munoz said those are
24 questions of procedural arbitrability. Our job is
25 to simply determine is there an arbitration

1 provision. And if there is, everything else is for
2 a panel of arbiters.

3 So it really is a chicken or the egg
4 Judge, but, if you're me, if we sent out a letter
5 and we engaged in this process under this statute,
6 I would be sitting here arguing how it is that I
7 waived my right to arbitration by engaging in these
8 state procedures. And so I think the proper thing
9 Judge, is and, Judge, just to finalize this, they
10 served requests for admissions. It's to that we
11 filed a protective order because we viewed that as
12 inconsistent with the right of arbitration and
13 another reason that they would say that we waived
14 the right to arbitrate.

15 And so I think the Court's inquiry is
16 first is there an agreement to arbitrate. There
17 is. And then everything else goes to the panel.

18 THE COURT: All right. I saw somewhere
19 in here the contract between these parties. I
20 think I got it right. Where is the arbitration
21 agreement?

22 MR. EPTING: Right on the front page
23 top of the page, Judge.

24 MR. DAIGLE: Your Honor, if I may?

25 THE COURT: Just a second. Let me just

1 look at this. I see a stamped this agreement is
2 subject to arbitration. Where is the arbitration
3 clause in the contract itself?

4 MR. EPTING: It's actually in the 201,
5 Judge, that is referenced in the bottom. And
6 here's the 201.

7 THE COURT: My first question is I see
8 something that is not signed, but it does say
9 August 22nd, 2007. Andrew and Kim McIntire and
10 SeaQuest Development Company. The McIntire
11 residence and wherein and it's stamped with this
12 arbitration thing. Is there an arbitration clause
13 within the document itself?

14 MR. EPTING: Well, I think the
15 arbitration clause, Judge, is the provision that
16 this shall be governed by the South Carolina
17 Arbitration Act.

18 THE COURT: I am asking whether beyond
19 that warning there is an actual agreement to
20 arbitrate. Where is it?

21 MR. EPTING: It's in the 201, Judge.

22 THE COURT: What is a 201?

23 MR. EPTING: If you look at the bottom
24 of that contract, Judge, in your hand on the front
25 page, it says that it shall be read in accordance

1 with the 201 which are the general conditions and
2 supplemental conditions to that particular
3 agreement.

4 THE COURT: I see on the first page of
5 this document has important legal consequences.
6 The 201, AIA 201 is adopted in this document by
7 reference. Is that what you are talking about?

8 MR. EPTING: Yes, ma'am.

9 THE COURT: So there isn't any
10 arbitration clause other than the adoption in the
11 very small print of the AIA 201. That's the very
12 first time I have ever seen it done like that. We
13 have had a whole lot of debate about how big the
14 warning has to be and so forth and so on, but I
15 have never seen one that is exactly like this.

16 MR. EPTING: Judge, can I address that?

17 THE COURT: Sure.

18 MR. EPTING: The size of the print and
19 where it is on the document is wholly irrelevant
20 for purposes of the application of the Federal
21 Arbitration Act. That language only is necessary
22 if you do not have interstate commerce and you are
23 enforcing arbitration under the South Carolina act.
24 But the federal act applies to any agreement to
25 arbitrate.

1 THE COURT: Well, of course this thing
2 references a South Carolina code.

3 MR. EPTING: Right.

4 THE COURT: That's what it references
5 as the arbitration provision. So if it's an
6 arbitration provision it's that. Certainly the
7 Federal Arbitration Act is applicable when it's
8 interstate commerce and most of these construction
9 contracts are held to be that. I'm just simply
10 making the observation that this is as thin a
11 notice to everybody. Of course SeaQuest is the one
12 who made the contract so they got certain
13 responsibilities in that regard. But what I am
14 trying to figure out is this: Let's say that we
15 agree you do have an arbitration clause. We have
16 got this statute that talks about staying things.
17 It doesn't waive anything. But it stays until the
18 right to cure procedures are followed.

19 And what I am trying to determine,
20 apparently this house rocked along without any fuss
21 about its construction until something else
22 happened to damage it and when they got into fixing
23 it I guess they discovered all these other things;
24 is that right?

25 MR. EPTING: That's essentially it,

1 yes.

2 THE COURT: And but as I understand,
3 you all have not attempted to comply with the Right
4 to Cure Statute.

5 MR. EPTING: We have not sent anything
6 in writing, Judge, that's true.

7 THE COURT: All right.

8 MR. EPTING: That's true.

9 THE COURT: Let me hear from --

10 MR. EPTING: Judge, can I give you the
11 201?

12 THE COURT: Oh, certainly. I trust you
13 that's in there.

14 MR. EPTING: I marked it for you.

15 THE COURT: Thank you.

16 MR. DAIGLE: Your Honor, I don't have
17 much more to say other than Mr. Epting admitted
18 they haven't complied with the notice part of the
19 Right to Cure Statute and the Right to Cure Statute
20 specifically says in 40-59-830 that an action, a
21 civil lawsuit or arbitration proceeding shall be
22 stayed. The definition of the -- that
23 compliance --

24 THE COURT: What happens procedurally,
25 though, y'all say they can't possibly comply with

1 it. They have attempted to at this point, but you
2 say hey, they can't really comply with this. So
3 the whole -- do you take the position they would
4 never be able to sue you for any construction
5 defects if this thing happens after the house has
6 been used for many, many years and they have a
7 calamity that they have got to repair, but they
8 have got to go back and give you a right to cure
9 after they have repaired?

10 MR. DAIGLE: Your Honor, if they can
11 comply with the statute then I am all for it. But
12 the fact is they haven't even tried yet and that's
13 why I made the point earlier that that may be an
14 argument for another day. If they can comply with
15 the statute, then this case should be allowed to
16 proceed. But until they have, this proceeding must
17 be stayed.

18 THE COURT: And what kind of time frame
19 do you see as the statute anticipating for the
20 notice and your attempt to remedy the defects?

21 MR. DAIGLE: The statute if you add all
22 the days that are specified in the statute comes to
23 I think about 55 days. But realistically, in order
24 to -- with everyone's schedule in getting
25 inspection done, I think 90 days would be a more

1 appropriate stay in this case to give everyone the
2 opportunity to comply with the statute.

3 THE COURT: What do you see as the
4 application of the Grazia case to this matter?

5 MR. DAIGLE: The Grazia case I actually
6 cited in my --

7 THE COURT: Yes.

8 MR. DAIGLE: The difference in that
9 case, that was a class action case. What the court
10 was trying to do was marry the Rule 23 class action
11 notice with the Right to Cure Statute because they
12 are in opposite. The Court did a good job doing
13 that saying that they can work in harmony and then
14 laid out the argument for that.

15 So, and Mr. Epting is right that the
16 circuit court was found in error when the court
17 struck the class action allegations in the
18 complaint. That that wasn't appropriate. So as
19 far as the motion to dismiss goes, it doesn't
20 really apply in this case. This isn't a class
21 action. That's what the Grazia case was talking
22 about.

23 But what Grazia does a really good job
24 is is going into the rights that the Right to Cure
25 Statute infers on the builders and on the claimant

1 or Plaintiff in this case. And that is the
2 proposition that we're standing on.

3 THE COURT: Now, how do you see
4 arbitration playing into this? Why isn't he right
5 that this is an arbitrable contract and the first
6 thing that ought to be done is arbitrate?

7 MR. DAIGLE: Because the --

8 THE COURT: Does that stay statute talk
9 about arbitration?

10 MR. DAIGLE: Yes, ma'am, it does. It
11 says that the Right to Cure Statute stays all
12 proceedings including arbitration. That's in the
13 statute.

14 THE COURT: Um-hmm. But in practical
15 terms how do you see this thing as playing out? It
16 can't be a situation where he can't pursue any
17 claim against your client simply because a lot of
18 time has passed. Let's say he does give you a
19 complete list of everything that's wrong with the
20 house. You are not going to be able to cure it in
21 90 days. So where does it go from there?

22 MR. DAIGLE: From there if you walk
23 through the statute we would have the right to ask
24 for clarification on those issues. We have a right
25 to inspect those issues and then we have a right to

1 offer to cure. And whether the Plaintiff takes
2 that offer or not is up to them. If they take the
3 offer then I think that we would be in agreement
4 and we could agree to continue to stay the case
5 pending the resolution of those defects.

6 But if we go through the statutory
7 requirements of notice of clarification, inspection
8 offer and then acceptance or rejection, then we
9 have complied with -- the statute has been complied
10 with and the stay would be lifted at that point.

11 THE COURT: And then what are you going
12 to do? Insist to be arbitrated?

13 MR. DAIGLE: We are arguing against
14 arbitration, Your Honor.

15 THE COURT: Why? I mean let's say they
16 comply and then the next stage is reached and the
17 suit had been filed. Stay is now lifted. You are
18 going to continue to oppose arbitration?

19 MR. DAIGLE: Yes, ma'am.

20 THE COURT: Why?

21 MR. DAIGLE: If you look at the
22 arbitration agreement we think they have waived it.

23 THE COURT: How have they waived it?

24 MR. DAIGLE: I can go into our whole
25 argument at this point if you like.

1 THE COURT: Yes, I would.

2 MR. DAIGLE: Your Honor, if I can hand
3 up our -- if I can approach.

4 THE COURT: Um-hmm.

5 MR. DAIGLE: This is our motion -- not
6 our motion. This is our memorandum in opposition
7 to arbitration and from a -- to answer Your Honor's
8 question, your first question why do we not want to
9 arbitrate? Because we are the only ones on the
10 contract. The arbitration would be solely against
11 SeaQuest and there are 15 or so other parties named
12 in the lawsuit that would not be subject to
13 arbitration.

14 THE COURT: All right, sir. And so?

15 MR. DAIGLE: So in order to fully
16 litigate this case and get a proper result we think
17 all those other parties need to be part of this
18 case. That their presence is mandatory and
19 necessary in order to properly litigate this case.

20 THE COURT: Why so?

21 MR. DAIGLE: Because SeaQuest didn't
22 perform any of the work. We were acting solely as
23 general contractor.

24 THE COURT: That doesn't absolve you
25 from contractual responsibilities you have.

1 MR. DAIGLE: Certainly not, but if you
2 look at the complaint we weren't sued under breach
3 of contract. We were sued for negligence. We were
4 sued for breach of warranty claims. We are not
5 even sued for breach of contract.

6 THE COURT: We have got a long
7 tradition beginning with Lane v. Trenholm Builders,
8 Kennedy v. Columbia Lumbar Company, et cetera, et
9 cetera, that well after and long after construction
10 has been done, particularly residential
11 construction, that general contractors continue to
12 have responsibility even when the matter -- when
13 the residence has been sold.

14 MR. DAIGLE: I agree.

15 THE COURT: For what some people call a
16 contort. A contractual obligation for having built
17 and a responsibility for negligence, et cetera, et
18 cetera. So that's the kind of action they have
19 brought.

20 MR. DAIGLE: It is -- I'm not arguing
21 otherwise. I'm not saying they couldn't have sued
22 us for contract. But they haven't and that's why
23 -- and all these other Defendants weren't part of
24 that contract anyway. They sued under tort
25 warranty. And in order to fully litigate this case

1 and get the proper result for all parties, I think
2 we need to do -- all those parties need to be
3 present. Arbitration solely against the general
4 contractor, we have to go through this whole
5 process and then we would still have to litigate
6 this case because the Plaintiff has claims against
7 all these other Defendants and we have -- we being
8 SeaQuest have cross-claims against all Defendants
9 as our subs and material men as well as third-party
10 claims against two other subcontractors.

11 THE COURT: Let me ask you this: If
12 your contractual obligation is not what is at play
13 here, then what impact does that have on the Right
14 to Cure Statute?

15 MR. DAIGLE: I don't think it does.

16 THE COURT: The Right to Cure Statute
17 anticipates both suits and contract against a
18 contractor as well as suits in tort?

19 MR. DAIGLE: Yes, ma'am. It says any
20 action.

21 THE COURT: Um-hmm. So let's say the
22 Right to Cure Act is engaged in. Then your
23 contemplation is that the lawsuit would be tried as
24 a -- the lack of a better term, a Ryders v. Cypress
25 Trim Builders, et cetera, type lawsuit.

1 MR. DAIGLE: Once the stay is lifted
2 from the right to cure then the litigation would
3 proceed normally. And if the Plaintiffs want to
4 move for arbitration against SeaQuest so be it.
5 That does not stop the case itself because they
6 still got claims against these other parties.

7 THE COURT: All right. And you say --
8 you argue that it's a waiver matter.

9 MR. DAIGLE: Yes, ma'am.

10 THE COURT: But the lawsuit that they
11 brought you say does not sue you for breach of
12 contract.

13 MR. DAIGLE: Does not.

14 THE COURT: Is that a necessary
15 prerequisite to enforcing their right to
16 arbitration in your view?

17 MR. DAIGLE: If I am understanding you
18 correctly, are you asking me?

19 THE COURT: Can a party demand
20 arbitration under a contract without suing the
21 other contracting party if it has disagreements?

22 MR. DAIGLE: They can, but there's a
23 test for it and we believe they fail that test.

24 THE COURT: What is that test? Are you
25 talking about the three part test you are

1 discussing in waiver terms? Basically you argue
2 waived because of delay.

3 MR. DAIGLE: Correct. And then if
4 the --

5 THE COURT: Then you argue
6 contractually barred because of --

7 MR. DAIGLE: The test is actually
8 outlined in Section 2 on page 6. It's the Zabinski
9 case.

10 THE COURT: Um-hmm.

11 MR. DAIGLE: It says our Supreme Court
12 has noted the following test has been used to
13 determine whether a particular tort claim falls
14 within an agreement or contract to arbitrate. The
15 test is based on a determination whether the
16 particular tort claim is so interwoven with the
17 contract that it could not stand alone. If the
18 tort and contract claims are so interwoven both are
19 arbitrable. On the other hand, if the tort is
20 completely independent of the contract and can be
21 maintained without reference to the contract the
22 tort is not arbitrable.

23 That's the test. And clearly these --
24 Mr. Epting felt so highly of his tort and warranty
25 claims that he didn't even bothering filing breach

1 of contract claims. He doesn't need it. These
2 tort and warranty claims stand on their own and his
3 well drafted complaint shows that.

4 THE COURT: Mr. Epting -- excuse me.
5 Yes, sir.

6 MR. LACOUR: If the Court please, Your
7 Honor, Andy Lacour. I represent one of the
8 subcontractors. If Your Honor intends to reach an
9 arbitration issue I would like to be heard either
10 now or after Mr. Epting. We are a tier below the
11 parties to the agreement.

12 THE COURT: Well, it's all on the table
13 right now because that's the nature of these
14 motions that are pending. So, yes, you may be
15 heard. Your name is?

16 MR. LACOUR: Andy Lacour. I represent
17 one of the subcontractors, Your Honor who is --

18 THE COURT: Which one?

19 MR. LACOUR: -- the installer of the
20 fireplaces and chimney flues. Not the chase, not
21 the structure, but the metal flue that connects the
22 fireplace inside the house with the sparker at the
23 top of the chase. But it's not clear, Your Honor,
24 at this point exactly the breadth of the Plaintiffs
25 motion to compel. It doesn't -- the motion that

1 they filed says -- asks the Court to enforce the
2 agreement between the parties according to its
3 terms. My client as a subcontractor is not a party
4 to that agreement, is not a party to any agreement
5 to arbitrate. So while there may be an agreement
6 between the owners and the contractor SeaQuest that
7 incorporates the AIA 201 and contains an
8 arbitration agreement in those general conditions,
9 we will leave the enforceability to them to argue;
10 we are not a party to that agreement.

11 We are not bound by that agreement in
12 any way. And the last time I was before Your Honor
13 was April 16th, '13 and the Supreme Court on a case
14 called Cape Romain Contractors v. Wando E. And
15 what we are about to figure out is whether I
16 learned anything as a result of Your Honor's ruling
17 in that case. But I have handed up --

18 THE COURT: Certainly.

19 MR. LACOUR: -- three things. I have
20 got a copy of that case. I have got one provision
21 from -- if I may approach.

22 THE COURT: Please.

23 MR. LACOUR: One provision from that
24 general conditions document. And one copy of a
25 portion of our state act. Your Honor touched on

1 all three so far, but not to the depth we need to
2 look for the subcontractors. The first thing is
3 that in the Cape Romain case what was said was
4 three key things. First, arbitration is
5 contractual in its nature. Secondly, it is
6 available only when the parties have agreed to
7 arbitrate. And third, the courts must enforce the
8 agreement according to its terms including with
9 whom a party has agreed to arbitrate a dispute and
10 the rules to be applicable whatever they have
11 agreed to.

12 The fourth thing they said citing Bolt
13 Information Services, a U.S. Supreme Court case,
14 Your Honor, y'all pointed out to me at that time
15 that the FAA confers that no right to arbitrate.
16 Federal act does not contain a right to arbitrate.
17 It only gives a party to a contract to right the
18 seek the assistance of the courts for an order to
19 proceed in accordance with the agreement.

