

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2007-CP-42-296
Appellate Case No. 2014-001151

Nationwide Mutual Insurance Company,
and Gilliam Construction Company, Inc..... Respondents,

v.

Eagle Windows & Doors, Inc., ... Appellant.

RECORD ON APPEAL, VOLUME I

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SC Court of Appeals

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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Nationwide Mutual Insurance Company
And Gilliam Construction Company Inc.

Plaintiff,

vs.

Eagle Windows & Doors, Inc.

Defendant.

IN THE COURT OF COMMON PLEAS
CA#: 2007-CP-42-296

ORDER OF JUDGMENT

Date of Trial: December 9, 2013

Presiding Judge: The Honorable J. Mark Hayes

Attorney for Plaintiff: Jason M Imhoff

Attorney for Defendant: G. Dana Sinkler

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I. PROCEDURAL HISTORY

This case arises out of an arbitration proceeding commenced by Renaul Abel and Karen Abel against Gilliam Construction Company, Inc., alleging defective construction and/or materials in the home built for them by Gilliam Construction Company, Inc. located at 4 Lobelia Way in Landrum, South Carolina at the Cliffs of Glassy. Defendant, Eagle Windows & Doors, Inc. was invited to participate in that arbitration proceeding but elected not to participate. The underlying arbitration claim was settled prior to the arbitration and a release was executed between Gilliam Construction Inc., Nationwide Mutual Insurance Company, and Renaul and Karen Abel. That release expunged the

liability of Eagle Window and Door, Inc. The entire settlement amount was \$235,000.00 which was paid by Gilliam Construction Inc., and its insurer Nationwide Mutual Insurance Company. Nationwide Mutual Insurance Company contributed \$200,000.00 and Gilliam Construction Company, Inc., contributed \$10,000.00 in cash and wrote off \$25,000.00 still owed to Gilliam Construction Company, Inc., by Renaul and Karen Abel. Thereafter, Gilliam Construction Company, Inc. (hereinafter "Gilliam") and Nationwide Mutual Insurance Company (hereinafter "Nationwide") brought this contribution claim against Eagle Window and Door Inc., to recover the settlement amount paid to Renaul and Karen Abel. Window and Door Concepts, Inc., Charles Goad, Hobbit Plastering, Inc., Phillip Bender, Upstate Waterproofing Inc., and M. Dale Coleman were dismissed from the case prior to trial.

II. FACTS, EVIDENCE, AND TESTIMONY

A. Stipulations

Both Plaintiff and Defendant stipulated to the admissibility of several documents.

Among the documents admitted were the following:

1. Affidavit of Stephen Perry;
2. Eagle's Answers to Plaintiff's Interrogatories date 10/28/2011;
3. Corrected affidavit of Andrew Wickham;
4. Eagle Window and Door websites dated 09/06/2007, 04/17/2007, and 09/06/2007;
5. Eagle Window's responses to Plaintiff's Request to Admit dated October 18, 2011.

Those documents include the following:

A. Eagle Website

The business presently known as Eagle Windows was founded as Cardaco and Company in 1886. It progressed "through this vast series of name changes" and "eventually became Caradco in 1958." At the time "it remained one of the largest Window and Door Manufactures in the country..."¹ Thereafter, Eagle was sold to Masco Corporation in 1987 and then to American Architectural Products Corporation in 1996.² In 2000, Eagle moved to a brand new 39,000 square foot manufacturing facility and continued manufacturing aluminum clad wood windows and doors.³ In 2001, American Architectural Products Corporation filed for bankruptcy and sold "it's only profitable company" to Linsalata Capital Partners in April of 2002. During this time period, President and CEO, David Beeken worked at Eagle from high school through present day, including guiding Eagle through the bankruptcy of 2002.⁴ "Throughout this tumult, one of Eagle's consistent aspects has been Beeken's leadership and commitment. His guidance has kept employees motivated and eager to make Eagle soar."⁵

Linsalata bought Eagle in 2002, and "to a great extent takes a handoff approach to running a successful companies like Eagle Window & Door".⁶ "We work closely with management teams in developing and buying into the strategies, but it is up to management to utilize that strategy and manage that capital wisely to grow the business...without the appropriate level of autonomy it would be difficult for the team to approach that".⁷

¹ Eagle Window and Door website history 09/06/2007.

² Eagle Window and Door website history 09/06/2007.

³ Eagle Window and Door website history 09/06/2007.

⁴ Eagle website news and announcements 04/17/2007.

⁵ Eagle website news and announcements 04/17/2007.

⁶ Eagle window July 10, 2002 news and announcements 09/06/2007.

⁷ Eagle window July 10, 2002 news and announcements 09/06/2007.

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B. Affidavit of Stephen B. Perry

The affidavit of Stephen B. Perry indicated that he personally met with and was the successful bidder to purchase Eagle and Taylor doing business as Eagle Window and Door Inc., on April 15, 2002 through EWD Acquisition Company. On April 30, 2002, EWD Acquisition Company changed its name back to Eagle Window and Door Inc. Prior to the sale David Beeken was the president of Eagle Window and Door Inc., Charles Daoud was the executive vice president of Eagle Window and Door Inc., Steven R. Stoppelmoor was the vice president of finance for Eagle Window and Door, Inc., Ronald Vander Weerd was the vice president of engineering for Eagle Window and Door Inc., and Andrew Wickham was the controller for Eagle Window and Door, Inc. All of those individuals remained in their positions during and after the sale. Further David Beeken was added as a director of Eagle Window and Door, Inc. David Beeken, Charles Daoud, Ronald Vander Weerd, and Andrew Wickham were also shareholders.

C. Affidavit of Andrew Wickham

The corrected affidavit of Andrew Wickham indicated that he is the financing business integration manager for Eagle Window and Door Manufacturing Inc. formerly known as EWD Acquisition Company and Eagle Window and Door. Again, Mr. Wickham's affidavit indicated that Charles Daoud, Ronald Vander Weerd, Steven R. Stoppelmoor, David Beeken and Andrew Wickham were all officers of Eagle prior to and after the sale. David Beeken also became a director of Eagle Window and Door Inc., sometime prior to January 27, 2003.

D. Discovery

Defendant's responses to requests for admissions dated October 18, 2011 admit that Mr. Beeken was the president of Eagle and Taylor Company doing business as Eagle Window and Door Inc., from 2000 through May 6, 2002. After May 6, 2002, Mr. Beeken was the president of Eagle Window and Door Inc. and subsequently became the president of Eagle Window and Door Manufacturing Inc. when it changed its name again on April 1, 2007. Mr. Beeken has been the president of Eagle Windows & Doors, Inc, in every incarnation, from 2000 to present.

The application form and certificate of authority of the Secretary of State of Iowa indicated that EWD Acquisition Company was created on April 10, 2002. It indicated that David Beeken, Charles Daoud, Steven R. Stoppelmoor, Ronald Vander Weerd, Gregory Taber, and Andrew Wickham were all directors and officers of EWD acquisition company.

Defendant's answers to interrogatories dated October 28, 2011 indicate that the above officers and directors were officers and directors from 2000 through the present day. Those discovery responses also indicated that David Beeken, Andrew Wickham, Ronald Vander Weerd, Charles Daoud, and Steven R. Stoppelmoor were shareholders of Eagle Windows prior to and after the sale of the company.

E. Testimony

In addition to the documents admitted by stipulation, Plaintiffs called three witnesses: Phillip Gilliam, Cindy Thomas, and Randy Still.

1. Testimony of Phillip Gilliam

Phillip Gilliam is the owner of Gilliam Construction Company. Mr. Gilliam testified about his construction with Renual Abel, the issues with the home, and the

5 *[Signature]*

subsequent lawsuit and arbitration. He testified that he purchased windows which were manufactured by Eagle Windows and Doors at the direction of Mr. Abel. Based upon his investigation, the investigation of experts, and water testing done on the house, it was determined that the windows purchased from Eagle Windows and Doors were defective and leaking. Mr. Gilliam testified that his contract with Mr. Abel required him to provide the Abels with a house free from defects. As the home contained defective windows, he was forced to defend himself in arbitration and ultimately settled the case. During the arbitration proceedings, Eagle Windows and Doors was offered an opportunity to participate and defend its Windows. They refused to do so.

During the investigation, testing was done on the windows. Eagle Windows and Doors was invited to attend and participate. Eagle Windows and Doors sent a technician who did not participate but observed the water testing. That person made no suggestions, complaints, or otherwise criticized the water testing at all. The results of the water testing on the windows indicated that the windows were defective and leaked. Due to the defective windows water was able to migrate behind the stucco on the home and destroyed and damaged framing and sheathing on the home. A substantial repair was necessary to repair the home due to those windows. Instead of removing and replacing all of the windows, the stucco, and the damaged framing of the home a scope of repair was created to repair any damaged framing and sheathing and created a copper window dam which would collect and expel any water running through the windows to the outside of house. Mr. Gilliam testified that this was a much cheaper, efficient and reasonable manner to repair the issues with the windows.

Mr. Gilliam further testified that any repair of the stucco and the window rough openings was necessitated due to the defective and leaking windows. Further, Mr. Gilliam testified that he and his company fulfilled their obligations as a general contractor because they did not know and could not have known that the windows selected by Mr. Abel were defective and would leak. He testified that the windows were installed pursuant to code and industry-standard and the installation of the stucco was installed and applied pursuant to industry-standard. Based upon his investigation and analysis, Mr. Gilliam testified that he attributed 100% fault for the repair to the defective windows and attributed no-fault for the repair to Gilliam or any other party.

Mr. Gilliam testified that the settlement was reasonable. He testified that the Abel's demand was in excess of \$250,000. Based upon the demand and the fact that the windows were defective, the case was settled with the Abels for \$235,000: Nationwide paid \$200,000 cash, while Gilliam Construction paid \$10,000 cash from Gilliam Construction, and waived \$25,000 owed by the Abels to Gilliam Construction. A release was drafted and executed which extinguished the liability of Eagle Windows and Doors. Thereafter, the contribution suit was filed to recover from Eagle Windows and Doors.