20 So that brings us down to the second
21 thing. If you will turn in the document I handed
22 up behind the Cape Romain case, there is a single
23 page at the bottom, is page 23, of that AIA 201.
24 Paragraph 4.6.4 and its entitled limitation on
25 consolidation or joinder. And you have to read

1 this paragraph very carefully because the
2 architects cover a lot of ground in these general
3 conditions, most of which is for their protection
4 and not ours. The first paragraph addresses the
5 joinder with the owner and the architect and the
6 architect's subconsultants and employees. And that
7 first sentence only addressed those parties and
8 that's not applicable here.

9 The second sentence talks about other
10 persons substantially involved in common questions
11 of fact or law. Which sounds like it might apply.
12 But its presence is required to afford a complete
13 relief.

14 Well, in this case, Your Honor, first
15 of all, there's not any reason why complete relief
16 cannot be afforded to the Plaintiffs against
17 SeaQuest. In other words, there's no compulsory
18 counterclaim that has to require the Defendant to
19 join another Plaintiff, another person on the
20 Plaintiffs side in this case. Cross-claims are
21 always permissive. And so you have to read a
22 little further down. You find out that other
23 person has to consent to the arbitration as to the
24 claims to be arbitrated and as to the entities with
25 whom they have agreed to arbitrate.

1 And then the final sentence in
2 paragraph 4.6.4 makes it clear that other
3 agreements to arbitrate with an additional person
4 or entity duly consented to by the parties to the
5 agreement shall be specifically enforceable.
6 There's nothing in this paragraph that says parties
7 who have not agreed to arbitrate somewhere can be
8 joined. That's why it starts out and called it a
9 limitation on consolidation of joinder.

10 So I am saying if properly read and
11 properly applied, no subcontractor who has not
12 agreed someplace somewhere to arbitrate can be
13 forced to join this arbitration. Because 4.6.4
14 only says people that have agreed and consented to
15 join. So no agreement can be forced.

16 In other words, specific performance
17 can only be had for those who signed on. You can't
18 specifically enforce a contract against somebody
19 who is not a party to it. As far as the state
20 statute, that's the third document in the package I
21 handed up which is the joinder provision of the
22 statute. The state statute, so assuming we are not
23 under the FAA, assuming we are under the state
24 action, and all those issues that I'm really not a
25 party to, the question is can you join somebody who

1 has not agreed to arbitrate under the state act?

2 The answer we believe is no.

3 Because first of all, you have got to
4 be an entity subject to service of process. Well,
5 my client would be so that's not going to bar it.
6 The next one would be complete relief cannot be
7 afforded to those already parties to that agreement
8 to arbitrate. And again as I said already,
9 Plaintiff can have complete relief against SeaQuest
10 without the subcontractors.

11 And SeaQuest can have complete relief
12 and air all its defenses without the
13 subcontractors. If it wants later an indemnitory
14 contribution of the subcontractors it can do it
15 later. It doesn't have to happen all in one
16 arbitration. So we are not required there.

17 And then the third point is or the
18 entity claims an interest in the subject of the
19 action. Well, we don't. We are just the sub that
20 worked on it. We don't claim like a mortgage
21 holder or a partial owner or a member of an LLC to
22 have any rights. So even under the state statute I
23 don't believe joinder would be appropriate. That
24 might be an issue that really gets addressed by the
25 arbitrator, not by this court, but the reason I

1 didn't want to miss my chance to speak is if you
2 are going to go there, Your Honor, I don't believe
3 your order should include the subcontractors for
4 those reasons. Thank you.

5 MR. DAIGLE: Your Honor, I think I
6 misspoke earlier. I misunderstood a question you
7 asked. You asked if the failure to bring breach of
8 contract claim prevented you from compelling
9 arbitration. I believe it does because the Court
10 enforces arbitration provisions like any other
11 contract. And I believe that's addressed in the
12 Zabinski case. If there is no contract before the
13 Court there's nothing for the Court to enforce.

14 So I think that suing under the breach
15 of contract which includes the arbitration clause
16 is a condition precedent to demanding arbitration
17 once the lawsuit has been filed.

18 THE COURT: Well, that wasn't exactly
19 my question. My question was if you have got a
20 contract party and it has an arbitration clause in
21 it, you can demand arbitration, can you not?

22 MR. DAIGLE: You can.

23 THE COURT: And I assume that's what's
24 been done here.

25 MR. DAIGLE: No arbitration has

1 demanded, Your Honor.

2 THE COURT: Well, they brought a
3 lawsuit asking that arbitration be compelled.

4 MR. DAIGLE: The lawsuit doesn't
5 mention arbitration. What they did is they moved
6 -- after they filed their lawsuit they waited four
7 months or three months or however long it was, and
8 then filed a motion with this court to compel
9 arbitration. They never gave us notice of
10 arbitration, never demanded from us. They demanded
11 arbitration from the court. There is not a
12 contract before the Court. There is contract
13 before the Court for the Court to enforce an
14 arbitration provision.

15 THE COURT: Where does this -- I will
16 get to you in a second. Where does this matter
17 stand between the two of y'all as far as the
18 contract is concerned with respect to the statute
19 of limitations?

20 MR. DAIGLE: We haven't done any
21 discovery in this case, Your Honor, so I can't
22 answer that.

23 THE COURT: Mr. Epting.

24 MR. EPTING: Judge, you are doing a
25 very good job of pulling back all the layers here.

1 There probably wouldn't be a statute of limitations
2 problem if this was dismissed, but it will be a
3 statute of repose problem.

4 The second thing that is going on is
5 the Defendants want to get this in some sort of
6 position in which something is appealable. And
7 while that may exist no matter what the Court does,
8 that's another level that's going on.

9 One of the questions that you asked is
10 okay, so you're saying that since this poor fella
11 when you wouldn't fix this house went out and fixed
12 his house that he now can never ever sue you
13 because you don't have the right to cure that you
14 wouldn't work with him to start with.

15 And so what I think the proper
16 analysis, Judge, would be you would ultimately end
17 up in some sort of spoliation analysis, was that
18 really the party's intentions or does this
19 person --

20 THE COURT: Why didn't you sue them in
21 contract?

22 MR. EPTING: Your Honor, probably an
23 oversight. No other reason and I would move at
24 this time to allege a breach of contract action,
25 but I don't think Your Honor has anything to do

1 with the place we find ourselves in arbitration.
2 Doesn't have a thing to do with that. And so as I
3 am thinking this thing through, Judge, I agree with
4 Mr. Lacour, we are not trying to enforce
5 arbitration as to any of the subs.

6 But what I would say, Judge, for your
7 edification, there are likely very good arguments
8 that the general contractor is going to have as to
9 many of the subcontractors because while we don't
10 have these subcontractors, if the subcontracts
11 incorporate the terms of the general contract then
12 there's going to be an arbitration provision and no
13 doubt that will be some argument that will be made
14 at some other date.

15 But we simply because of the cost and
16 the expense thought we don't need anybody but the
17 general and let's go forward with the general. And
18 let's ask the Court as to us to stay the litigation
19 with the subs. I really do think --

20 THE COURT: But there are a whole lot
21 more Defendants listed in here than just SeaQuest.
22 Has that been done by a third-party complaint?

23 MR. EPTING: No, ma'am.

24 THE COURT: You sued all the subs as
25 well.

1 MR. EPTING: We had to, Judge, because
2 of the statute of repose. The intent of this
3 statute, Judge, was I think the court in Grazia
4 says intent is to promote settlement. It has
5 created a host of problems. This being one of
6 them. But one of the questions that's never been
7 answered. I still come back, Judge, under Primer
8 Paint, Moses H. Cone and Dean Witter, this Court's
9 obligation is purely to determine is there an
10 arbitration provision. And if there is, to move it
11 to arbitration. And every other thing, procedural
12 questions of arbitrability, compliance with
13 statutes, is for the arbitrators.

14 THE COURT: Well, they say your right
15 to do that is completely dependent on whether or
16 not you sue them in contract. And if you do not
17 sue them in contract then the contractual provision
18 requiring the matter to be arbitrated doesn't
19 apply. That's what we are trying to argue.

20 MR. EPTING: I think I can, Judge, with
21 a little research, I think I can pretty well --

22 THE COURT: Well, there is one thing
23 for sure. None of the nursing homes suits would
24 ever be arbitrated if that were the case because
25 most of them are not suits on the contract. They

1 are tort suits against the nursing home. That's
2 one very deviling area where now Congress has
3 stepped in and taken a different approach to the
4 arbitrability of the courts in the nursing home
5 area. Since it's saying that you can't contract
6 away certain rights and particularly vulnerable
7 people. I don't know how that would play out in
8 this context. We have got some cases including
9 some that have very recently been published where
10 certain writers have taken the position that the
11 tort, Kennedy v. Columbia Lumbar Company type cases
12 if they are outrageous enough trump the arbitration
13 provisions.

14 So the Court is still looking at
15 arbitration as a pretty strongly enforced right no
16 matter whether the suit that arises from it is a
17 suit in tort or suit in contract. I don't know
18 what the answer to that is.

19 MR. EPTING: Well, I think, Judge, I
20 can certainly provide you with cases, but you can
21 see with collective bargaining agreements where
22 there is a provision to arbitrate with suits that
23 have nothing to do at times with the contract
24 having --

25 THE COURT: Well, I believe you are

1 going to have to get a little more focused into
2 residential construction.

3 MR. EPTING: All right. I think I can
4 do that. But at the end of the day, Judge, we are
5 looking at trying to find a solution that doesn't
6 break my client. He had to pay to fix all this.
7 He had a statute of repose. I didn't want to add
8 all these people. But had I not then there would
9 be the argument that well, these are the people who
10 are really responsible, not the general. I don't
11 believe that. And so then those people go by the
12 wayside.

13 THE COURT: Do you think there's a way
14 to protect -- the argument seems to come, and I
15 won't speak for Mr. Daigle, so if I am not reciting
16 your position correctly, I want you to correct me,
17 Mr. Daigle. But I get the impression that they're
18 not taking the position that somehow participation
19 in the right to cure provisions and a stay in that
20 regard is going to affect your -- affect by itself
21 a waiver of your arbitration rights. They argue
22 waiver for different reasons, but the participation
23 in the provisions of the Right to Cure Statute is
24 not going to in and of itself deprive you of your
25 right to insist if you have a right to insist on

1 arbitration. Am I right about that?

2 MR. DAIGLE: Yes, ma'am. We are not
3 going to use the compliance with the Right to Cure
4 Statute as any waiver argument.

5 THE COURT: Right. I sure got to go
6 back and study the Right to Cure Statute, but if it
7 applies then that's just a hurdle to be jumped over
8 with a small period of time involved. From your
9 standpoint it may seem like a big delaying tactic
10 on the part of the Defendant. But my bet is that
11 no circuit judge, myself or anyone else, would
12 tolerate any lengthy period of trying to delay this
13 whole thing. The right to cure is pretty thinly
14 appropriate for something where you have got
15 construction long ago, a completely independent act
16 that brought all the problems out in the open, but
17 if the statute nevertheless requires that hurdle to
18 be jumped, I don't see that as having any
19 long-standing effect on your ability to litigate
20 these properly.

21 MR. EPTING: Judge, I don't think it
22 has a thin meaning. My objection is not to another
23 30 or 60 days of delay. Never has been. It was
24 just I was sure -- in this case, Judge, we sued in
25 April. Because of everybody, many of these

1 companies are out of business, we didn't get
2 service on everybody until the end of June. We
3 filed our motion, we took no other action in this
4 litigation. We filed our motion right after.

5 THE COURT: I understand they are
6 simple placeholders and although Mr. Lacour and I
7 think others will make some argument on behalf of
8 subs, your main battle is SeaQuest and you want to
9 get this thing postured in such a way that you can
10 have your day in court, some court, either an
11 arbitration panel or the circuit court, to discuss
12 whether they are to be held accountable for what
13 you allege are construction defects.

14 MR. EPTING: Judge, again, trying to
15 say the practical thing, I absolutely do not mind
16 sending out this notice and they can come over next
17 week if they want and look and everything. I would
18 ask that this Court take -- continue its
19 jurisdiction over the issues that are pending
20 before you. And if we get back here I still want
21 to try to convince you. I may have done that
22 voluntarily. I really do think, Judge, under the
23 supremacy clause if there is an arbitration
24 provision and the FAA applies, this Court's
25 jurisdiction really would be limited to there is an

1 arbitration provision, you go sort this out.
2 Because what I don't want to do, Judge, and where
3 my head is in all of this, is get back here and all
4 of a sudden we have gone from the statute to
5 spoliation issues and now we are in substantive
6 affirmative arguments that should be in front of a
7 panel.

8 THE COURT: I understand. Now, before
9 I come back for some remarks by Mr. Daigle I notice
10 there are some other attorneys present and I assume
11 that all of you are representing subcontractors, am
12 I right?

13 MR. WATKINS: Yes, ma'am. Tre Watkins
14 here on of behalf Jerry's Tiles and Marble. And
15 there are a number of other folks in the room.

16 THE COURT: How about we recite who
17 else is here and who they represent?

18 MS. NETTLES: I am Sam Nettles, I am
19 here for New South Construction Supply.

20 MR. JOHNSON: Matt Johnson. I am here
21 for third party Defendant Sealtight of South
22 Carolina.

23 UNKNOWN SPEAKER: I am here on behalf
24 of Benzenberg Custom Cabinets.

25 MS. DYER: Davi Dyer, I am here on

1 behalf of the termite control company.

2 THE COURT: All right.

3 MS. STEPHENS: Shanna Stephens, here on
4 behalf of Coastal Plumbing and Gas.

5 THE COURT: So you have got a number of
6 subcontractors here and basically the battle is
7 joined at this time on an issue Mr. Lacour has well
8 outlined. Your contention is that you are not
9 involved in any arbitration battle. And whatever
10 battle you have will be a battle fought at a later
11 time either by cross-claims against you by the
12 general contractor as well as claims in what I call
13 contort negligence claims against you by the
14 Plaintiff; is that right, Mr. Lacour?

15 MR. LACOUR: Yes, ma'am. I would think
16 Your Honor could stay those claims pending whatever
17 happens, however the other parts of this case go
18 forward.

19 THE COURT: That's what I would be
20 inclined to do.

21 MR. EPTING: That's the motion I filed,
22 Judge.

23 THE COURT: Ordinarily you wouldn't do
24 that because finances of subcontractors take all
25 kind of twists and turns if you don't move on with

1 adjudicating their liability. This construction is
2 so old relative that I don't know that stay is
3 going to make it more or less likely, but either of
4 the main parties can successfully pursue claims.
5 So I think for all of the subcontractors one thing
6 that ought to be done is to stay matters regarding
7 your liability until this first battle is
8 adjudicated which is A, what the forum is and B,
9 what kind of rights are had under the statute to
10 begin the proceedings with the right to cure.

11 So I can assure you that in the midst
12 of all this we will do something that suits all of
13 the subs in that way. Do I hear any objection to
14 proceeding in that way?

15 MR. LACOUR: No.

16 THE COURT: We will be sure that's
17 done. And, Mr. Lacour, thank you for articulating
18 the subs position and we will try to be sure that
19 that is taken care of in any order this court
20 passes.

21 MR. LACOUR: Thank you, Your Honor.

22 THE COURT: Mr. Daigle, certainly I
23 want you to have the chance to make any concluding
24 remarks you want to with respect to Mr. Epting.
25 But one thing that I hope you might cover is how

1 this thing can practically proceed. One of the
2 things motion judges are supposed to do is tee this
3 thing up that so whoever tries it can proceed in an
4 orderly way. You are insisting on right to cure
5 and I have obviously got to study that statute a
6 little bit to decide its applicability in this
7 situation. But Mr. Epting hasn't really advanced
8 many arguments about the right to cure. He simply
9 says arbitration trumps everything. And you have
10 taken the position that is -- the statute covers
11 everything including arbitration if it should be
12 available, but you have further taken the position
13 that arbitration is not available because they
14 aren't suing in a breach of contract and I find
15 that unusual in that so many arbitratable matters
16 involve not a suit on the contract itself, but a
17 claim against the party who contracted to resolve
18 all claims by means of arbitration. So as you sum
19 up, how about cover those issues that I have
20 outlined.

21 MR. DAIGLE: Yes, ma'am. One thing I
22 did want to address real quickly. Mr. Epting said
23 they were looking for a solution that won't break
24 the bank here. That's exactly what the purpose of
25 the Right to Cure Statue is. That is set forth in

1 our motion. That gives everyone an opportunity to
2 look at problems and make offers.

3 THE COURT: Well, ordinarily that would
4 give me great comfort. I am a little discomfited
5 and maybe this is simply a matter you had to do it
6 in the pleadings, but won't necessarily govern your
7 clients conduct. But you took a pretty strong
8 position in your papers that right to cure can
9 never even get off the ground because this is such
10 an old construction, that they have already made so
11 many repairs you could never get back to square one
12 to figure out what are construction defects. I
13 mean is that going to be what you say?

14 MR. DAIGLE: I made that out of an
15 abundance of caution. The reason I did is because
16 we have done zero discovery in this case. I don't
17 know what pictures, videos, anything that they have
18 retained concerning these defects.

19 THE COURT: This stay would be a stay
20 of discovery as well. You wouldn't be resolving
21 this matter by using discovery.

22 MR. DAIGLE: That's correct.

23 THE COURT: The decision is that the
24 Right to Cure Statute is where we are right now.
25 You won't be spinning your wheels with a whole

1 bunch of expensive discovery and that kind of
2 thing. You will be getting together and giving
3 after Plaintiff gives you the outline that the
4 statute anticipates, am I right?