Mr. Gilliam testified that other parties were sued in contribution for damages separate from the \$235,000.00 settlement. He testified that Coleman Waterproofing was sued for a \$5,000.00 repair to below grade waterproofing which was paid for directly by Gilliam Construction Company. That \$5,000.00 was not included in the scope of repair implemented by the Abel's and was not a basis for the Abels \$250,000.00 demand to Gilliam or the \$235,000.00 settlement and should not be included in this contribution action. He testified further that any other Defendants in the contribution action were

similarly unrelated to the \$235,00.00 settlement and their separate settlements and prior participation in the contribution action should not count against the \$235,000.00 settlement.

Mr. Gilliam testified that his investigation revealed that Eagle Windows and Doors no longer considered itself Eagle Windows and Doors. Despite his knowledge of the construction industry and the materials used therein, he had never been notified at any point until after the lawsuit was filed that Eagle Windows and Doors had been "sold" to a new company and no longer honored its products manufactured prior to that sale. He honored the warranties on those products.

2. Testimony of Cindy Thomas

Cindy Thomas is an adjuster for Nationwide Mutual Insurance Company. She testified that a lawsuit was filed by the Abels against Nationwide insured Gilliam Construction Company. After investigation, defense, and analysis and consultation with defense counsel, Nationwide determined that the best course of action was to settle the case for \$200,000. Phil Gilliam added an additional \$10,000 in cash and waived \$25,000 owed to it by the Abels. Based upon her experience and knowledge of the file, she believed that the settlement was reasonable. She also testified that the release executed was drafted to expunge the liability of Eagle Windows and Doors.

3. Testimony of Randy Still

Randy Still testified on behalf of Plaintiffs although he was originally hired by the Abels to testify against Gilliam Construction. Randy Still is a professional engineer who worked with H2L Consulting Engineers. After giving his education, experience and

qualifications he was admitted as an expert in residential construction, building products, and building envelopes.

Mr. Still testified that he was hired by Gilliam Construction Company to investigate the allegations of construction defects at the Abel house. During his investigation a water test was performed on the windows to determine if they were leaking. The manufacturer of the windows, Eagle Windows and Doors was invited to participate. Although a representative of Eagle Windows and Doors attended the water testing they did not participate or add any observations or suggestions. The water testing on the windows revealed that the windows leaked, were defective, and caused damage to the framing and sheathing behind the stucco. Based upon that investigation and testing Mr. Still offered testimony that the windows were defective. He further testified that damage occurred due to the leaking windows which necessitated removal of stucco to repair the windows and damaged framing, repairs to the rough opening windows, and repair to damaged sheathing.

Mr. Still prepared a scope of repair which limited the amount of stucco removed so that the windows could be fitted with a copper window dam under each window which would collect and exit the water out of the building envelope. All damage was located and repaired. He testified that his scope of repair was the most efficient and economical repair and it was used by the Abels to repair the home.

Mr. Still also testified that Gilliam Construction did not breach any construction standard which caused any of the damages at the Abel household. He testified that a general contractor has a duty to oversee, coordinate, and supervise sub-contractors. The general contractor also has the obligation to select and purchase quality non-defective

materials. In his opinion, Mr. Still believed that Gilliam construction could not have suspected or known that the windows selected by Abel were defective and leaking. He testified that the defective windows were 100% at fault for all of the damage to the Abel house.

Randy still testified that reports of other experts, including Construction Science and Engineering and Summit Engineering, supported those findings. Both of those reports found that the windows were leaking and caused the damages. Randy still introduced photographs of the leaking windows, the installation of the windows, and the damage caused by the Windows.

III. FINDINGS OF FACT

Based upon the above, and defendant's failure to introduce any evidence, the court finds as follows:

1. The predecessors and successor Eagle companies shared directors, officers, and shareholders.
2. Eagle Windows and Doors, throughout its numerous incarnations and name changes, made no effort to notify the general public that it no longer considered itself Eagle Windows and Doors of the early 2000's. It made no effort to notify the public that it could not be sued for and was not responsible for any products sold prior to 2002. It did not notify customers that it was a brand-new company and not the 100 year old Eagle window manufacturer.
3. Gilliam Construction Company entered into a contract with Mr. and Mrs. Abel which required that the home built by Gilliam Construction Company be free from defects.

4. Gilliam Construction Company could not and did not know that the Windows sold to it by Eagle Windows and Doors were defective and leaked.
5. The windows were properly installed in the Abel home.
6. The windows leaked and caused damage to the sheathing and framing behind the stucco at the home.
7. The leaking windows in the home gave rise to an actionable claim by the Abels against Gilliam Construction Company for repair to the home and windows.
8. The contract between Mrs. and Mr. Abel and Gilliam required repair of the windows and damages to the Abel home.
9. Gilliam Construction Company invited Eagle Windows and Doors to participate in the investigation of the window defects and the scope of repair. Eagle Windows and Doors refused to participate in the investigation.
10. The Abels retained Randy Still of H2L Engineering to investigate the claims of construction defects at the Abel home and create a scope of repair that was economical and efficient.
11. Randy Still found that defective windows required repairs and he created a scope of repair which was economical, efficient, and implemented by the Abels
12. The Abels demanded over \$250,000 from Gilliam Construction Company and Nationwide Mutual Insurance Company.
13. Nationwide Mutual Insurance Company and Gilliam Construction Company made a reasonable decision to settle the case for \$235,000.
14. The defective windows were completely at fault for the construction defects and damages to the Abel's house which required the expenditure of \$235,000.