5 MR. DAIGLE: You are absolutely right,
6 Your Honor. There will be no depositions, but what
7 we can ask for pursuant to that statute is
8 clarification. I was hoping Mr. Epting would
9 provide pictures, reports.

10 THE COURT: I'm sure to the extent he
11 has it, that's what he will do, but keep in mind
12 that what you don't have you can't give.

13 MR. DAIGLE: No question.

14 THE COURT: And what I don't want to
15 see is to have all my friends in the Charleston
16 bench and the clerk's office have this thing linger
17 around and say you have to go back and jump on this
18 again. It's all falling apart. So I would hope
19 there would be some spirit trying to see whether
20 this Right to Cure Statute is the vehicle and if it
21 is not, then is the vehicle arbitration, some
22 vehicle here, unless the whole suit can be
23 dismissed for some other reason that you all have
24 not propounded at this time.

25 MR. DAIGLE: I agree with that.

1 THE COURT: Okay. Now, with those as
2 preliminary remarks do you have anything else you
3 would like to say in summary?

4 MR. DAIGLE: Not in summary, Your
5 Honor. I believe you asked me how practically this
6 case would proceed. Again, my hope is that we
7 could agree through the right to cure process 60,
8 90 days, whatever it is, and get an understanding
9 what these issues are and my client may be in a
10 position to want to with wrap this thing up if both
11 sides are reasonable. I don't know the answer to
12 that question yet. That's the point of the right
13 the cure, to go through the process. Like you
14 said, there is not going to be any discovery. It's
15 going to be relatively quick.

16 THE COURT: Very good.

17 MR. DAIGLE: After that my
18 understanding is that that complies with -- the
19 right to cure stays everything else. I have no
20 problem with Mr. Epting's proposal this Court
21 retain jurisdiction over the other outstanding
22 motions in this case pending the stay. After the
23 stay then we would be in -- this Court would still
24 have jurisdiction over those pending motions.
25 Moving forward, though, we believe the vehicle for

1 this case is through the circuit court, not through
2 arbitration. We made some arguments that I can
3 walk you through if you would like to about why we
4 don't think arbitration in this case is applicable.
5 Specifically they haven't even demanded it yet.
6 And there's some time restrictions in the contract
7 that specifically talk about when arbitration can
8 be demanded and all those time limits have expired.
9 They can no longer demand arbitration pursuant to
10 the contract because the contract itself says it's
11 too late. So that would be another argument.

12 And so like with any other construction
13 case I think that this case should go through the
14 circuit system and the majority of these get
15 settled in mediation anyway.

16 THE COURT: Counsel, here is what I
17 will do. I will look at this and either I or my
18 law clerk will be in touch with all of you that I
19 have got contact information for to let you know
20 first of all, what the determination is about the
21 right to sue -- I mean the right the cure. That
22 really is where you start. And then whether I can
23 now also make a determination about the right to
24 insist on arbitration by Plaintiff. And I will
25 look at those two things and then the rest of these

1 motions.

2 If I -- one of the options available if
3 the right to cure is determined to be applicable is
4 to simply hold jurisdiction and recess on the rest
5 of these motions until some type of cure has been
6 reached and I might well set a time for that in the
7 order. Which would be subject of course to
8 revision and expansion if the parties are making
9 progress, et cetera.

10 So I'm going to look at all that. I
11 will let you know quickly. Here is what I would
12 like counsel who have attended to do. Would you be
13 so kind as to circulate amongst you a note pad that
14 gives your name, your e-mail and the party you
15 represent so that I can be sure that all of you
16 receive notification. Some of these parties that
17 are named have never been served and so forth.

18 MR. DAIGLE: I have an easier way to do
19 that, Your Honor. I have an got e-mail
20 distribution list in my office.

21 THE COURT: If you would send that to
22 JToal@sccourts.org with a copy to
23 Awearing@sccourts.org. And to CC Leonard, our
24 deputy clerk who takes care of the motion roster.

25 MR. DAIGLE: Your clerk is

1 A-W-A-R-I-N-G.

2 THE COURT: Waring like you
3 Charlestonians say. Very well. I think that
4 concludes what I can do today. Thank you very
5 much.

6 MR. EPTING: Judge, would you give me
7 -- I have not seen this waiver brief. Would you
8 give me a few days to respond to the brief?

9 THE COURT: SeaQuest?

10 MR. EPTING: The SeaQuest brief.

11 THE COURT: Let's say this. I will
12 give both sides until next -- subs, you don't need
13 to worry about it since we got a battle going on
14 between the principals right now. But each side
15 will have until next Wednesday to submit any
16 further written material you would like to submit
17 about the matter. I am not going to go through a
18 whole bunch of received, reply and so forth, but
19 just each side submit anything you think is
20 pertinent further than what has been submitted.

21 MR. DAIGLE: Yes, Your Honor.

22 THE COURT: Then I will delay telling
23 you what I am going to do until I receive that. I
24 will let you know before next week is out what the
25 Court's decision is going to be. Very good.

(These proceedings were concluded at
11:31 a.m., October 13, 2016, Charleston County,
South Carolina.)

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CERTIFICATE OF REPORTER

I, Ruth C. Weese, Registered Diplomate
Reporter for the State of South Carolina at Large,
do hereby certify that the foregoing transcript is
a true, accurate, and complete record.

I further certify that I am neither related
to nor counsel for any party to the cause pending
or interested in the events thereof.

Witness my hand, I have hereunto affixed my
official seal this 13th day of January, 2017 at
Charleston, Charleston County, South Carolina.

Ruth C. Weese

Ruth C. Weese
Registered Diplomate
Reporter

Jaan Rannik

From: Waring, Amelia <awaring@sccourts.org>
Sent: Wednesday, January 4, 2017 15:57
To: Daigle, Jason; Angela Gross; Toal, Jean; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'
Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Counsel,

Thank you for your patience on this. Here is Justice Toal's ruling:

- (1) Plaintiffs' Motions to Stay and Compel Arbitration are denied. Plaintiffs have waived their right to demand arbitration per the arbitration agreement for the reasons stated in section I of Defendant Seaquest's Memorandum in Opposition to the Motion to Stay and Compel Arbitration (waiver) and for the reasons contained in section III of Seaquest's memorandum in Opposition (contractually barred). However, Justice Toal does not base her ruling on the Seaquest's argument that section 15-48-10(a) is inapplicable to the claims here (see Seaquest's Memorandum in Opposition section II).
- (2) Defendant Seaquest's Motion to Dismiss is granted because Plaintiffs have failed to comply with the S.C. Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. 40-59-810, et seq.
- (3) The remaining motions for protective order and dealing with the co-defendants are moot because the action is being dismissed.

Counsel for Defendant Seaquest should draft a proposed order and e-mail it to me awaring@sccourts.org by the end of next week.

Thanks,

Amelia

Amelia Waring Walker
Law Clerk to the Honorable Jean H. Toal
South Carolina Supreme Court
(803)734-1584
awaring@sccourts.org

From: Daigle, Jason [mailto:jdaigle@ycrlaw.com]
Sent: Wednesday, January 04, 2017 11:45 AM
To: Angela Gross; Toal, Jean; Waring, Amelia; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'
Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodelaw.com; mjustman@kernodelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdragan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

It has come to my attention that this case has an ADR deadline of February 5, 2017. Caroline Leonard suggested that I contact you directly so the parties don't run afoul of the ADR deadline. We are still awaiting your ruling on the motions that were heard on October 13 after you stayed the case as to all parties except for Plaintiffs and Seaquest. Is there anything else you need from our Plaintiffs' counsel on these motions?

Thank you,
Jason

Jason A. Daigle, Esq.
Young Clement Rivers, LLP
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jdaigle@ycrlaw.com



From: Daigle, Jason
Sent: Wednesday, October 19, 2016 5:08 PM
To: 'Angela Gross'; jtoal@sccourts.org; awaring@sccourts.org; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'
Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodelaw.com; mjustman@kernodelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdragan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your instruction, attached please find Defendant Seaquest Development's Supplemental Memorandum in Opposition to Plaintiffs' Motion to Stay and to Compel Arbitration which was filed with the clerk today.

Jason

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From: Angela Gross [<mailto:agg@epting-law.com>]
Sent: Wednesday, October 19, 2016 4:35 PM
To: Daigle, Jason; jtoal@sccourts.org; awaring@sccourts.org; 'Caroline Crisler. Leonard (cclleonard@charlestoncounty.org)'
Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PREconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your instruction, attached please find Plaintiffs' Reply in Support of Their Motion to Stay and Compel Arbitration in the above-referenced matter.

Angela

Angela Gross
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And Michelle N. Endemann, Esquire
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From: Daigle, Jason [<mailto:jdaigle@ycrlaw.com>]
Sent: Thursday, October 13, 2016 2:15 PM
To: jtoal@sccourts.org; awaring@sccourts.org; 'Caroline Crisler. Leonard (cclleonard@charlestoncounty.org)'
<cclleonard@charlestoncounty.org>

Cc: Andrew K. Epting <ake@epting-law.com>; Michelle Endemann <mne@epting-law.com>; Angela Gross <agg@epting-law.com>; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PREconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arlawsc.com; tdrazan@arlawsc.com; jphillips@arlawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your request, I have copied on this email the distribution list for the above-referenced case. Please let me know if you need any additional information.

Thank you,
Jason

Jason A. Daigle, Esq.
Young Clement Rivers, LLP
Phone: (843) 724-6609
Fax: (843) 579-1324
jdaigle@ycrlaw.com



Young Clement Rivers, LLP
<http://www.ycrlaw.com>
Charleston: (843) 577-4000

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## **Jaan Rannik**

---

**From:** Daigle, Jason <jdaigle@yclaw.com>  
**Sent:** Friday, January 13, 2017 18:27  
**To:** Waring, Amelia; Angela Gross; Toal, Jean; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'  
**Cc:** Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdp.com; XIngram@tgdp.com; sstephens@arlawsc.com; tdrazan@arlawsc.com; lphillips@arlawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandl@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com  
**Subject:** RE: McIntire v. Sequest, et al. - 2016-CP-10-1833  
**Attachments:** 3528195.doc

Amelia,

I have attached the proposed order in Word form. Please let me know if you need anything else from me.

Thank you,  
Jason

---

**From:** Waring, Amelia [mailto:awaring@sccourts.org]  
**Sent:** Wednesday, January 04, 2017 3:57 PM  
**To:** Daigle, Jason; Angela Gross; Toal, Jean; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'  
**Cc:** Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdp.com; XIngram@tgdp.com; sstephens@arlawsc.com; tdrazan@arlawsc.com; lphillips@arlawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandl@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com  
**Subject:** RE: McIntire v. Sequest, et al. - 2016-CP-10-1833

Counsel,

Thank you for your patience on this. Here is Justice Toal's ruling:

- (1) Plaintiffs' Motions to Stay and Compel Arbitration are denied. Plaintiffs have waived their right to demand arbitration per the arbitration agreement for the reasons stated in section I of Defendant Sequest's Memorandum in Opposition to the Motion to Stay and Compel Arbitration (waiver) and for the reasons contained in section III of Sequest's memorandum in Opposition (contractually barred). However, Justice

Toal does not base her ruling on the Seaquest's argument that section 15-48-10(a) is inapplicable to the claims here (see Seaquest's Memorandum in Opposition section II).

- (2) Defendant Seaquest's Motion to Dismiss is granted because Plaintiffs have failed to comply with the S.C. Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. 40-59-810, et seq.
- (3) The remaining motions for protective order and dealing with the co-defendants are moot because the action is being dismissed.

Counsel for Defendant Seaquest should draft a proposed order and e-mail it to me [awaring@sccourts.org](mailto:awaring@sccourts.org) by the end of next week.

Thanks,

Amelia

Amelia Waring Walker  
Law Clerk to the Honorable Jean H. Toal  
South Carolina Supreme Court  
(803)734-1584  
[awaring@sccourts.org](mailto:awaring@sccourts.org)

---

**From:** Daigle, Jason [<mailto:jdaigle@ycrlaw.com>]  
**Sent:** Wednesday, January 04, 2017 11:45 AM  
**To:** Angela Gross; Toal, Jean; Waring, Amelia; 'Caroline Crisler. Leonard ([ccleonard@charlestoncounty.org](mailto:cleonard@charlestoncounty.org))'  
**Cc:** Andrew K. Epting; Michelle Endemann; [jelliott@richardsonplowden.com](mailto:jelliott@richardsonplowden.com); [snettles@richardsonplowden.com](mailto:snettles@richardsonplowden.com); [cmajure@murphygrantland.com](mailto:cmajure@murphygrantland.com); [Trey.Watkins@WallTempleton.com](mailto:Trey.Watkins@WallTempleton.com); [ddyer@kernodlelaw.com](mailto:ddyer@kernodlelaw.com); [mjustman@kernodlelaw.com](mailto:mjustman@kernodlelaw.com); [Danielle.payne@mgclaw.com](mailto:Danielle.payne@mgclaw.com); [PREconnu@murphygrantland.com](mailto:PREconnu@murphygrantland.com); [JGoodman@murphygrantland.com](mailto:JGoodman@murphygrantland.com); [ErinDean@tgdpa.com](mailto:ErinDean@tgdpa.com); [XIngram@tgdpa.com](mailto:XIngram@tgdpa.com); [sstephens@arslawsc.com](mailto:sstephens@arslawsc.com); [tdrazan@arslawsc.com](mailto:tdrazan@arslawsc.com); [lphillips@arslawsc.com](mailto:lphillips@arslawsc.com); [smontague@gwblawfirm.com](mailto:smontague@gwblawfirm.com); [ljones@gwblawfirm.com](mailto:ljones@gwblawfirm.com); [alacour@clawsonandstaubes.com](mailto:alacour@clawsonandstaubes.com); [mandi@chandlerdudgeon.com](mailto:mandi@chandlerdudgeon.com); [matt@chandlerdudgeon.com](mailto:matt@chandlerdudgeon.com); [hsharkey@clawsonandstaubes.com](mailto:hsharkey@clawsonandstaubes.com); [shatch@clawsonandstaubes.com](mailto:shatch@clawsonandstaubes.com); [bawilson@murphygrantland.com](mailto:bawilson@murphygrantland.com); [sandra.schultz@walltempleton.com](mailto:sandra.schultz@walltempleton.com); [pbd@aikenbridges.com](mailto:pbd@aikenbridges.com); [ice@aikenbridges.com](mailto:ice@aikenbridges.com); [mbarfield@barnwell-whaley.com](mailto:mbarfield@barnwell-whaley.com); [sclarke@barnwell-whaley.com](mailto:sclarke@barnwell-whaley.com); [jsegell@barnwell-whaley.com](mailto:jsegell@barnwell-whaley.com); [shatch@barnwell-whaley.com](mailto:shatch@barnwell-whaley.com); [murch@gwblawfirm.com](mailto:murch@gwblawfirm.com)  
**Subject:** RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

It has come to my attention that this case has an ADR deadline of February 5, 2017. Caroline Leonard suggested that I contact you directly so the parties don't run afoul of the ADR deadline. We are still awaiting your ruling on the motions that were heard on October 13 after you stayed the case as to all parties except for Plaintiffs and Seaquest. Is there anything else you need from or Plaintiffs' counsel on these motions?

Thank you,  
Jason

Jason A. Daigle, Esq.  
Young Clement Rivers, LLP  
Phone: (843) 724-6609  
Fax: (843) 579-1324

[jdaigle@ycrlaw.com](mailto:jdaigle@ycrlaw.com)



**From:** Daigle, Jason

**Sent:** Wednesday, October 19, 2016 5:08 PM

**To:** 'Angela Gross'; [jtoal@sccourts.org](mailto:jtoal@sccourts.org); [awaring@sccourts.org](mailto:awaring@sccourts.org); 'Caroline Crisler. Leonard ([ccleonard@charlestoncounty.org](mailto:ccleonard@charlestoncounty.org))'

**Cc:** Andrew K. Epting; Michelle Endemann; [jelliott@richardsonplowden.com](mailto:jelliott@richardsonplowden.com); [snettles@richardsonplowden.com](mailto:snettles@richardsonplowden.com); [cmajure@murphygrantland.com](mailto:cmajure@murphygrantland.com); [Trey.Watkins@WallTempleton.com](mailto:Trey.Watkins@WallTempleton.com); [ddyer@kernodlelaw.com](mailto:ddyer@kernodlelaw.com); [mjustman@kernodlelaw.com](mailto:mjustman@kernodlelaw.com); [Danielle.payne@mqclaw.com](mailto:Danielle.payne@mqclaw.com); [PReconnu@murphygrantland.com](mailto:PReconnu@murphygrantland.com); [JGoodman@murphygrantland.com](mailto:JGoodman@murphygrantland.com); [ErinDean@tgdpa.com](mailto:ErinDean@tgdpa.com); [XIngram@tgdpa.com](mailto:XIngram@tgdpa.com); [sstephens@arlawsc.com](mailto:sstephens@arlawsc.com); [tdrazan@arlawsc.com](mailto:tdrazan@arlawsc.com); [lphillips@arlawsc.com](mailto:lphillips@arlawsc.com); [smontague@gwblawfirm.com](mailto:smontague@gwblawfirm.com); [ljones@gwblawfirm.com](mailto:ljones@gwblawfirm.com); [alacour@clawsonandstaubes.com](mailto:alacour@clawsonandstaubes.com); [mandi@chandlerdudgeon.com](mailto:mandi@chandlerdudgeon.com); [matt@chandlerdudgeon.com](mailto:matt@chandlerdudgeon.com); [hsharkey@clawsonandstaubes.com](mailto:hsharkey@clawsonandstaubes.com); [shatch@clawsonandstaubes.com](mailto:shatch@clawsonandstaubes.com); [bawilson@murphygrantland.com](mailto:bawilson@murphygrantland.com); [sandra.schultz@walltempleton.com](mailto:sandra.schultz@walltempleton.com); [pbd@aikenbridges.com](mailto:pbd@aikenbridges.com); [ice@aikenbridges.com](mailto:ice@aikenbridges.com); [mbarfield@barnwell-whaley.com](mailto:mbarfield@barnwell-whaley.com); [sclarke@barnwell-whaley.com](mailto:sclarke@barnwell-whaley.com); [jsegell@barnwell-whaley.com](mailto:jsegell@barnwell-whaley.com); [shatch@barnwell-whaley.com](mailto:shatch@barnwell-whaley.com); [murch@gwblawfirm.com](mailto:murch@gwblawfirm.com)  
**Subject:** RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your instruction, attached please find Defendant Seaquest Development's Supplemental Memorandum in Opposition to Plaintiffs' Motion to Stay and to Compel Arbitration which was filed with the clerk today.