15. Gary Churchill, Hobbit plastering, Coleman waterproofing and any other prior defendants and their settlements, if any, were unrelated to the \$235,000 settlement between Gilliam Construction Company and Abel.

IV. FINDINGS OF LAW

A. SUCCESSOR LIABILITY

I find that defendant, Eagle Windows, is a mere continuation of its predecessor corporation. In South Carolina, a plaintiff may maintain a state-based product liability claim under successor liability theory against a successor corporation which purchased a predecessor's assets in a voluntary sale approved by the Federal Bankruptcy Court. Simmons v. Marklift Industries, Inc., 366 S.C. 308, 622 S.E.2d 213 (2005); Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924). The South Carolina Supreme Court in Brown stated:

In the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless (1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrants a finding of a consolidation or merger of the two corporations, (3) the successor company was a mere continuation of the predecessor, or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims. Id. at 123 S.E.2d 97 (emphasis added). A successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, or shareholders. Simmons v. Marklift Industries, Inc., 366 S.C. 308, 313, 622 S.E.2d 213, 216 (2005).

The South Carolina Supreme Court has approved the instigation and continuation of a state based products liability action despite a Federal Bankruptcy Court Order prohibiting the action. Id. Regardless of the reasoning the Court used to deal with the issues of Full Faith and Credit, preemption and retention of jurisdiction, it is clear that the South Carolina Supreme Court will not honor or enforce a Federal Bankruptcy Court Order limiting South Carolina citizen's rights to sue a successor corporation in a state based liability case if that citizen can show that the successor is a mere continuation of the predecessor.

This decision is in line with the majority of other jurisdictions and comports with the doctrines of fairness and justice. Justice Burnett strenuously opined that the stroke of a corporate pen or blind adherence to unfair rules out of touch with modern realities did not promote justice or allow intelligent adjudication of issues which touched upon the Bankruptcy Court's perceived jurisdiction. Justice Burnett stated: [t]he corporate fiction and the rules surrounding it have been of inestimable service in the affairs of business, but they must be applied in such a manner as to promote justice, not to hinder or defeat it. Id. at 323 (citing Long v Carolina Baking Co., 190 S.C. 367, 377, 3 S.E.2d 46, 50 (1939)).

In the case at bar, the Court finds that a review of Eagle's own website establishes that Eagle is a mere continuation of its predecessor corporation. The President and CEO of Eagle, David Beeken, held the same position with the company prior to and after the sale. It is clear from that marketing material that Eagle considers itself a separate and autonomous entity which has designed and manufactured windows in the same city for a century and a half, despite its numerous parent companies. Eagle's parent company, Linsalata, is merely an investment firm which takes a "hands off" approach when dealing with Eagle. Based on the website alone, it is evident that Eagle's present incarnation is a

mere continuation of its former self and Eagle benefits from that name recognition and history.

As set forth above, a successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, or shareholders. Simmons v. Marklift Industries, Inc., 366 S.C. 308, 313, 622 S.E.2d 213, 216 (2005). Based on the language used by the Court in Simmons, to prove that a "mere continuation" exists, a party need only show that the successor corporation has substantially the same officers, directors or shareholders; thus, proving that a successor corporation has substantially the same officers is sufficient to prove a mere continuation. Id.

Eagle's President, David Beeken, was the President of Eagle prior to and after the sale. Further, prior to and after the sale, the following individuals were officers of Eagle & Taylor Company d/b/a Eagle Window and Door, Inc.: Charles A. Daoud, David Beeken, Steven R. Stoppelmoor, Ronald Vander Weerd and Andrew Wickham.

Thus, post-sale, of the eight officers appointed to represent Eagle, five of the eight were officers of pre-sale Eagle. Specifically, individuals that were officers of Eagle prior to the bankruptcy sale held the following positions at Eagle post-bankruptcy: President, Vice President, Vice President of Finance, Vice President of Engineering and Controller. This information alone establishes that Eagle is a mere continuation of its predecessor as the successor is made up of substantially the same officers. Based upon the fact that Eagle is made up of substantially the same officers, under the standards set forth in Brown and Simmons, Eagle's successor corporation should be liable for its predecessor's product defects.

Eagle, by the stroke of a pen, attempted to end its liability globally, totally, and permanently by merely changing owners. Eagle was not forced into bankruptcy by economics, but rather was dragged through it by its parent company's bankruptcy. As such, the ordinary purpose of bankruptcy was not present for Eagle. Ordinarily bankruptcy's purpose is to provide the debtor with a fresh start, freeing it from the obligations and responsibilities consequent upon financial misfortune so that it may continue to survive. CJS Bankruptcy § 2. In this case, Eagle was American's only profitable company. Eagle did not require the intervention of the Bankruptcy Court or the protection afforded by it. Therefore, it should not be allowed to use its parent company's fortuitous bankruptcy as a sword with which to sever its entire pre-bankruptcy obligations. This would not serve justice, but would rather hinder or defeat it. Justice Burnett, citing another case with similar facts cited the strong language used by that Court:

The [successor's] position does not appeal to us; it is an attempt to dodge the damages that [the plaintiff] has sustained by a quirk and technical question of law, and smacks too much of a skin game, and hand stacked and dealt to dealer from the bottom of the deck...By its action [the successor] has allowed the [predecessor] to go out of existence and now proposes to let the [plaintiff] whistle for his money, and by its technicality, which would besmirch the character of any honest man, smacks its lips and licks its chops and congratulates itself on its shrewdness in avoiding its payment of a just claim.

Id. at 318 (citing *Brabham v. Southern Express Co.*, 124 S.C. 157, 117 S.E. at 368 (1922)).

Eagle focuses on Linsalata and the officers, shareholders or directors of Linsalata. Linsalata is not a party to this action. Plaintiffs sued Eagle, not Linsalata. Eagle is the

proper entity that should be analyzed in determining that Eagle is a mere continuation of Eagle.

The Court finds that Eagle Windows and Doors continued to occupy the same space, manufactured the same products with the same employees, and marketed, manufactured, and continues to sell the same products under the same company name.

I find that the Defendant accepted the goodwill and name recognition of the Eagle Window brand but has specifically attempted to extinguish any potential liability arising from that goodwill despite their complete failure to notify owners of Eagle Windows and Doors windows manufactured, marketed, and sold prior to April 2002 that it no longer honored those products or claimed them as its own.

I find that the analysis of whether the Brown and Simmons courts intended the analysis to require officers and directors or officers or directors is unnecessary because the Plaintiffs have proven, and the Defendant has not refuted, that officers, directors, and stockholders remained in the successor corporation from the predecessor corporation. Specifically, President and Director of both the predecessor and successor corporation was David Beeken. Therefore, this Court finds commonality of officers, directors, and stockholders in both the predecessor and successor sufficient to satisfy the mere continuation exception.

B. CONTRIBUTION

I find that a proper action for contribution was filed by Gilliam Construction Company and Nationwide Mutual Insurance Company under South Carolina Code Ann § 15-38-20. I further find that Plaintiffs expunged Defendant's liability through a release and the settlement was reasonable. I find that only two parties, Plaintiffs Nationwide

Mutual Insurance Company and Gilliam Construction and Defendant Eagle Window create the number of shares for a pro rata analysis of liability under the Contribution Act. Based upon principles of equity and fairness, the testimony and evidence, which was unrefuted by defense witnesses or evidence, and the Act I find that the entire \$235,000 settlement is attributable solely to Eagle Windows and no other prior party or settlement should increase the number of parties for pro rata calculations or reduce the amount of the total damage.

The right of contribution exists in favor of a tortfeasor who has paid more than his pro-rata share of a common liability. The tortfeasors total recovery is limited to the amount paid by him in excess of his pro rata share. S.C. Code Ann § 15-38-20. The right to contribution exists only when a settling tortfeasor extinguishes the liability of the noncontributing tortfeasor by settlement. Further, a tortfeasor is not entitled to contribution for any amount paid in settlement which is in excess of what was reasonable. S.C. Code Ann § 15-38-20.

Based upon the Act, the evidence indicates that Plaintiffs paid more than their fair share of a common liability. Further, evidence was submitted that established that Plaintiffs extinguished Defendant's liability through a settlement and release and that settlement was reasonable and necessary.

The Court's determination of shares of liability is supported by the evidence and testimony and the language of the Act. For the purpose of determining shares of liability toward contribution under the Uniform Contribution Among Tortfeasors Act of 1955, if equity so requires, the collective liability of some tortfeasors as a group will constitute a single share. American Law Products Liability 3d. § 52:55. In determining the pro rata

shares of tortfeasors in the entire liability, the Court may consider, if equity requires, the collective liability of some as a group shall constitute a single share and principles of equity. S.C. Code Ann. 15-38-30.

The evidence and testimony support a finding that Eagle Window's defective windows were the sole cause of the damage and needed repairs. The record reflects that all prior defendants were dismissed from the action prior to trial. The testimony of Phillip Gilliam was that the prior defendants had liability and damages separate and apart from the liability and damage alleged against Eagle Window and therefore should not be included in the determination of shares of liability. Further, the testimony was that any prior settlements should not reduce the amount of damages because they were settlements unrelated to the liability and damages alleged against Eagle. Based on this testimony and evidence, and absent testimony or evidence to the contrary, the Court finds that the prior defendants should not be included in the determination of shares of liability or reduction in damages. Therefore, any joint liability for the settlement paid to Mr. Abel should be divided pro rata equally between Plaintiffs and Defendant.