Jason

Jason A. Daigle, Esq.  
Young Clement Rivers, LLP  
Phone: (843) 724-6609  
Fax: (843) 579-1324  
[jdaigle@ycrlaw.com](mailto:jdaigle@ycrlaw.com)



**From:** Angela Gross [<mailto:agg@epting-law.com>]

**Sent:** Wednesday, October 19, 2016 4:35 PM

**To:** Daigle, Jason; [jtoal@sccourts.org](mailto:jtoal@sccourts.org); [awaring@sccourts.org](mailto:awaring@sccourts.org); 'Caroline Crisler. Leonard ([ccleonard@charlestoncounty.org](mailto:ccleonard@charlestoncounty.org))'

**Cc:** Andrew K. Epting; Michelle Endemann; [jelliott@richardsonplowden.com](mailto:jelliott@richardsonplowden.com); [snettles@richardsonplowden.com](mailto:snettles@richardsonplowden.com); [cmajure@murphygrantland.com](mailto:cmajure@murphygrantland.com); [Trey.Watkins@WallTempleton.com](mailto:Trey.Watkins@WallTempleton.com); [ddyer@kernodlelaw.com](mailto:ddyer@kernodlelaw.com); [mjustman@kernodlelaw.com](mailto:mjustman@kernodlelaw.com); [Danielle.payne@mqclaw.com](mailto:Danielle.payne@mqclaw.com); [PReconnu@murphygrantland.com](mailto:PReconnu@murphygrantland.com); [JGoodman@murphygrantland.com](mailto:JGoodman@murphygrantland.com); [ErinDean@tgdpa.com](mailto:ErinDean@tgdpa.com); [XIngram@tgdpa.com](mailto:XIngram@tgdpa.com); [sstephens@arlawsc.com](mailto:sstephens@arlawsc.com); [tdrazan@arlawsc.com](mailto:tdrazan@arlawsc.com); [lphillips@arlawsc.com](mailto:lphillips@arlawsc.com); [smontague@gwblawfirm.com](mailto:smontague@gwblawfirm.com); [ljones@gwblawfirm.com](mailto:ljones@gwblawfirm.com); [alacour@clawsonandstaubes.com](mailto:alacour@clawsonandstaubes.com); [mandi@chandlerdudgeon.com](mailto:mandi@chandlerdudgeon.com); [matt@chandlerdudgeon.com](mailto:matt@chandlerdudgeon.com); [hsharkey@clawsonandstaubes.com](mailto:hsharkey@clawsonandstaubes.com); [shatch@clawsonandstaubes.com](mailto:shatch@clawsonandstaubes.com); [bawilson@murphygrantland.com](mailto:bawilson@murphygrantland.com); [sandra.schultz@walltempleton.com](mailto:sandra.schultz@walltempleton.com); [pbd@aikenbridges.com](mailto:pbd@aikenbridges.com); [ice@aikenbridges.com](mailto:ice@aikenbridges.com); [mbarfield@barnwell-whaley.com](mailto:mbarfield@barnwell-whaley.com);

[sclarke@barnwell-whaley.com](mailto:sclarke@barnwell-whaley.com); [jsegell@barnwell-whaley.com](mailto:jsegell@barnwell-whaley.com); [shatch@barnwell-whaley.com](mailto:shatch@barnwell-whaley.com); [murch@gwblawfirm.com](mailto:murch@gwblawfirm.com)  
**Subject:** McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your instruction, attached please find Plaintiffs' Reply in Support of Their Motion to Stay and Compel Arbitration in the above-referenced matter.

*Angela*

Angela Gross  
Legal Assistant to Andrew K. Epting, Jr., Esquire  
And Michelle N. Endemann, Esquire  
Andrew K. Epting, Jr., LLC  
46A State Street  
Charleston, SC 29401  
Telephone: (843) 377-1871  
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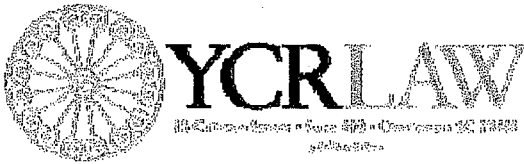
**From:** Daigle, Jason [<mailto:jdaigle@ycrlaw.com>]  
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**To:** [jtoal@sccourts.org](mailto:jtoal@sccourts.org); [awaring@sccourts.org](mailto:awaring@sccourts.org); 'Caroline Crisler. Leonard ([ccleonard@charlestoncounty.org](mailto:ccleonard@charlestoncounty.org))'  
<[ccleonard@charlestoncounty.org](mailto:ccleonard@charlestoncounty.org)>  
**Cc:** Andrew K. Epting <[ake@epting-law.com](mailto:ake@epting-law.com)>; Michelle Endemann <[mne@epting-law.com](mailto:mne@epting-law.com)>; Angela Gross <[agg@epting-law.com](mailto:agg@epting-law.com)>; [jelliott@richardsonplowden.com](mailto:jelliott@richardsonplowden.com); [snettles@richardsonplowden.com](mailto:snettles@richardsonplowden.com); [cmajure@murphygrantland.com](mailto:cmajure@murphygrantland.com); [Trey.Watkins@WallTempleton.com](mailto:Trey.Watkins@WallTempleton.com); [ddyer@kernodlelaw.com](mailto:ddyer@kernodlelaw.com); [mjustman@kernodlelaw.com](mailto:mjustman@kernodlelaw.com); [Danielle.payne@mgclaw.com](mailto:Danielle.payne@mgclaw.com); [PReconnu@murphygrantland.com](mailto:PReconnu@murphygrantland.com); [JGoodman@murphygrantland.com](mailto:JGoodman@murphygrantland.com); [ErinDean@tgdpa.com](mailto:ErinDean@tgdpa.com); [XIngram@tgdpa.com](mailto:XIngram@tgdpa.com); [sstephens@arslawsc.com](mailto:sstephens@arslawsc.com); [tdrazan@arslawsc.com](mailto:tdrazan@arslawsc.com); [lphillips@arslawsc.com](mailto:lphillips@arslawsc.com); [smontague@gwblawfirm.com](mailto:smontague@gwblawfirm.com); [liones@gwblawfirm.com](mailto:liones@gwblawfirm.com); [alacour@clawsonandstaubes.com](mailto:alacour@clawsonandstaubes.com); [mandi@chandlerdudgeon.com](mailto:mandi@chandlerdudgeon.com); [matt@chandlerdudgeon.com](mailto:matt@chandlerdudgeon.com); [hsharkey@clawsonandstaubes.com](mailto:hsharkey@clawsonandstaubes.com); [shatch@clawsonandstaubes.com](mailto:shatch@clawsonandstaubes.com); [bawilson@murphygrantland.com](mailto:bawilson@murphygrantland.com); [sandra.schultz@walltempleton.com](mailto:sandra.schultz@walltempleton.com); [pbd@aikenbridges.com](mailto:pbd@aikenbridges.com); [ice@aikenbridges.com](mailto:ice@aikenbridges.com); [mbarfield@barnwell-whaley.com](mailto:mbarfield@barnwell-whaley.com); [sclarke@barnwell-whaley.com](mailto:sclarke@barnwell-whaley.com); [jsegell@barnwell-whaley.com](mailto:jsegell@barnwell-whaley.com); [shatch@barnwell-whaley.com](mailto:shatch@barnwell-whaley.com); [murch@gwblawfirm.com](mailto:murch@gwblawfirm.com)  
**Subject:** McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your request, I have copied on this email the distribution list for the above-referenced case.  
Please let me know if you need any additional information.

Thank you,  
Jason

Jason A. Daigle, Esq.  
Young Clement Rivers, LLP  
Phone: (843) 724-6609  
Fax: (843) 579-1324  
[jdaigle@ycrlaw.com](mailto:jdaigle@ycrlaw.com)



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<http://www.ycrlaw.com>
Charleston: (843) 577-4000

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-10-1833

ANDREW and KIMBERLY McINTIRE,)

Plaintiffs,)

v.)

SEAQUEST DEVELOPMENT COMPANY,)
INC.; RED BAY CONSTRUCTORS CORP.;)
BENZENBERG CUSTOM CABINETS, INC.;)
JONATHAN MARSHALL)
CONSTRUCTION; COASTAL WINDOW &)
DOOR CENTER OF CHARLESTON, LLC;)
CAROLINA WINDOW & MILLWORK, LLC)
n/k/a CAROLINA WINDOW & MILLWORK)
– OMNI GLASS INDUSTRIES, LLC;)
SOUTHCOST EXTERIORS, INC.;)
MICHAEL CASTEEN d/b/a CASTEEN)
CUSTOM CABINETS; QUALITY CEDAR)
PRODUCTS, INC. OF MICHIGAN d/b/a)
MICHIGAN PRESTAIN CO.; COASTAL)
PLUMBING & GAS, LLC; FOAM)
INSULATION CO. INC.; JERRY COMER)
d/b/a JERRY'S TILE & MARBLE, LLC;)
LOWCOUNTRY FIREPLACES, INC.;)
CAROLINA PEST SOLUTIONS, INC.; NEW)
SOUTH CONSTRUCTION SUPPLY, LLC,)

Defendants.)

ORDER OF DISMISSAL

SEAQUEST DEVELOPMENT COMPANY,)
INC.,)

Third-Party Plaintiff,)

v.)

ARCHITECTURAL PRODUCTS OF)
CHARLESTON, LLC; SEALTIGHT OF)
SOUTH CAROLINA, LLC,)

Third-Party Defendants.)

This residential construction-defect case is before the Court on the following four motions, all of them heard October 13, 2016:

- (1) Seaquest's¹ **Motion to Dismiss or Stay Proceedings** filed June 17, 2016 ("Seaquest's Motion to Dismiss");
- (2) Red Bay's² **Motion to Dismiss or for Stay of Proceedings** filed June 23, 2016 ("Red Bay's Motion to Dismiss");
- (3) The McIntires'³ **Motion to Stay and to Compel Arbitration** filed July 27, 2016 (the "Motion to Compel Arbitration"); and
- (4) The McIntires' **Motion for Protective Order as to Requests for Admissions of Seaquest Development Company** filed August 15, 2016 (the "Motion for Protective Order").

For the reasons below, Seaquest's Motion to Dismiss, which calls for a complete dismissal of the case, is GRANTED; the Motion to Compel Arbitration is DENIED; and the remaining motions (Red Bay's Motion to Dismiss and the McIntires' Motion for Protective Order) are MOOT as this case is DISMISSED in its entirety.

BACKGROUND

In August of 2007, the McIntires entered into a written contract with general contractor Seaquest for the construction of a home in Mount Pleasant. The work was performed by various subcontractors (the majority of whom are defendants or third-party defendants), and a certificate of occupancy was issued on September 25, 2008.

On April 8, 2016, the McIntires filed this lawsuit alleging defects in the home's construction and asserting the following causes of action against Seaquest: Negligence/Gross Negligence, Breach of Warranty of Habitability, Negligent Misrepresentation and Constructive

¹ "Seaquest" refers to Defendant Seaquest Development Company, Inc.

² "Red Bay" refers to Defendant Red Bay Constructors Corp.

³ The "McIntires" refers to Plaintiffs Andrew and Kimberly McIntire.

Fraud, and Breach of Warranty of Good and Workmanlike Work. Though their contract with Seaquest contains an arbitration clause, the McIntires have not asserted a cause of action for breach of contract.

Prior to filing this suit, the McIntires had discovered a number of alleged construction defects in the home and, without notifying Seaquest, had hired experts and begun repairs. The repairs had been substantially completed before suit was filed, or were so soon thereafter.

DISCUSSION

I. Seaquest's Motion to Dismiss

Seaquest contends this case should be dismissed because the McIntires filed this action before first complying with the requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §§ 40-59-810 to -860 (the "Right to Cure Act"), and under the circumstances, it is not possible for the McIntires to comply with the requirements of the Right to Cure Act, nor is it possible for Seaquest to be afforded its rights thereunder. The Court agrees.

The Right to Cure Act grants contractors like Seaquest (as well as subcontractors) the right to notice of, and an opportunity to inspect and cure, alleged "construction defect[s]"⁴ in a

⁴ As used in the Right to Cure Act,

"Construction defect" means a deficiency in or a deficiency arising out of the design, specifications, surveying, planning, supervision, or observation of construction or construction of residential improvements that results from any of the following:

- (a) defective material, products, or components used in the construction of residential improvements;
- (b) violation of the applicable codes in effect at the time of construction of residential improvements;
- (c) failure of the design of residential improvements to meet the applicable professional standards of care at the time of

“dwelling.”⁵ It requires a “claimant”⁶ to “serve”⁷, no less than ninety days before filing an “action”⁸ against a contractor or subcontractor arising out of the construction of a dwelling, “a written notice of claim on the contractor” containing certain required information about the

governmental approval of the design of residential improvements; or

(d) failure to construct residential improvements in accordance with accepted trade standards for good and workmanlike construction at the time of construction. Compliance with the applicable codes in effect at the time of construction conclusively establishes construction in accordance with accepted trade standards for good and workmanlike construction, with respect to all matters specified in those codes.

§ 40-59-820(3).

⁵ As used in the Right to Cure Act,

“Dwelling” means a single-family house or duplex or a multifamily unit not to exceed sixteen units and not to exceed three stories in height, and which is intended for residential use. A dwelling includes the systems and other components and improvements that are part of a single or multifamily unit at the time of construction.

§ 40-59-820(4).

⁶ As used in the Right to Cure Act,

“Claimant” means a homeowner, including a subsequent purchaser, who asserts a claim against a contractor, subcontractor, supplier, or design professional concerning a defect in the design, construction, condition, or sale of a dwelling or in the remodel of a dwelling.

§ 40-59-820(2).

⁷ As used in the Act, “‘Serve or ‘service’ means personal service or delivery by certified mail to the last known address of the addressee.” § 40-59-820(5).

⁸ As used in the Right to Cure Act,

“Action” means *any* civil lawsuit or action or *arbitration proceeding* for damages or indemnity asserting a claim for injury or loss to a dwelling or personal property caused by an alleged defect arising out of or related to the design, construction, condition, or sale of the dwelling or a remodel of a dwelling.

§ 40-59-820(1) (emphasis added).

claim. § 40-59-840(A); see also § 40-59-840(B) (providing, “The contractor or subcontractor shall advise the claimant within fifteen days of receipt of the claim if the construction defect is not sufficiently stated and shall request clarification.”). It also establishes a mandatory pre-suit inspection/opportunity-to-cure procedure and the related rights/obligations of the respective parties. See § 40-59-850; see also § 40-59-850(C) (“If the parties cannot settle the dispute pursuant to [the Right to Cure Act], the claimant *may* proceed with a civil action or other remedy provided by contract or by law.”) (emphasis added); § 40-59-830 (“If the claimant files an action in court before first complying with the requirements of this article, on motion of a party to the action, the court *shall* stay the action *until the claimant has complied* with the requirements of this article.”) (emphasis added).

Our Supreme Court was called upon to construe the Right to Cure Act in Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010). In so doing, the Court endorsed the view that § 40-59-840 “encompasses civil lawsuits filed against a contractor or subcontractor,” “imposes an absolute condition precedent to the filing of lawsuits that qualify under the Right to Cure Act[,]” and “*requires* the claimant to serve written notice no later than ninety days before filing the action.” Id. at 570, 703 S.E.2d 200-01 (emphasis in original). Further, regarding the legislative intent underlying the Right to Cure Act, the Court stated as follows:

The Right to Cure Act has an express public policy intent of: (1) addressing the need for an alternative dispute resolution method to promote settlement of construction disputes without litigation, while adequately protecting the rights of homeowners; and (2) requiring a would-be plaintiff in certain construction defect matters to file a notice of claim with the would-be defendant and provide an opportunity to resolve the claim without litigation. The stated public policy, therefore, is not abridged when a court, on motion, is required to stay a proceeding in order to *require compliance* with the Right to Cure Act’s notice provisions.