V. DAMAGES

Based upon the above findings of fact and law the court awards \$117,500.00 in this contribution action against Eagle Window. Additionally, the law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and if the sum is certain or capable of being reduced to certainty." Smith-hunter Const. Co., v. Hopson, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005). "The fact that the sum due is disputed does not render

the claim unliquidated for the purposes of an award of prejudgment interest." *Id.* "The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." *Id.*

In this case, as set forth in the Complaint and as established at trial, the measure of recovery was fixed on the date the Complaint was filed. The measure of recovery was fixed by the conditions set forth in the settlement agreement between Plaintiffs and Renaul and Karen Abel. Thus, as the Court found in Smith-Hunter Const. Co., Inc., the amount of damages in this case owed to Plaintiffs were "capable of being reduced to a sum certain." *Id.* The Court hereby finds that Plaintiffs are entitled to pre-judgment interest from the date the Complaint was served upon Defendants on February 2, 2007, to the date this Court ruled on this matter, December 19, 2013.

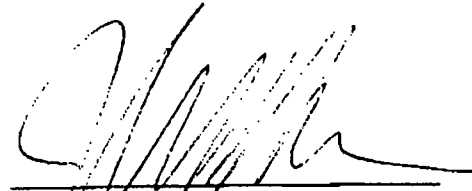
Pursuant to S.C. Code Ann. § 34-31-20, the legal interest shall be at the rate of eight and three-fourths (8.75%) percent per annum. Thus, the Court awarded damages to Plaintiffs in the amount of \$117,500.00. Plaintiffs are entitled to 6 years and 10 months worth of pre-judgment interest (82 months). Thus, Plaintiffs are entitled to pre-judgment interest in the amount of \$70,258.42.

Thus, the full judgment awarded to Plaintiffs is **\$187,758.42**.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiffs be awarded the amount of \$187,758.42 which is hereby granted and that judgment be entered on behalf of Gilliam Construction Company and Nationwide Mutual Insurance Company.

IT IS SO ORDERED.

~~April~~
March 29, 2014


The Honorable J. Mark Hayes
Seventh Judicial Circuit

2014 APR 29 PM 3:08

COPY

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Nationwide Mutual Insurance Company,
and Gilliam Construction Company,
Inc.

Plaintiffs,

vs.

Eagle Window, American Architectural
Products, Inc., Window and Door
Concepts, Inc., Charles Goad, Hobbit
Plastering, Inc., Phillip L. Bender,
Coleman Waterproofing, Dale Coleman,
and Gary Churchill,

Defendants.

IN THE COURT OF COMMON PLEAS

2007-CP-42-296
C.A. No.: _____

(Jury Trial Demanded)

COMPLAINT

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2007 JAN 26 AM 11:24
MARC KITCHENS

The above-named Plaintiffs, Nationwide Mutual Insurance Company and Gilliam Construction Company, Inc., complaining of the Defendants, Eagle Windows, American Architectural Products, Inc., Window and Door Concepts, Inc., Charles Goad, Hobbit Plastering, Inc., Phillip L. Bender, Coleman Waterproofing, Dale Coleman, and Gary Churchill, would respectfully allege and show unto the Court as follows:

1. The Plaintiff, Nationwide Mutual Insurance Company (hereinafter referred to as "Nationwide") is an insurance company organized and existing under the laws of one of the fifty states which conducts business in Spartanburg County, South Carolina. The Plaintiff, Gilliam Construction Company, Inc. (hereinafter referred to as "Gilliam"), is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Spartanburg County, South Carolina.

2. The Defendant, American Architectural Products, Inc. (hereinafter referred to as "American"), is a corporation organized and existing pursuant to the laws of the State of Delaware

and conducts business in the State of South Carolina. Upon information and belief, American is the parent company of Eagle Window and Door Concepts, Inc. which manufactured and sold windows to Gilliam Construction and/or Renaul Abel.

3. Defendant, Eagle Window and Doors Concepts (hereinafter referred to as "Eagle"), is a corporation organized and existing pursuant to the laws of the State of Delaware and is a corporation authorized and doing business in the State of South Carolina.

4. Defendant Hobbit Plastering, Inc. is a corporation organized and operating under the law of the State of Florida and conducting business in the State of South Carolina. Upon information and belief, Phillip L. Bender is the owner and/or principal of Hobbit Plastering, Inc. and is a resident and citizen of the county of Greenville, South Carolina.

5. Defendant, Upstate Waterproofing, Inc. d/b/a Coleman Waterproofing, is a corporation organized and existing under the laws of the State of South Carolina and located primarily in Greenville County, South Carolina. Upon information and belief, M. Dale Coleman is the owner and/or principal of Upstate Waterproofing, Inc. and is a resident of Greenville County, South Carolina.

6. Defendant, Window and Door Concepts, Inc. is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Greenville County, South Carolina. Upon information and belief, Charles Goad is the principal and/or owner of Window and Door Concepts, Inc. and is a citizen and resident of Spartanburg County, South Carolina.

7. Upon information and belief Defendant, Gary Churchill, is a resident and citizen of Tryon, North Carolina and regularly conducts business in the State of South Carolina and did so in regard to the allegations giving rise to this complaint.

8. This court has jurisdiction, both subject and personal, over all parties hereto and venue

is proper in the Spartanburg County Court of Common Pleas.

9. In 1999 and 2000, Renaul Abel and Karen Abel contracted with Gilliam Construction Company, Inc. to build a home at 4 Lobelia Way, Landrum, Spartanburg County, South Carolina. Subsequently, Gilliam Construction and Renaul and Karen Abel hired the above Defendants as subcontractors and material suppliers to provide labor and materials for the construction of the project.

10. After the project was completed, and the various above-named Defendants as subcontractors and material supplies, allegedly completed their work, Renaul and Karen Abel discovered alleged deficiencies and defects with the home. Thereafter, Renaul and Karen Abel invoked the arbitration clause of the construction contract with Gilliam Construction to force arbitration with Gilliam Construction related to those alleged deficiencies created by Defendants.

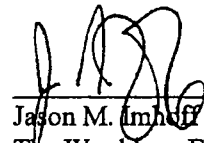
11. Among the alleged deficiencies were the Abel's allegations that the waterproofing was done improperly, the stucco application was deficient and defective, the framing and window installation was defective, and the windows were defective and leaking.

12. During the course of that arbitration litigation Gilliam invited all above-named Defendants to join the case and defend their work or product. No Defendant joined the arbitration litigation. After a lengthy period of discovery, settlement negotiations occurred. After a period of negotiation, Gilliam Construction settled with Renaul and Karen Abel for \$210,000.00 in addition to a waiver by Gilliam Construction of amounts still due and owing under the contract. Under the terms of that settlement, a settlement agreement was drafted through which Gilliam Construction and Nationwide Insurance would extinguish the liability of the above-named Defendants but expressly reserve their right to prosecute a contribution action against the at fault Defendants to recover contribution of the settlement amount. A copy of that settlement agreement is attached hereto as Exhibit "A".

13. The Plaintiffs are informed and believe that the payment of \$210,000.00 and the waiver of amounts still due and owing under the contract by Gilliam Construction affords them the right of contribution as provided for by S.C. Code Ann §15-38-20 in that the Plaintiffs and Defendants have a common liability to the Plaintiffs in the underlying action. They are informed and believe that by later settling the case for \$210,000.00 in addition to waiver of amounts still due and owing under the contract, and obtaining a full release in favor of all parties, including the above-named Defendants, they have paid a disproportionate share of this common liability and are therefore entitled to pursue this contribution claim against the above-named Defendants.

14. They are further informed and believe that they are entitled to a judgment against the above-named Defendants in the amount of \$250,000.00 together with interest thereon at the legal rate from the time they paid their disproportionate share of the liability until such time as a verdict is satisfied as provided for in S.C. Code Ann §15-38-20, 15-38-30, and 15-38-40.

WHEREFORE, Plaintiffs, Nationwide Mutual Insurance Company and Gilliam Construction Company, Inc., pray for judgment against Eagle Windows, American Architectural Products, Inc., Window and Door Concepts, Inc., Charles Goad, Hobbit Plastering, Inc., Phillip L. Bender, Coleman Waterproofing, Dale Coleman, and Gary Churchill, in the amount of \$250,00.00 together with interest thereon from March 21, 2006, until such time as this judgment is paid and satisfied together with the cost of this action and for any such other and further relief as this Court may deem just and proper.



Jason M. Imhoff (S.C. Bar No.: 69355)

The Ward Law Firm, P.A.

233 South Pine Street

Post Office Box 5663

Spartanburg, SC 29304

Telephone: 864-582-3075

Facsimile: 864-585-3090

Attorney for Plaintiffs Nationwide Mutual
Insurance Company and Gilliam Construction
Company, Inc.

Spartanburg, South Carolina
January 25th 2007.

EXHIBIT "A"

FHG Revisions

3.06.06

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

SETTLEMENT AGREEMENT AND
MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE is made this 24th day of March 2006 (the "Effective Date") by and between Plaintiffs, Renaul N. Abel and Karen V. Abel, and Defendants Gilliam Construction Company, Inc. and Phillip A. Gilliam

WHEREAS, Plaintiffs are the owners of real property located at 4 Lobelia Way (formerly Lot #207), Landrum SC 29356 (the "Property"); and

WHEREAS, Plaintiffs have alleged that Defendants were the general contractors for the Property; and

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WHEREAS, Plaintiffs have alleged the existence of certain construction related defects and damages in connection with the Property; including, but not limited to, deficiencies in the framing, window installation, stucco application, windows, paving, subgrade water barrier, generator, chimney, and flooring systems of the Property; and

WHEREAS, Plaintiffs acknowledge that Defendants paid subcontractors to complete most if not all of the above construction projects, but Plaintiffs assert that Defendants are responsible for the subcontractors who allegedly caused such defects; and