Id. at 572-73, 703 S.E.2d at 202 (emphasis in original) (internal citation omitted).

Without question, the Right to Cure Act applies here; the McIntires filed this action before first complying with its requirements; and under the circumstances, it is not possible for the McIntires to comply with its requirements, nor indeed is it possible for Seaquest to be afforded its rights thereunder. Wherefore, consistent with the Court's directive to ascertain and effectuate the intention of the legislature,⁹ based on the statutory language and in view of Grazia, I find that this case should be dismissed.

While, as referenced above, the Right to Cure Act expressly calls for a "stay" when a claimant files an action before compliance, it also expressly calls for the stay to remain in effect "until the claimant has complied" § 40-59-830 (emphasis added). Moreover, as also referenced above, the language of the Right to Cure Act makes plain the legislature's intent that no "civil action or other remedy provided by contract or by law" proceed until there has been compliance. See § 40-59-850(C) ("If the parties cannot settle the dispute pursuant to [the Right to Cure Act], the claimant *may* proceed with a civil action or other remedy provided by contract or by law.") (emphasis added). Here, the McIntires have made compliance with the Right to Cure Act impossible. They have substantially repaired and remodeled their home, in the process

⁹ "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007); see also id. ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."); id. at 499, 640 S.E.2d at 459 (In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation."); S.C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) ("[T]he statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect."); Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citation omitted) ("If the statute is ambiguous . . . courts must construe the terms of the statute."); id. (statutory language must be construed in light of the intended purpose of the statute); id. (a statute should not be construed in a way which leads to an absurd result or renders it meaningless).

destroying the alleged defects without giving Seaquest any notice of those alleged defects and without giving Seaquest an opportunity to inspect/cure them. Because the McIntires have not complied with the Right to Cure Act, the act plainly requires a stay; because they foreclosed even the possibility of compliance with the Right to Cure Act, the stay must be permanent; as a practical matter, a permanent stay is a dismissal, which this Court now orders.

II. The Motion to Compel Arbitration

The McIntires contend the case should be stayed and the dispute compelled to arbitration. The Court disagrees, concluding that the McIntires are barred from arbitrating this dispute due to waiver as well as by the terms of their contract.

Whether a claim is subject to arbitration is a matter for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001). Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Like other contracts, arbitration clauses are to be enforced in accordance with their terms. Zabinski, 346 S.C. at 592.

The McIntires have waived any right they may have had to demand arbitration. Although South Carolina favors arbitration, the right to enforce an arbitration clause may be waived. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). "[T]o establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." Gen. Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). No set rule exists "as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)

(quoting Hyload, Inc. v. Pre-Engineered Prods., Inc., 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992)). Our courts consider the following three factors when determining whether a party has waived its right to compel arbitration:

(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

Rhodes, 374 S.C. at 126, 647 S.E.2d at 251.

“To establish prejudice, the non-moving party must show something more than ‘mere inconvenience.’” Id. at 127, 647 S.E.2d at 251 (quoting Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003)). “Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts.” Id., 647 S.E.2d at 251-52 (internal citation omitted). The particular and peculiar facts of this case lead the Court to the inescapable conclusion that the McIntires waived any right to arbitrate.

Prior to filing the Motion to Compel Arbitration, the McIntires engaged in extensive discovery in that they retained forensic and construction liability and repair experts to investigate, document, and repair the alleged defects at their home. They undertook these actions related to litigation without demanding arbitration and, as noted above, without complying with the Right to Cure Act. The repairs to the home were substantially completed prior to the filing of the Motion to Compel Arbitration. The resulting material prejudice to Sequest is clear and irreparable.

A substantial amount of time transpired between the time the McIntires engaged their experts and the time they moved to compel arbitration. By the time of the Motion to Compel Arbitration, the repairs to the alleged defects were substantially completed, the alleged defective conditions eliminated, precluding Seaquest from investigating, inspecting, and/or challenging the McIntires' claims. In a residential construction case, the most important evidence may in fact be the home itself. Here, the home Seaquest constructed, in its allegedly defective condition, no longer exists, with Seaquest left to rely on the McIntires' inspections and investigations and the evidence they chose to preserve.

Had the McIntires demanded arbitration when they first discovered the alleged defects, or when they first engaged liability or construction experts to perform their investigation, or at any time prior to repairing them, Seaquest would have had the opportunity to inspect, investigate, and/or test the alleged defects. Their delay in demanding arbitration does not constitute a mere inconvenience; rather, it amounts to a denial of Seaquest's right to fairly defend itself.

Additionally, the McIntires are contractually barred from demanding arbitration. The McIntires are attempting to invoke provisions in their contract¹⁰ with Seaquest to compel arbitration. Specifically, they claim that Section 4.6 of that contract requires arbitration.

The interpretation of a written contract is a matter of law to be decided by the court. Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991) (providing, "As a general rule, written contracts are to be construed by the Court" except where a contract is ambiguous or capable of more than one construction.). The McIntires have failed to demand arbitration in accordance with the very section they are attempting to enforce. Paragraph 4.6.2 states that a

¹⁰ The contract is a standard form AIA Document A101-1997, including AIA Document A201-1997 – General Conditions of the Contract for Construction. The Court has noted that the Plaintiffs have not sued for breach of contract, the very contract which Plaintiffs now contend requires arbitration of this dispute.

demand for arbitration must be filed in writing with the opposing party and with the American Arbitration Association. The McIntires have not done so; indeed, though they would like it stayed in favor in arbitration, they filed this lawsuit.

Paragraph 4.6.3 of the contract states that a “demand for arbitration shall be made . . . within a reasonable time after the claim has arisen” As previously stated, the McIntires have not made a demand for arbitration pursuant to the contract. They could not possibly comply with the “reasonable time” requirement in their contract. Having discovered alleged defects that would have given rise to a “Claim,” they investigated that claim, retained counsel, retained experts, and substantially repaired and eliminated the alleged defects underlying the claim they wish to arbitrate. Accordingly, they are barred from demanding arbitration. The determination of a “reasonable time” for performance of one’s obligations under a contract must be determined upon examination of the facts and circumstances of each particular case. And while generally the question of “reasonable time” would be one of fact for a jury, this case is different. As a matter of law, I find that an attempt to compel arbitration (without any prior demand therefor and, indeed, in the context of court proceedings that the moving parties themselves commenced) after the party seeking arbitration destroyed all or most of the physical evidence to support or refute the claim is manifestly unreasonable. Cf. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001) (“If the evidence as a whole is susceptible of only one reasonable inference, no jury issue is created and a directed verdict motion is properly granted.”).

Paragraph 4.6.3 of the contract goes on to reference statutes of limitations for demanding arbitration. Specifically, Paragraph 4.6.3 states that “in no event shall [an arbitration demand] be made after the date when the institution of legal or equitable proceedings based on such Claim

would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.” The applicable statute of limitations for the claims brought by the McIntires is three years as set forth in S.C. Code Ann. § 15-3-510, *et seq.* Paragraph 13.7.1.3 states, “As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued” Accordingly, the McIntires’ demand for arbitration had to have been made sometime prior to 2012.¹¹ The statute of limitations to demand arbitration, as calculated by the contract and by the arbitration clause contained therein, has run.

Wherefore, I find the Motion to Compel Arbitration should be denied.

¹¹ The Certificate of Occupancy was issued on September 25, 2008 and it is doubtless that the final Certificate of Payment was issued soon thereafter. Therefore, the statute of limitations would have run during 2009, 2010, and 2011

CONCLUSION

NOW, THEREFORE, for the foregoing reasons, it is hereby

ORDERED, ADJUDGED AND DECREED that Sequest's Motion to Dismiss is
GRANTED; it is

ORDERED, ADJUDGED AND DECREED that the Motion to Compel Arbitration is
DENIED; it is

ORDERED, ADJUDGED AND DECREED that all remaining motions in this case are
MOOT; and it is

FURTHER ORDERED that this case shall be and is hereby DISMISSED.

AND IT IS SO ORDERED.

Jean Hoefer Toal
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina

_____, 2017

Jaan Rannik

From: Michelle Endemann
Sent: Tuesday, January 17, 2017 16:28
To: Daigle, Jason; Waring, Amelia; Angela Gross; Toal, Jean; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'
Cc: Andrew K. Epting; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdp.com; XIngram@tgdp.com; sstephens@arlawsc.com; tdrazan@arlawsc.com; lphillips@arlawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Madame Chief Justice,

Plaintiffs respectfully request that they be allowed until this Friday, January 20th to review and raise objections, if any, to the proposed order provided by Mr. Daigle. Thank you for your consideration.

Regards,

Michelle N. Endemann
Attorney
Andrew K. Epting, Jr., LLC
46A State St.
Charleston, SC 29401
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From: Daigle, Jason [<mailto:jdaigle@ycrlaw.com>]
Sent: Friday, January 13, 2017 6:27 PM
To: Waring, Amelia <awaring@sccourts.org>; Angela Gross <agg@epting-law.com>; Toal, Jean <JToal@sccourts.org>; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)' <ccleonard@charlestoncounty.org>
Cc: Andrew K. Epting <ake@epting-law.com>; Michelle Endemann <mne@epting-law.com>; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdp.com; XIngram@tgdp.com; sstephens@arlawsc.com; tdrazan@arlawsc.com; lphillips@arlawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com;

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jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Amelia,

I have attached the proposed order in Word form. Please let me know if you need anything else from me.

Thank you,
Jason

From: Waring, Amelia [mailto:awaring@sccourts.org]
Sent: Wednesday, January 04, 2017 3:57 PM
To: Daigle, Jason; Angela Gross; Toal, Jean; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'
Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com;
cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com;
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sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Counsel,

Thank you for your patience on this. Here is Justice Toal's ruling:

- (1) Plaintiffs' Motions to Stay and Compel Arbitration are denied. Plaintiffs have waived their right to demand arbitration per the arbitration agreement for the reasons stated in section I of Defendant Seaquest's Memorandum in Opposition to the Motion to Stay and Compel Arbitration (waiver) and for the reasons contained in section III of Seaquest's memorandum in Opposition (contractually barred). However, Justice Toal does not base her ruling on the Seaquest's argument that section 15-48-10(a) is inapplicable to the claims here (see Seaquest's Memorandum in Opposition section II).
- (2) Defendant Seaquest's Motion to Dismiss is granted because Plaintiffs have failed to comply with the S.C. Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. 40-59-810, et seq.
- (3) The remaining motions for protective order and dealing with the co-defendants are moot because the action is being dismissed.

Counsel for Defendant Seaquest should draft a proposed order and e-mail it to me awaring@sccourts.org by the end of next week.

Thanks,

Amelia

Amelia Waring Walker
Law Clerk to the Honorable Jean H. Toal

South Carolina Supreme Court
(803)734-1584
awaring@sccourts.org

From: Daigle, Jason [<mailto:jdaigle@ycrlaw.com>]
Sent: Wednesday, January 04, 2017 11:45 AM
To: Angela Gross; Toal, Jean; Waring, Amelia; 'Caroline Crisler. Leonard' (cleonard@charlestoncounty.org)
Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trev.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

It has come to my attention that this case has an ADR deadline of February 5, 2017. Caroline Leonard suggested that I contact you directly so the parties don't run afoul of the ADR deadline. We are still awaiting your ruling on the motions that were heard on October 13 after you stayed the case as to all parties except for Plaintiffs and Seaquest. Is there anything else you need from or Plaintiffs' counsel on these motions?

Thank you,
Jason

Jason A. Daigle, Esq.
Young Clement Rivers, LLP
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Fax: (843) 579-1324
jdaigle@ycrlaw.com



From: Daigle, Jason
Sent: Wednesday, October 19, 2016 5:08 PM
To: 'Angela Gross'; jtoal@sccourts.org; awaring@sccourts.org; 'Caroline Crisler. Leonard' (cleonard@charlestoncounty.org)
Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trev.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com;

sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; scarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: RE: McIntire v. Sequest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your instruction, attached please find Defendant Sequest Development's Supplemental Memorandum in Opposition to Plaintiffs' Motion to Stay and to Compel Arbitration which was filed with the clerk today.

Jason

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Young Clement Rivers, LLP
Phone: (843) 724-6609
Fax: (843) 579-1324
jdaigle@yrcrlaw.com



From: Angela Gross [<mailto:agg@epting-law.com>]

Sent: Wednesday, October 19, 2016 4:35 PM

To: Daigle, Jason; jtoal@sccourts.org; awaring@sccourts.org; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'

Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; scarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: McIntire v. Sequest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your instruction, attached please find Plaintiffs' Reply in Support of Their Motion to Stay and Compel Arbitration in the above-referenced matter.

Angela

Angela Gross
Legal Assistant to Andrew K. Epting, Jr., Esquire
And Michelle N. Endemann, Esquire
Andrew K. Epting, Jr., LLC
46A State Street
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From: Daigle, Jason [<mailto:jdaigle@ycrlaw.com>]

Sent: Thursday, October 13, 2016 2:15 PM

To: jtoal@sccourts.org; awaring@sccourts.org; 'Caroline Crisler, Leonard (ccleonard@charlestoncounty.org)' <ccleonard@charlestoncounty.org>

Cc: Andrew K. Epting <ake@epting-law.com>; Michelle Endemann <mne@epting-law.com>; Angela Gross <agg@epting-law.com>; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdp.com; XIngram@tgdp.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com

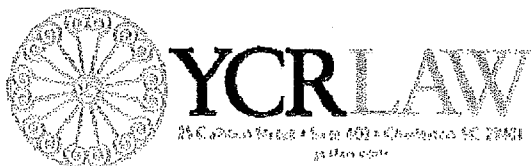
Subject: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your request, I have copied on this email the distribution list for the above-referenced case. Please let me know if you need any additional information.

Thank you,
Jason

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## **Jaen Rannik**

---

**From:** Waring, Amelia <awaring@sccourts.org>  
**Sent:** Tuesday, January 17, 2017 16:30  
**To:** Michelle Endemann; Daigle, Jason; Angela Gross; Toal, Jean; 'Caroline Crisler, Leonard (ccleonard@charlestoncounty.org)'  
**Cc:** Andrew K. Epting; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddier@kernodelaw.com; mjustman@kernodelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com  
**Subject:** RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

That will be fine. Thanks,

Amelia

---

**From:** Michelle Endemann [mailto:mne@epting-law.com]  
**Sent:** Tuesday, January 17, 2017 4:28 PM  
**To:** Daigle, Jason; Waring, Amelia; Angela Gross; Toal, Jean; 'Caroline Crisler, Leonard (ccleonard@charlestoncounty.org)'  
**Cc:** Andrew K. Epting; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddier@kernodelaw.com; mjustman@kernodelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com  
**Subject:** RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Madame Chief Justice,

Plaintiffs respectfully request that they be allowed until this Friday, January 20<sup>th</sup> to review and raise objections, if any, to the proposed order provided by Mr. Daigle. Thank you for your consideration.

Regards,

Michelle N. Endemann  
Attorney  
Andrew K. Epting, Jr., LLC  
46A State St.  
Charleston, SC 29401  
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**From:** Daigle, Jason [<mailto:jdaigle@ycrlaw.com>]

**Sent:** Friday, January 13, 2017 6:27 PM

**To:** Waring, Amelia <[awaring@sccourts.org](mailto:awaring@sccourts.org)>; Angela Gross <[agg@epling-law.com](mailto:agg@epling-law.com)>; Toal, Jean <[JToal@sccourts.org](mailto:JToal@sccourts.org)>; 'Caroline Crisler. Leonard' (<[ccleonard@charlestoncounty.org](mailto:cleonard@charlestoncounty.org)>') <[ccleonard@charlestoncounty.org](mailto:cleonard@charlestoncounty.org)>

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[lphillips@arslawsc.com](mailto:lphillips@arslawsc.com); [smontague@gwblawfirm.com](mailto:smontague@gwblawfirm.com); [lions@gwblawfirm.com](mailto:lions@gwblawfirm.com); [alacour@clawsonandstaubes.com](mailto:alacour@clawsonandstaubes.com);

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**Subject:** RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Amelia,

I have attached the proposed order in Word form. Please let me know if you need anything else from me.

Thank you,

Jason

---

**From:** Waring, Amelia [<mailto:awaring@sccourts.org>]

**Sent:** Wednesday, January 04, 2017 3:57 PM

**To:** Daigle, Jason; Angela Gross; Toal, Jean; 'Caroline Crisler. Leonard' (<[ccleonard@charlestoncounty.org](mailto:cleonard@charlestoncounty.org)>')

**Cc:** Andrew K. Epling; Michelle Endemann; [jelliott@richardsonplowden.com](mailto:jelliott@richardsonplowden.com); [snettles@richardsonplowden.com](mailto:snettles@richardsonplowden.com);

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**Subject:** RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Counsel,

Thank you for your patience on this. Here is Justice Toal's ruling:

- (1) Plaintiffs' Motions to Stay and Compel Arbitration are denied. Plaintiffs have waived their right to demand arbitration per the arbitration agreement for the reasons stated in section I of Defendant Seaquest's Memorandum in Opposition to the Motion to Stay and Compel Arbitration (waiver) and for the reasons contained in section III of Seaquest's memorandum in Opposition (contractually barred). However, Justice

Toal does not base her ruling on the Sequest's argument that section 15-48-10(a) is inapplicable to the claims here (see Sequest's Memorandum in Opposition section II).

- (2) Defendant Sequest's Motion to Dismiss is granted because Plaintiffs have failed to comply with the S.C. Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. 40-59-810, et seq.
- (3) The remaining motions for protective order and dealing with the co-defendants are moot because the action is being dismissed.

Counsel for Defendant Sequest should draft a proposed order and e-mail it to me [awaring@sccourts.org](mailto:awaring@sccourts.org) by the end of next week.

Thanks,

Amelia

Amelia Waring Walker  
Law Clerk to the Honorable Jean H. Toal  
South Carolina Supreme Court  
(803)734-1584  
[awaring@sccourts.org](mailto:awaring@sccourts.org)

---

**From:** Daigle, Jason [<mailto:jdaigle@ycrlaw.com>]  
**Sent:** Wednesday, January 04, 2017 11:45 AM  
**To:** Angela Gross; Toal, Jean; Waring, Amelia; 'Caroline Crisler. Leonard' ([ccleonard@charlestoncounty.org](mailto:ccleonard@charlestoncounty.org))  
**Cc:** Andrew K. Epting; Michelle Endemann; [jelliott@richardsonplowden.com](mailto:jelliott@richardsonplowden.com); [snettles@richardsonplowden.com](mailto:snettles@richardsonplowden.com); [cmajure@murphygrantland.com](mailto:cmajure@murphygrantland.com); [Trey.Watkins@WallTempleton.com](mailto:Trey.Watkins@WallTempleton.com); [ddyer@kernodlelaw.com](mailto:ddyer@kernodlelaw.com); [mjustman@kernodlelaw.com](mailto:mjustman@kernodlelaw.com); [Danielle.payne@mgclaw.com](mailto:Danielle.payne@mgclaw.com); [PReconnu@murphygrantland.com](mailto:PReconnu@murphygrantland.com); [JGoodman@murphygrantland.com](mailto:JGoodman@murphygrantland.com); [ErinDean@tgdpa.com](mailto:ErinDean@tgdpa.com); [XIngram@tgdpa.com](mailto:XIngram@tgdpa.com); [sstephens@arslawsc.com](mailto:sstephens@arslawsc.com); [tdrazan@arslawsc.com](mailto:tdrazan@arslawsc.com); [lphillips@arslawsc.com](mailto:lphillips@arslawsc.com); [smontague@gwblawfirm.com](mailto:smontague@gwblawfirm.com); [ljones@gwblawfirm.com](mailto:ljones@gwblawfirm.com); [alacour@clawsonandstaubes.com](mailto:alacour@clawsonandstaubes.com); [mandi@chandlerdudgeon.com](mailto:mandi@chandlerdudgeon.com); [matt@chandlerdudgeon.com](mailto:matt@chandlerdudgeon.com); [hsharkey@clawsonandstaubes.com](mailto:hsharkey@clawsonandstaubes.com); [shatch@clawsonandstaubes.com](mailto:shatch@clawsonandstaubes.com); [bawilson@murphygrantland.com](mailto:bawilson@murphygrantland.com); [sandra.schultz@walltempleton.com](mailto:sandra.schultz@walltempleton.com); [pbd@aikenbridges.com](mailto:pbd@aikenbridges.com); [ice@aikenbridges.com](mailto:ice@aikenbridges.com); [mbarfield@barnwell-whaley.com](mailto:mbarfield@barnwell-whaley.com); [scarke@barnwell-whaley.com](mailto:scarke@barnwell-whaley.com); [jsegell@barnwell-whaley.com](mailto:jsegell@barnwell-whaley.com); [shatch@barnwell-whaley.com](mailto:shatch@barnwell-whaley.com); [murch@gwblawfirm.com](mailto:murch@gwblawfirm.com)  
**Subject:** RE: McIntire v. Sequest, et al. - 2016-CP-10-1833

Chief Justice Toal,

It has come to my attention that this case has an ADR deadline of February 5, 2017. Caroline Leonard suggested that I contact you directly so the parties don't run afoul of the ADR deadline. We are still awaiting your ruling on the motions that were heard on October 13 after you stayed the case as to all parties except for Plaintiffs and Sequest. Is there anything else you need from or Plaintiffs' counsel on these motions?

Thank you,  
Jason

Jason A. Daigle, Esq.  
Young Clement Rivers, LLP  
Phone: (843) 724-6609  
Fax: (843) 579-1324

[jdaigle@ycrlaw.com](mailto:jdaigle@ycrlaw.com)



---

**From:** Daigle, Jason  
**Sent:** Wednesday, October 19, 2016 5:08 PM  
**To:** 'Angela Gross'; [jtoal@sccourts.org](mailto:jtoal@sccourts.org); [awaring@sccourts.org](mailto:awaring@sccourts.org); 'Caroline Crisler. Leonard ([cdeonard@charlestoncounty.org](mailto:cdeonard@charlestoncounty.org))'  
**Cc:** Andrew K. Epting; Michelle Endemann; [jelliott@richardsonplowden.com](mailto:jelliott@richardsonplowden.com); [snettles@richardsonplowden.com](mailto:snettles@richardsonplowden.com); [cmajure@murphygrantland.com](mailto:cmajure@murphygrantland.com); [Trey.Watkins@WallTempleton.com](mailto:Trey.Watkins@WallTempleton.com); [ddyer@kernodlelaw.com](mailto:ddyer@kernodlelaw.com); [mjustman@kernodlelaw.com](mailto:mjustman@kernodlelaw.com); [Danielle.payne@mqclaw.com](mailto:Danielle.payne@mqclaw.com); [PReconnu@murphygrantland.com](mailto:PReconnu@murphygrantland.com); [JGoodman@murphygrantland.com](mailto:JGoodman@murphygrantland.com); [ErinDean@tgdpa.com](mailto:ErinDean@tgdpa.com); [XIngram@tgdpa.com](mailto:XIngram@tgdpa.com); [sstephens@arlawsc.com](mailto:sstephens@arlawsc.com); [tdrazan@arlawsc.com](mailto:tdrazan@arlawsc.com); [lphillips@arlawsc.com](mailto:lphillips@arlawsc.com); [smontague@gwblawfirm.com](mailto:smontague@gwblawfirm.com); [ljones@gwblawfirm.com](mailto:ljones@gwblawfirm.com); [alacour@clawsonandstaubes.com](mailto:alacour@clawsonandstaubes.com); [mandi@chandlerdudgeon.com](mailto:mandi@chandlerdudgeon.com); [matt@chandlerdudgeon.com](mailto:matt@chandlerdudgeon.com); [hsharkey@clawsonandstaubes.com](mailto:hsharkey@clawsonandstaubes.com); [shatch@clawsonandstaubes.com](mailto:shatch@clawsonandstaubes.com); [bawilson@murphygrantland.com](mailto:bawilson@murphygrantland.com); [sandra.schultz@walltempleton.com](mailto:sandra.schultz@walltempleton.com); [pbd@aikenbridges.com](mailto:pbd@aikenbridges.com); [ice@aikenbridges.com](mailto:ice@aikenbridges.com); [mbarfield@barnwell-whaley.com](mailto:mbarfield@barnwell-whaley.com); [scarke@barnwell-whaley.com](mailto:scarke@barnwell-whaley.com); [jsegell@barnwell-whaley.com](mailto:jsegell@barnwell-whaley.com); [shatch@barnwell-whaley.com](mailto:shatch@barnwell-whaley.com); [murch@gwblawfirm.com](mailto:murch@gwblawfirm.com)  
**Subject:** RE: McIntire v. Sequest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your instruction, attached please find Defendant Sequest Development's Supplemental Memorandum in Opposition to Plaintiffs' Motion to Stay and to Compel Arbitration which was filed with the clerk today.

Jason

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---

**From:** Angela Gross [<mailto:agg@epting-law.com>]  
**Sent:** Wednesday, October 19, 2016 4:35 PM  
**To:** Daigle, Jason; [jtoal@sccourts.org](mailto:jtoal@sccourts.org); [awaring@sccourts.org](mailto:awaring@sccourts.org); 'Caroline Crisler. Leonard ([cdeonard@charlestoncounty.org](mailto:cdeonard@charlestoncounty.org))'  
**Cc:** Andrew K. Epting; Michelle Endemann; [jelliott@richardsonplowden.com](mailto:jelliott@richardsonplowden.com); [snettles@richardsonplowden.com](mailto:snettles@richardsonplowden.com); [cmajure@murphygrantland.com](mailto:cmajure@murphygrantland.com); [Trey.Watkins@WallTempleton.com](mailto:Trey.Watkins@WallTempleton.com); [ddyer@kernodlelaw.com](mailto:ddyer@kernodlelaw.com); [mjustman@kernodlelaw.com](mailto:mjustman@kernodlelaw.com); [Danielle.payne@mqclaw.com](mailto:Danielle.payne@mqclaw.com); [PReconnu@murphygrantland.com](mailto:PReconnu@murphygrantland.com); [JGoodman@murphygrantland.com](mailto:JGoodman@murphygrantland.com); [ErinDean@tgdpa.com](mailto:ErinDean@tgdpa.com); [XIngram@tgdpa.com](mailto:XIngram@tgdpa.com); [sstephens@arlawsc.com](mailto:sstephens@arlawsc.com); [tdrazan@arlawsc.com](mailto:tdrazan@arlawsc.com); [lphillips@arlawsc.com](mailto:lphillips@arlawsc.com); [smontague@gwblawfirm.com](mailto:smontague@gwblawfirm.com); [ljones@gwblawfirm.com](mailto:ljones@gwblawfirm.com); [alacour@clawsonandstaubes.com](mailto:alacour@clawsonandstaubes.com); [mandi@chandlerdudgeon.com](mailto:mandi@chandlerdudgeon.com); [matt@chandlerdudgeon.com](mailto:matt@chandlerdudgeon.com); [hsharkey@clawsonandstaubes.com](mailto:hsharkey@clawsonandstaubes.com); [shatch@clawsonandstaubes.com](mailto:shatch@clawsonandstaubes.com); [bawilson@murphygrantland.com](mailto:bawilson@murphygrantland.com); [sandra.schultz@walltempleton.com](mailto:sandra.schultz@walltempleton.com); [pbd@aikenbridges.com](mailto:pbd@aikenbridges.com); [ice@aikenbridges.com](mailto:ice@aikenbridges.com); [mbarfield@barnwell-whaley.com](mailto:mbarfield@barnwell-whaley.com);

sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com  
**Subject:** McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your instruction, attached please find Plaintiffs' Reply in Support of Their Motion to Stay and Compel Arbitration in the above-referenced matter.

*Angela*

Angela Gross  
Legal Assistant to Andrew K. Epting, Jr., Esquire  
And Michelle N. Endemann, Esquire  
Andrew K. Epting, Jr., LLC  
46A State Street  
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**From:** Daigle, Jason [mailto:jdaigle@ycrlaw.com]  
**Sent:** Thursday, October 13, 2016 2:15 PM  
**To:** jtoal@sccourts.org; awaring@sccourts.org; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'  
<ccleonard@charlestoncounty.org>  
**Cc:** Andrew K. Epting <ake@epting-law.com>; Michelle Endemann <mne@epting-law.com>; Angela Gross <agg@epting-law.com>; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandl@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com  
**Subject:** McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your request, I have copied on this email the distribution list for the above-referenced case. Please let me know if you need any additional information.

Thank you,  
Jason

Jason A. Daigle, Esq.  
Young Clement Rivers, LLP  
Phone: (843) 724-6609  
Fax: (843) 579-1324  
jdaigle@ycrlaw.com



Young Clement Rivers, LLP  
<http://www.ycrlaw.com>  
Charleston: (843) 577-4000

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Jaan Rannik

From: Angela Gross
Sent: Friday, January 20, 2017 15:16
To: Daigle, Jason; Waring, Amelia; Toal, Jean; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'
Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arlawsc.com; tdrazan@arlawsc.com; lphillips@arlawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandichandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: RE: McIntire v. Sequest, et al. - 2016-CP-10-1833
Attachments: 2017 01 20 - Ltr to Justice Toal re Objections to proposed Order.pdf

Madam Chief Justice,

Attached please find Plaintiffs' objections to the proposed Order in the above-referenced matter. The original will follow by regular U.S. Mail.

Angela

Angela Gross
Legal Assistant to Andrew K. Epting, Jr., Esquire
And Michelle N. Endemann, Esquire
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ANDREW K. EPTING, JR., LLC

ATTORNEYS AT LAW

January 20, 2017

The Honorable Jean H. Toal
Charleston County Judicial Center
100 Broad St., Suite 368
Charleston, SC 29401

RE: McIntire v. Seaquest, et al
Case No.: 2016-CP-10-1833

Dear Madame Chief Justice:

Thank you for giving me the opportunity to review and respond to the proposed order sent to you by counsel for SeaQuest Development Company ("SeaQuest") on January 13, 2017. The proposed order concerns the following motions: (1) SeaQuest's Motion to Dismiss or Stay Proceedings made pursuant to South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §§ 40-59-810 to 860 (the "Right to Cure Act")¹; (2) Plaintiffs Andrew and Kimberly McIntire's Motion to Stay and to Compel Arbitration; and (3) the McIntires' Motion for Protective Order. Each of these motions was heard by Your Honor on October 13, 2016. A copy of the transcript of the proceedings is attached for your convenience.

The Right to Cure Act:

There are two main holdings in the proposed order. The first finds that compliance with the Right to Cure Act is a mandatory precondition to filing a residential construction defect claim and that the McIntires' complaint is dismissed because they: (1) failed to comply with the Act; and (2) are unable to comply with the Act because repairs to the home have been substantially completed. With regard to this holding in the proposed order, the McIntires raise the following objections:

- 1) There is no provision of the Right to cure act that authorizes the dismissal of a lawsuit for the failure to comply with the Act. The Act authorizes only a stay of proceedings. Further, no decision construing the Act has authorized a dismissal. In fact, the Supreme Court in *Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2010) refused to strike class action allegations in a complaint on the basis of the Act.

¹ Red Bay Constructors Corp. ("Red Bay") filed a motion on the same grounds, which was also heard and is resolved by the proposed order.

- 2) There is nothing in the record that supports the finding that the McIntires have not complied with the Act.
- 3) A dismissal of this claim at this point in the litigation is unwarranted, as there is no basis for holding that the McIntires will be unable to comply with the Act.
- 4) The McIntires believe this dispute is subject to arbitration pursuant to the Federal Arbitration Act and therefore, the only issue before the Court concerns arbitrability. All other issues, including compliance with the Right to Cure Act, are properly decided in arbitration.

Waiver of the McIntires' Right to Arbitration

The second holding in the proposed order finds the McIntires have waived their right to arbitration. This ruling is based on two grounds: (1) that the McIntires have engaged in "extensive discovery" and retained "forensic and construction liability and repair experts to investigate, document, and repair the alleged defects at their home"; and (2) the McIntires failed to comply with the arbitration provision in the contract. With regard to the holding that the McIntires have waived their right to arbitration by engaging in "extensive discovery," the McIntires raise the following objections:

- 1) This holding is factually inaccurate and contradicted by the record. First, The McIntires, specifically preserving their arbitration rights, have not participated in any discovery at all. They have not served discovery. They have not answered discovery. One of the motions that was before this Court at the October 13, 2016 hearing was the McIntires' motion for protective order which was made on the grounds that the McIntires had an arbitration provision and that they could not respond to discovery because responding could jeopardize its arbitration rights. Second, as the McIntires never answered discovery, there is no basis for the Defendants to claim that the McIntires retained "forensic and construction liability and repair experts." Further, hiring a contractor to make repairs is not inconsistent with arbitration.

With regard to the finding that the McIntires have failed to comply with the arbitration provision in the construction contract, the McIntires raise the following objections:

- 1) The proposed order finds that the construction contract requires arbitration to be demanded "within a reasonable time after the claim has arisen" and that the McIntires did not comply with this provision. The proposed order acknowledges that we are only at the pleading stage, without the benefit of discovery and that typically questions concerning "reasonableness" are for the trier of fact. Nonetheless, the order finds the McIntires did not demand arbitration in a reasonable time despite the fact that McIntires only discovered the defects in their home after it was struck by lightning

during a storm, that the McIntires filed suit as soon as they were able to discover the defects and identify the Defendants,² and demanded arbitration as soon as the Defendants were served. This finding is without any evidentiary support and contrary to the facts.

- 2) The proposed order finds the construction contract stipulates that "in no event shall [an arbitration demand] be made after the date when the institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations" and further finds the statute of limitations as articulated by S.C. Code Ann. § 15-3-510 has run. Therefore, the proposed order states, the McIntires' arbitration demand was contrary to the arbitration provision in the contract. The Order suggests that the statute of limitations would have begun to run when the Certificate of Occupancy was issued or sometime even before that date. (See Proposed Order, p. 11, Fn. 11). First, this argument was not made at the hearing. Second, finding that the statute of limitations runs from the issuance of the Certificate of Occupancy is contrary to the discovery rule. Third, there is not one fact in the record that supports a finding that the statute of limitations has run. Fourth, the Defendants have never argued that the statute has run and have never moved to dismiss the suit on this basis. Therefore, as the "applicable statute of limitations" has not and did not run before the arbitration demand was made, the demand is not contrary to the arbitration provision in the contract. Accordingly, as this Court expressed no doubts concerning the scope of the arbitration provision or that the McIntires' claims are encompassed by the broadly worded provision, arbitration should be ordered and all matters, including compliance with the Right to Cure Act, decided in arbitration.

With kind regards,

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr.

AKE/agg

cc: Counsel of Record

² The McIntires acted expediently and were required to as the statute of repose was becoming an issue.

AIA DOCUMENT

A101-1997

WARNING:

THIS AGREEMENT SUBJECT TO BINDING ARBITRATION IN THE STATE OF SOUTH CAROLINA, CITY OF CHARLESTON, UNDER THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (CODE SEC. 15-48-10, ET. SEQ.)

A Revised Version Of The -

Standard Form of Agreement Between Owner and Contractor

Where the basis of payment is a Cost Plus 12.5% with a minimum \$125,000.00

AGREEMENT made as of this 22nd day of August in the year 2007

BETWEEN the Owner: Andrew and Kim McIntire

(Name, address and other information) 407 Barbadian Way, Mt. Pleasant SC, 29464

and the Contractor: SeaQuest Development Company, Inc.

(Name, address and other information) 528 Country Place Rd, Mt. Pleasant, SC, 29464

The Project is: The McIntire Residence

(Name and location) Lot 4-30, 821 Bridgetown Pass

The Architect is New Urbanist Design

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 by the Associate General Contractors of America.

The Owner and Contractor agree as follows.

The American Institute of Architects 1735 New York Avenue, N.W. Washington, D.C. 20006-5202
Copyright 1915, 1918, 1925, 1937, 1951, 1958, 1981, 1983, 1987, 1974, 1977, 1987, 1997 by The American Institute of

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 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.)

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:

3.2 The Contract Time shall be measured from the execution of the "Notice to Proceed"

3.3 The Contractor shall achieve Substantial Completion of the entire Work not later than 365 days from the date of commencement, or as follows: 365 Days plus any additional days necessitated by changes. (12 months) Unreasonable delays by the Owner will result in additional days added to the allocated period of time.

(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.)

, subject to adjustments of this Contract Time as provided in the Contract Documents.

1987

AIA DOCUMENT A101-1987

OWNER-CONTRACTOR
AGREEMENT

Interior Trim

- Trim for interior openings
- Crown Molding
- Baseboard
- Closet Shelving
- Interior Stairs

Cabinetry

- Kitchen Cabinetry
- Bath Cabinetry
- Laundry Room, Mudroom Cabinetry
- Other Built-Ins

Tile and Glass

- Tile
- Glass shower enclosures and Mirrors

Specialties

- Bath Accessories

Plumbing Finish/Fixtures

Electrical Finish/Fixtures

Kitchen Appliances

Painting

- Interior Painting
- Exterior Painting

Flooring

- Wood Flooring
- Tile

Landscaping

- Final Grade
- Fencing
- Driveways
- Swimming Pool

Trash Removal

- Dumpsters
- Site Clean-up
- Final Clean-up

4.2 The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner. Any changes to the Work priced at the reasonable discretion of the Contractor. Changes for each portion of the Work must be requested at least seven(7) working days prior to the date of such is to begin

(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.)

4.3 Unit prices, if any, are as follows:

ARTICLE 6 PAYMENTS

5.1 PROGRESS PAYMENTS

5.1.1 Based upon Applications for Payment submitted to the Bank by the Contractor, 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 based upon : A limit of seven draws will be made by the Contractor during the construction process and will be in keeping with standard bank policy. Payment will be made to the Contractor in no more than seven (7) working days. Payments will be made directly to the Contractor from bank sources.

5.1.3 Each Application for Payment shall be based on the most recent inspection schedule performed by banking institution providing the construction loan.

5.1.4 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.

5.1.5 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

1. Payments will be made to contractor in conjunction with the completion of key milestones agreed upon by the contractor and the owner. Key milestones are defined as follows, and coincide with the draw schedule determined by the bank construction loan inspections:

1st Payment - Upon completion of Clearing and rough grade, footings, Foundation and slab

2nd Payment - Upon completion of house framing (Flooring/Subflooring, Wall Sheathing, Roof Sheathing, Exterior Doors and Windows)

3rd Payment - Upon completion of Trade Rough-ins (Plumbing, Electrical, HVAC, Fireplace)

4th Payment - Upon completion of Exterior trim/sheetrock (Exterior Veneer, Cornice & Facia, Roofing, Exterior Paint, Insulation, Sheetrock)

5th Payment - Upon Completion of Interior finishes (Trim, Interior doors, Tile, Cabinets, Interior Paint, Flooring Install)

6th Payment - Upon Completion of Interior Trim-outs (Plumbing Fixtures, Electrical Fixtures, HVAC, Appliances, Hardware)

Final Draw - This payment will be held until Certificate of Occupancy is issued and contractor and owner are in agreement that home is complete. (Stoops & Decks, Driveways and Walks, Finish Grade, Landscaping, Final Clean)

2. Owner will be invoiced in conjunction with each milestone/payment request. Each invoice will include documentation of expenses for labor and materials, plus 12.5% for project management fee. Payment should be received within 7 days of submitted invoice.

5.1.6 The progress payment amount determined in accordance with Subparagraph 5.1.5 shall be further modified under the following circumstances:

N/A

5.1.7 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 (see final draw above section 5.1.5)

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 identified in a final work agreement. This final work, known as the "punch list", will be assigned a fair value and will be held by a mutually agreed party, and will be released as each item is completed to satisfactory standards by owner and contractor.

2. a final Certificate of Occupancy has been issued by the Town of Mt. Pleasant

AIA DOCUMENT A101-1997

OWNER-CONTRACTOR
AGREEMENT

The American Institute of Architects 1735 New York Avenue, N.W. Washington, D.C. 20006-5202

5.2.2 The Owner's final payment to the Contractor shall be made no later than 30 days after the issuance of the Contractor's final Certificate for Payment, or as follows:

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.

6.3 All warranties and/or obligations of the Contractor become null and void if final and complete payment is not received within 30 days of completion.

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.) 10%

(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 in addition laws, and also regarding requirements such as written disclosures or waivers.)

7.3 The Owner's representative is: Mr. Andrew McIntire

7.4 The Contractor's representative is: Mr. Craig Hines

7.5 Neither the Owner's nor the Contractor's representative shall be changed without ten days written notice to the other party.

7.6 Other provisions:

AIA DOCUMENT A101-1997

OWNER-CONTRACTOR AGREEMENT

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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.

8.1.2 The General Conditions are the 1997 edition of the General Conditions of the Contract for Construction, AIA Document A201-1997.

8.1.3 The Supplementary and other Conditions of the Contract are those contained in the Project

| Document | Title | Pages |
|---------------|----------------------------|-------|
| Exhibit A | AIA Document 101-1997 | 7 |
| AIA Exhibit B | Specifications
Part One | 10 |
| Exhibit C | Drawings | 13 |
| | Site | |
| | First Floor Plan | |
| | Second Floor Plan | |
| | Door and Window Schedule | |
| | Front Elevations | |
| | Right Side Elevations | |
| | Rear Elevations | |
| | Left Side Elevations | |
| | Wall Sections | |
| | Miscellaneous Wall Details | |
| | Details/Sections | |
| | First Floor Electrical | |
| | Second Floor Electrical | |

Architectural Drawings as provided by New Urbanist Design

Structural Drawings as provided by B.W. Engineering

16.1.5 The Drawings above are dated 8/22/07 unless a different date is shown below:

16.1.6 [].

16.1.7 Other Documents, if any, forming part of the Contract Documents are as follows:

8.1.6 The Addenda, if any, are as follows:

Addenda No.1 - Contract Note Date _____ Pages 1

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.)

This Agreement is entered into as of the day and year first written above and is executed in at least three original copies with each page initialed by all parties, of which two are to be delivered to the Contractor, and the remainder to the Owner.

OWNER

CONTRACTOR

Andrew R. McIntire 8/22/07
(Signature and date)

(Signature and date)

ANDREW R. MCINTIRE
(Printed name and title)

Craig Hines 8/22/07
(Signature and date) *President Sealbest Development Company, Inc.*
PRESIDENT CRAIG HINES
(Printed name and title)

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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 is a cost estimate of \$1,600,000. This estimate and contract are based on a cost plus arrangement. The ultimate contract price will be based on cost plus 12.5%, with a minimum fee of \$125,000. Costs will be determined by any and all costs associated with the construction of the residence as defined by the approved plans at 821 Bridgetown Pass including the following:

General Conditions

- Architectural and engineering
- Permits and fees
- Insurance (General liability, Builders risk, Flood, Workman's compensation policies associated with or allocated to this project)
- Legal
- Professional/Field Services (Survey, Soil testing)
- Temporaries (toilet facilities)
- Equipment rental if necessary

Site Preparation

- Termite Pretreatment
- Site Clearing (including unsatisfactory dirt and replacement with compacted soil)

Excavation

- Site Drainage/Grading

Concrete

- Batterboards/footings/Steel
- Concrete footings
- Rebar

Masonry

- Block walls/piers
- Brickwork or Stucco
- Lintels, Sand, Mortar

Framing

- Beams/Girders/
- Exterior & Interior Walls
- Roof Assemblies
- Stair Framing
- Porch Framing
- Frame Labor
- Framing Hardware

Roofing

- Roofing material and Labor

Windows and Exterior Doors

Plumbing Rough

- Water & Sewer Lines
- Plumbing Rough -in

HVAC

- Heat and AC
- HVAC Venting

Electrical Rough

Exterior Trim

Siding

Insulation

- Floor Insulation
- Wall Insulation
- Roof Insulation
- Other Insulation (soundproofing)

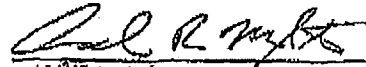
Wall and Ceiling Finish

- Drywall

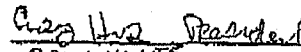
Interior Doors and Hardware

- Interior Pre-hung Doors
- Door Hardware

* ANY COSTS ABOVE ESTIMATED COST OF \$1,623,372.30
WILL BE RESPONSIBILITY OF OWNER 9/21/07


ANDREW MCINTIRE

9/21/07


CRAG HIMES

9/21/07

8/21/2007

| Trade/Category | Budget | Supplier/Comments | | | | | | |
|---------------------------------|-----------------|---|------------------|---|-------|-------|--|---------|
| Backfill and grade lot | 1000 | | Irrigation Zones | 6 | 850 | 2750 | | |
| Gas | 3000 | | Sod Pallets | 2 | 250 | 2000 | | |
| Sidewalk, driveway | 12000 | | Plant materials | 1 | 15000 | 15000 | | |
| Garage Doors | 6000 | | | | | | | |
| Hardware | | | | | | | | |
| Door knobs/lock sets | 8500 | East Cooper Lock and Svc - Pauline 843-681-2044 | | | | | | |
| Cabinet hardware | 600 | | | | | | | |
| Glass/Mirrors | | | | | | | | |
| Shower door | 4000 | | | | | | | |
| Mirrors | 500 | | | | | | | |
| Towel bars, etc | 700 | | | | | | | |
| Closest | 3500 | | | | | | | |
| Punch out | 2000 | | | | | | | |
| Misc Lowe's | 2000 | | | | | | | |
| Nails | 2500 | | | | | | | |
| Glazing | 1000 | | | | | | | |
| Shutters | 0 | | Shutters | 0 | 600 | 0 | | |
| HOA Dues | 450 | | | | | | | |
| Builders Risk Insurance | 3000 | | | | | | | |
| General Liability Insurance | 2000 | | | | | | | |
| Pool | 115000 | | | | | | | 1125000 |
| COST OF CONSTRUCTION | 108681.76 | Interest to date on lot | 221,122,424 | | | | | 880000 |
| Lot purchase + interest to date | 880000 | 25000 | | | | | | 880000 |
| Sub Total | \$ 1,439,881.76 | | | | | | | |
| 1394 | \$ 193,232.72 | | | | | | | |
| Total | \$ 1,676,084.47 | | | | | | | |
| Interest Expense | \$ | | | | | | | |
| Commission/closing costs | \$ 47,263.55 | | | | | | | |
| Grand Total | \$ 1,625,977.90 | | | | | | | |

Andrew McIntire 9/21/07
 ANDREW MCINTIRE DATE

Cathy Himes 9/21/07
 CATHY HIMES DATE

EXHIBIT B - SPECIFICATIONS

This exhibit, dated 8/22/07, is a part of the agreement between

| | | |
|-----------------|------------------|-----------------------------------|
| the Owner: | Name | Mr. & Mrs. Andrew McIntire |
| | Address | 407 Barbadian Way |
| | City, State, Zip | Mt Pleasant, S.C. 29464 |
| the Contractor: | Name | SeaQuest Development Company Inc. |
| | Address | 528 Country Place Rd. |
| | City, State, Zip | Mt Pleasant, S.C. 29464 |
| the Project is: | Name | McIntire Residence |
| | Address | Lot 4-30, 821 Bridgetown Pass |
| | City, State, Zip | Mt Pleasant, S.C. 29464 |

These Specifications, although not signed by the parties, shall be as binding as if they were.

These specifications, Part One and Two, detail under what guidelines the Work is to be performed on the project. The work has been divided into 29 divisions. There are two parts to the specifications: "Part One" which is an explanation of the Work to be performed under each division, and "Part Two" which is the quantitative cost of each division of the Work.

Although not specifically mentioned in each division, the Work shall be performed to comply with local building codes and shall also comply with the manufacturers recommendations. When, or if, the requirements of local building codes is contrary with the manufacturers recommendations, the Owner and Contractor shall reach an agreement as to the performance of that portion of the work in conflict.

The quantities listed in Part Two of the Specifications are taken from the drawings, Exhibit C of the agreement. Naturally any change in the drawings or Exhibits shall cause a change in the quantity of materials or services listed in Part Two.

Allowances

Explanation of Allowance Items:

Selected materials and their installation are included in this bid as allowances and are specified below. Allowances have been established in lieu of additional requirements and to defer the selection of actual materials and equipment to a later date when additional information is available for evaluation. Additional requirements, if necessary, will be issued by change order. Upon selection of actual materials or equipment, the contractor shall investigate and provide the owner with the actual costs. Any changes in the contract sum, and any expenditure over the allowance amount allotted, whether paid by the Contractor or Owner, will be handled by change order. The contractor shall be responsible for providing accurate cost information for the purchase of allowance items. Unless specifically mentioned otherwise, allowance amounts must cover the cost of all labor, cost of materials, sales taxes, freight and delivery charges. It is

understood that the Owner is responsible for the accounting of all allowance items and any cost overruns over the "total" of allowances is the responsibility of the Owner. It is understood there will be no refunds on the amount that may be left in the allowance total. Contractor will, from time to time or upon owners request, advise the owner of current status of allowances.

Schedule of Allowance Items:

The following specifications, finishes and allowances are proposed for the McIntire residence in Hibben, lot 4-30.

Exterior:

| Item | Manufacturer | Description | Finish/Color |
|----------------|--|---|--------------|
| Siding | | Cedar Shakes | Natural |
| Exterior Trim | | P.T. Wood or hardy trim, Hardy soffit, 5/4 x 6 ipca decking | |
| Foundation | | 8" CMU | |
| Shutters | | NA | NA |
| Roof | | Shingle or Metal | TBD |
| Exterior Doors | | Mahogany custom doors | Natural |
| Windows | Andersen "Eagle" or Built-best or equivalent | Double Hung - SDL low E Vinyl or aluminum clad, wood interior | TBD |

Kitchen:

| Item | Manufacturer | Description | Finish/Color |
|------------------|--------------|-------------------------|--------------|
| Cabinetry | Tbd | | TBD |
| Counter Tops | | Granite | TBD |
| Island Cabinetry | See above | | |
| Sink | TBD | Double Bowl Under-mount | Stainless |

Appliances:

| Item | Manufacturer | Description | Finish/Color |
|----------------|---------------------------|-------------------|--------------|
| Gas Range/Hood | Wolf or French equivalent | Cook-top and hood | Stainless |
| Refrigerator | Sub Zero | 42" built-in | Stainless |
| Dishwasher | Pfister Pykel | Double drawer | Stainless |
| Disposal | Insinkerator | 3/4 horsepower | |
| Microwave | TBD | | Stainless |

Floor Finishes:

| Item | Location | Description | Finish/Color |
|----------------|---|-------------|--------------|
| Hardwood Floor | Entire first floor, second floor MB and hallway | Heart Pine | Natural |
| Tile | Bathrooms, laundry room | TBD | TBD |
| Pine | Children's/Guest bedrooms | TBD | |

Trim:

| | | | |
|----------|--|--------------------------------|-----|
| Base | First floor | 10" with cap | TBD |
| | Second Floor | 10" with cap | TBD |
| Crown | 1 st - two piece
2 nd - 1 piece | Poplar casing, crown, MDF base | TBD |
| Doors | | Solid Core | TBD |
| Wainscot | TBD | Painted | TBD |

Plumbing Fixtures

| Item | Location | Description | Finish/Color |
|---------------|--------------|---|--------------|
| Toilets/Sinks | Bathrooms | Toto | White |
| Tub | MB | TBD - Jacuzzi style air tub | White |
| | Guest bath's | cast iron | White |
| Shower | Master | Custom Tile with 3/8" Glass shower door | |
| Water Heater | | instant hot-water unit | |
| Faucets | | Rohl or equivalent | Tbd |

HVAC

| Item | Location | Description | Finish/Color |
|-------------------|---|-------------|--------------|
| Heating/Air units | 1 st and 2 nd floor | Geo-Thermal | na |

Allowances:

| | |
|-------------------|---|
| Tile | <ul style="list-style-type: none"> • \$5.00 per square foot plus labor • \$15 per linear foot for shower borders in Master Bath |
| Wood | <ul style="list-style-type: none"> • 4.00 per square foot plus labor |
| Carpet | <ul style="list-style-type: none"> • \$30 Yd |
| Granite | <ul style="list-style-type: none"> • \$12,000 |
| Plumbing Fixtures | <ul style="list-style-type: none"> • \$20,000 (Toilets, sinks, faucets, shower valves, Disposal, Tub/Shower inserts) |
| Lighting Fixtures | <ul style="list-style-type: none"> • \$7000 (Interior and Exterior Lighting Fixtures) |
| Appliances | <ul style="list-style-type: none"> • \$25,000 (Refrigerator, ovens, cook-top/range, range-hood, microwave, dishwasher) |
| Structured Wiring | <ul style="list-style-type: none"> • 1 Cat5, 1 Cable each room with a central SMC panel |
| Landscaping | <ul style="list-style-type: none"> • \$19,500 Landscaping plus irrigation and sod, grading |
| Trim | <ul style="list-style-type: none"> • 2 Piece Crown 1st floor, 1 Piece crown 2nd floor, windows/casings 4 1/4" • 8" or 10" base with cap - outlets in the base boards when appropriate |
| Cabinets | <ul style="list-style-type: none"> • \$55,000 - Kitchen, bath, mudroom, laundry, built-ins includes cabinet knobs |
| Locks | <ul style="list-style-type: none"> • \$4,200 - interior and exterior lock sets, towel bars, tp holders, etc |

EXHIBIT B - SPECIFICATIONS - PART ONE

Division A - General Conditions

A.1 Architectural The contractor shall pay, and has included in the contract estimate all necessary fees to purchase building plan copies.

A.2 Permits and Fees The Contractor shall pay, and has included in the contract estimate, all necessary business license fees due either at the project site or the contractor's office.

A.3 Insurance/Legal The Contractor shall pay, and has included in the contract estimate, all necessary fees to maintain general liability, and workman's compensation insurance through the duration of the Work. Copies of policy to be provided before work commences.

A.4 Professional Fees The Contractor shall pay, and has included in the contract estimate, all necessary fees to provide surveys as required by the owner's lender and local building department officials.

A.5 Temporaries The Contractor shall pay, and has included in the contract estimate, all necessary fees to provide temporary toilet facilities, and other necessary utilities at the project site, throughout the duration of the Work.

A.6 Equipment Rental The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the rental of equipment not owned by the Contractor or his subcontractors.

Division B - Site Preparation

B.1 Termite Pretreatment The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of termite soil treatment.

B.2 Site Clearing The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense to clear necessary trees and to scrape the building area and dispose of the debris.

Division C - Excavation

C.1 Site Drainage/Grading The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of backfilling footing areas after foundation and block work and providing adequate drainage as per code.

Division D Concrete

D.1 Batterboards/Footings/Steel The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of excavating, forming, laying and tying horizontal and vertical steel reinforcement, and the installation of necessary straps and bolts as per plans and specifications.

D.2 Concrete Footings The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of labor and materials to pour the concrete footings.

D.3 Rebar The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of labor and materials for the reinforcement of the footings. Reinforcement will be in accordance with drawings.

Division E Masonry

E.1 Masonry Walls The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to construct the concrete block foundation walls, as shown on the drawings.

E.2 Brickwork or Stucco The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install a three layer, smooth, masonry coating on the exterior of the foundation walls, piers, and house as per the drawings. The finish layer will consist of a pigmented, synthetic or nonventional coat of the Owners color choice. Conventional color beyond those readily available will require an upcharge.

E.3 Lentils, Sand, Mortar The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials for sand, mortar, lentils, wire reinforcement, etc., necessary for the masonry process.

Division F Framing

F.1 Beams/Girders/Trusses The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials necessary to construct a 1st floor systems of 12" TJI 16" on center, and a 2nd floor system of 12" TJI at 16" on center, covered with 11/16" "Advantech" sheathing nailed and glued, per the drawings.

F.2 Exterior & Interior Walls The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials necessary to construct 1st and 2nd floor exterior walls of 2x6 studs with 7/16" O.S.B sheathing over the entire exterior. All interior walls of 2 x 4 construction, per the drawings.

F.3 Roof Assemblies The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials necessary to construct the roof system per plan.

F.4 Stair Framing The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of all labor and materials to cover the construction of the exterior and interior stairs as per drawings.

F.5 Porch Framing The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials necessary to construct the rough framing for the exterior porches and decks as per the architect's drawings.

F.6 Frame Labor The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of labor to frame the entire structure per the architects drawings.

F.7 Framing Hardware The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of framing hardware, nails, hangers, tie-down straps, etc.

Division H Roofing

H.1 Roofing The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install a shingle, 5-V crimp metal, or standing seam (all TBD) with all necessary drip edge, flashing, and ridge vent.

Division I Windows and Exterior Doors

I.1 Windows/Ext Drs The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install windows per the following specifications: double-hung or casement, as noted, aluminum clad, Low E, white, full screen, simulated divided light, windows as per the drawings. All exterior doors TBD.

Division J Plumbing Rough.

J.1 Water & Sewer Lines The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of materials and labor to install a sewer line from the residence to the sewer system and a water line from the meter to the residence.

J.2 Plbg Rough The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install all rough plumbing ready to accept finished fixtures, as shown on the drawings. Plumbing fixtures and fittings are not included in this cost category, but are included in Division W - Plumbing Finish.

Division K HVAC

K.1 Heat and AC The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install a Geothermal heating and air condition system.

K.2 HVAC - Venting The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install dryer vents for the laundry area and standard downdraft venting for the main level cooktop.

Division L Electrical Rough

L.1 Elect Rough The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install all rough electrical and hook-ups ready for installation of finished fixtures as shown on the drawings. The cost to furnish electrical fixtures are not included in this cost category, but are included in Division X - Electrical Finish.

Division M Exterior Trim

M.1 Ext. Trim The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install, handrails, porch columns, stairs, railings, porch screening, soffits, etc. as shown on the current drawings

Division N Siding

N.1 Siding The Contractor shall pay and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install Cedar Shake siding to all the sided areas of the house as per drawings.

Division O Insulation

O.1 Floor Insulation The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install R-19 insulation in each floor system.

O.2 Wall Insulation The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install R-13 insulation in all exterior walls.

O.3 Roof Insulation The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install R-30 insulation in all roof and ceiling areas.

O.4 Other Insulation The Contractor shall pay, and has included in the contract estimate and the schedule of values, the amount necessary to cover the expense of materials and labor to install R-11 Soundproofing insulation around all baths and in common walls that exist between bedrooms and "public" areas or hallways.

Division P Wall and Ceiling Finish

P.1 Drywall The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install ½" drywall on all walls and ceilings. All surfaces shall have a smooth finish.

Division Q Interior Doors and Hardware

Q.1 Int. Prehung Doors The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install interior prehung doors. Doors shall be solid core "Safe and Sound" or equal, 8-0", style TBD, solid masonite, and 1 3/8" thick on all doors except those to closets.

Q.2 Door Hardware The Contractor shall pay, and has included in the contract estimate, an allowance amount necessary to cover the expense of materials and labor to install interior and exterior door and miscellaneous hardware. This allowance amount is intended for the purchase of: deadbolts, locksets, slidebolts, doorstops, etc.

Division R Interior Trim

R.1 Trim for Int. Opngs The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install casing on all windows and doors, as shown on the current drawings.

R.2 Crown Molding The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install a 4 1/2" (1) part crown throughout the 1st floor. The laundry room and closets on the 1st floor will not receive any crown.

R.3 Baseboard The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install 10" base and cap type interior baseboard moldings on the first floor and second floor.

R.4 Closet Shelving The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of materials and labor to install custom wood or custom closet systems for bedroom closets.

R.5 Interior Stairs The Contractor shall pay, and has included in the contract estimate, the amount necessary to cover the expense of materials and labor to install interior stairs, treads, and handrails, as shown on the current drawings

Division S Cabinetry

S.1 Kitchen Cabinetry The Contractor shall pay, and has included in the contract estimate, an allowance amount to cover the expense of materials and labor to install cabinetry in the kitchen and bathrooms as per the drawings. This allowance amount is intended for the purchase and installation of all cabinetry, knobs, and accessories. Counter tops will be Granite or Marble of owners choice based on the counter top allowance.

Division T Tile and Glass

T.1 Ceramic Tile The Contractor shall pay, and has included in the contract estimate, an allowance amount to cover the expense of materials, to install ceramic tile in all bathrooms, and walk-in pantry room.

T.3 Glass and Mirrors The Contractor shall pay, and has included in the contract estimate, an amount to cover the expense of materials and labor to install plate vanity mirrors and Glass Shower enclosures in all baths except the powder room.

Division U Specialties

U.1 Bath Accessories The Contractor shall pay, and has included in the contract estimate, an allowance amount to cover the expense of materials to install bath accessories in all baths. The term bath accessories shall mean towel rods, tissue holders, robe hooks, soap holders, etc.

Division W Plumbing Finish

W.1 Plumbing Fixtures The Contractor shall pay, and has included in the contract estimate, an allowance amount to cover the expense of all plumbing fixtures and fittings, to include all showers, faucets, etc Hot water heaters and tub shower bases are part of this allowance.

Division X Electrical Finish

X.1 Electrical Fixtures The Contractor shall pay, and has included in the contract estimate, an allowance amount to cover the expense of all lighting fixtures, to include all fixtures, fans, exterior lights, etc. Recessed cans and smoke detectors are not part of this allowance.

Division Y Kitchen Appliances

Y.1 Kitchen Appliances The Contractor shall pay, and has included in the contract estimate, an allowance amount necessary to cover the expense of supplying and installing all kitchen appliances.

Division Z Painting

Z.1 Interior Painting The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of materials and labor to paint the interior of the residence pursuant to the following guidelines: apply one coat of top quality primer and two coats of top quality finish paint on all surfaces to receive paint. Interior walls to receive flat latex paint, interior wood trim and doors to receive semi-gloss oil paint. Top quality paint shall mean products manufactured by Glidden, Sherwin Williams, or equal, as approved by the Contractor. This contract does not include the amount necessary for the application of any type of wall finish that is not a standard flat finish paint. Owner will be permitted a total of four(4) color selections for wall paint and one(1) color selection for trim. Ceilings will be in white unless a change order is issued.

Z.2 Exterior Painting The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of materials and labor to paint the exterior of the residence pursuant to the following guidelines: apply one coat of top quality primer and two coats of top quality latex finish paint on all surfaces to receive paint. Top quality paint shall mean products manufactured by Glidden, Sherwin Williams, or equal, as approved by the Contractor.

Division AA Flooring

AA.1 Wood Flooring The Contractor shall pay, and has included in the contract estimate, an allowance to cover the expense of labor and materials to install and finish wood floors, finished with (3) coats of clear gloss polyurethane, on the entire first floor, up the stairs and the second floor.

Division BB Landscaping

BB.1 Final Grade The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of final grading at the site.

BB.2 Fencing The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of installing a temporary silt fence as necessary.

BB.3 Driveways A standard concrete drive will be poured as shown on the drawings.

Division CC Trash Removal

CC.1 Dumpsters The Contractor shall pay, and has included in the contract estimate and the schedule of values, an amount necessary to cover the expense of materials and labor to remove all construction debris from the project site.

CC.2 Interim Cleanup The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of materials and labor to keep the project site and residence clean during the performance of the work.

CC.3 Final Cleanup The Contractor shall pay, and has included in the contract estimate, an amount necessary to cover the expense of materials and labor to clean the project site and residence when all work is completed.

DRAFT AIA® Document A201™ - 1997

General Conditions of the Contract for Construction

for the following PROJECT:

(Name and location or address):

Project
University of Maine at Farmington

THE OWNER:

(Name and address):

University of Maine System acting through
University of Maine at Farmington

THE ARCHITECT:

(Name and address):

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- 2 OWNER
- 3 CONTRACTOR
- 4 ADMINISTRATION OF THE CONTRACT
- 5 SUBCONTRACTORS
- 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS
- 7 CHANGES IN THE WORK
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- 9 PAYMENTS AND COMPLETION
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- 12 UNCOVERING AND CORRECTION OF WORK
- 13 MISCELLANEOUS PROVISIONS
- 14 TERMINATION OR SUSPENSION OF THE CONTRACT

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

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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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.

§ 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 to bind 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 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.

§ 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 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.

§ 3.3 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.

§ 3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.

§ 3.3.3 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

§ 3.4.1 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.

§ 3.6 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.

§ 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.

§ 3.11 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.

§ 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. 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.

§ 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.

§ 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.

§ 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 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, 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 approval thereof.

§ 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 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. 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.

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.

§ 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 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.

§ 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.

§ 4.3.2 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 21 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, 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 persons; 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 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 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 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 reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 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.

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.

§ 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 was reasonably 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 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 these 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 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.

§ 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 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;
- .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.

§ 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.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Section 4.3.

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

ARTICLE 9 PAYMENTS AND COMPLETION

§ 9.1 CONTRACT SUM

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

§ 9.2 SCHEDULE OF VALUES

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

§ 9.3 APPLICATIONS FOR PAYMENT

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

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

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

§ 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location

agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

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

§ 9.4 CERTIFICATES FOR PAYMENT

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

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

§ 9.5 DECISIONS TO WITHHOLD CERTIFICATION

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

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

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

§ 9.6 PROGRESS PAYMENTS

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

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

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

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

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

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

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

§ 9.7 FAILURE OF PAYMENT

§ 9.7.1 If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

§ 9.8 SUBSTANTIAL COMPLETION

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

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

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

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

§ 9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

§ 9.9 PARTIAL OCCUPANCY OR USE

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

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

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

§ 9.10 FINAL COMPLETION AND FINAL PAYMENT

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

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

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

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

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

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

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

§ 10.1 SAFETY PRECAUTIONS AND PROGRAMS

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

§ 10.2 SAFETY OF PERSONS AND PROPERTY

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

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

§ 10.2.2 The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

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

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

§ 10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 3.18.

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

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

§ 10.3 HAZARDOUS MATERIALS

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

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

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

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

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

§ 10.6 EMERGENCIES

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

ARTICLE 11 INSURANCE AND BONDS

§ 11.1 CONTRACTOR'S LIABILITY INSURANCE

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

- .1 claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;
- .2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
- .3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;

- .4 claims for damages insured by usual personal injury liability coverage;
- .5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;
- .7 claims for bodily injury or property damage arising out of completed operations; and
- .8 claims involving contractual liability insurance applicable to the Contractor's obligations under Section 3.18.

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

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

§ 11.2 OWNER'S LIABILITY INSURANCE

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

§ 11.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE

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

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

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

§ 11.4 PROPERTY INSURANCE

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

§ 11.4.1.1 Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework,

testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss.

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

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

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

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

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

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

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

§ 11.4.5 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section 11.4.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

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

§ 11.4.7 Waivers of Subrogation. The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the

subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

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

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

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

§ 11.5 PERFORMANCE BOND AND PAYMENT BOND

§ 11.5.1 The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

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

ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

§ 12.1 UNCOVERING OF WORK

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

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

§ 12.2 CORRECTION OF WORK

§ 12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION

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

§ 12.2.2 AFTER SUBSTANTIAL COMPLETION

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

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

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

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

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

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

§ 12.3 ACCEPTANCE OF NONCONFORMING WORK

§ 12.3.1 If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

ARTICLE 13 MISCELLANEOUS PROVISIONS

§ 13.1 GOVERNING LAW

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

§ 13.2 SUCCESSORS AND ASSIGNS

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

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

§ 13.3 WRITTEN NOTICE

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

§ 13.4 RIGHTS AND REMEDIES

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

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

§ 13.5 TESTS AND INSPECTIONS

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

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

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

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

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

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

§ 13.6 INTEREST

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

§ 13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

§ 13.7.1 As between the Owner and Contractor:

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

Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and

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

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

§ 14.1 TERMINATION BY THE CONTRACTOR

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

- 1 issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped;
- 2 an act of government, such as a declaration of national emergency which requires all Work to be stopped;
- 3 because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- 4 the Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Section 2.2.1.

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

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

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

§ 14.2 TERMINATION BY THE OWNER FOR CAUSE

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

- 1 persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- 2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- 3 persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or
- 4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

§ 14.2.2 When any of the above reasons exist, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the

Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 accept assignment of subcontracts pursuant to Section 5.4; and
- .3 finish the Work by whatever reasonable method the Owner may deem expedient. Upon request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

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

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

§ 14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

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

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

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract.

§ 14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

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

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

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.