WHEREAS, Plaintiffs acknowledge that Defendants purchased the windows from a distributor and distributor received the windows from the manufacturer, but Plaintiffs asserts that Defendants are responsible for the results of defects in the windows in Plaintiffs' home; and

WHEREAS, Defendants deny that they are responsible for alleged defects, if any, and denies that Plaintiffs have suffered any damages resulting therefrom; and

WHEREAS, Plaintiffs have asserted claims against Defendants alleging damages resulting from the alleged construction defects; and

WHEREAS, Plaintiffs instituted an arbitration action in Spartanburg County,

WHEREAS, Plaintiffs and Defendants desire to fully, finally and forever compromise and settle all disputes currently pertaining between them, whether relating to the Property or not;

NOW THEREFORE, for and in consideration of the mutual promises contained herein, the parties agree as follows:

1. We, Renaul N. Abel and Karen V. Abel, individually and as husband and wife, for the consideration of Two Hundred Ten Thousand and No/100ths (\$210,000.00) Dollars to us in hand paid by Phillip Gilliam, Gilliam Construction Company Inc., and Nationwide Insurance Company, the receipt whereof is hereby acknowledged, do release and discharge, and by these presents do for ourselves, and any heirs, executors, administrators, personal representatives, successors and assigns release and forever discharge Phillip Gilliam, Gilliam Construction Company Inc., Nationwide Insurance Company, Eagle Windows, Window and Door Concepts and Charles Goad, Hobbitt Plastering and Phil Bender, Coleman Waterproofing and Dale Coleman, and Gary Churchill and their heirs, executors, administrators, successors, personal representatives, assigns, employers, employees, bailees, agents, subcontractors, partners, servants, insurers, sureties, and all other persons, firms, corporations, associations or partnerships, whether herein named or referred to or not, and who, as a result of their relationship with Defendants, may be liable to Plaintiffs and their heirs, successors and assigns, of and from any and all past, present and future claims, demands, debts, rights, actions, damages (including but not limited to, direct, indirect, incidental, statutory and consequential damages), costs, causes of action, suits at law or in equity, expenses and fees of attorneys, expenses and fees of consultants and/or experts in all claims of any nature or kind

whatsoever, now existing or which may hereafter accrue, whether known or unknown and from any and all manner of actions, causes of action, suits, debts, accounts, judgments, claims and demands whatsoever in law or equity as a result of, growing out of, or in any way connected with any and all damages to property resulting or to result or which might result in the future from construction of the house located at 4 Lobelia Way (formerly Lot #207), Landrum South Carolina 29356, and all activities, conduct, and communications attendant therewith for which damages to property we have claimed the said Phillip Gilliam, Gilliam Construction Company Inc., and Nationwide Insurance Company to be legally liable, which liability was and is expressly denied.

2. We, Phillip Gilliam and Gilliam Construction Company Inc., for the consideration of the mutual promises made herein by Renaul N. Abel and Karen V. Abel the receipt and sufficiency whereof are hereby acknowledged, do release and discharge, and by these presents do for ourselves, and any heirs, executors, administrators, personal representatives, successors and assigns release and forever discharge Renaul N. Abel and Karen V. Abel and their heirs, executors, administrators, successors, personal representatives, assigns, employers, employees, bailees, agents, subcontractors, partners, servants, insurers, sureties, and all other persons, firms, corporations, associations or partnerships, whether herein named or referred to or not, and who, as a result of their relationship with Plaintiffs, may be liable to Defendants and their heirs, successors and assigns, of and from any and all past, present and future claims, demands, debts, rights, actions, damages (including but not limited to, direct, indirect, incidental, statutory and consequential damages), costs, causes of action, suits at law or in equity, expenses and fees of attorneys, expenses and fees of consultants and/or experts in all claims of any nature or kind whatsoever, now existing or which may hereafter accrue, whether known or unknown and from any and all manner of actions, causes of action, suits, debts, accounts, judgments, claims and demands whatsoever in law or equity as a result of, growing out of,

or in any way connected with any and all damages to persons or property resulting or to result or which might result in the future from any amounts owed or allegedly owed by Plaintiffs to Defendants relating to the Property and allegedly defamatory remarks made by Plaintiffs about Defendants and all activities, conduct, and communications attendant therewith for which damages to persons and property we have claimed the said Renaul N. Abel and Karen V. Abel to be legally liable, which liability was and is expressly denied.

3. The parties further agree, as a consideration and inducement for this compromise settlement, that it shall apply to any and all unknown and unanticipated damages, defects, deterioration, mold, or any other damage, patent or latent, resulting from said construction, and/or from the allegedly defamatory remarks as well as to those now disclosed.

4. Plaintiffs hereby assign to Defendants any and all claims which may survive this release, which survival is expressly denied, against Eagle Windows, Window and Door Concepts and Charles Goad, Hobbitt Plastering and Phil Bender, Coleman Waterproofing and Dale Coleman, and Gary Churchill, and any other parties which may be responsible, whether in whole or in part, for the design, manufacture, installation or construction of the above mentioned alleged defects, or which may otherwise be liable for any of the damages alleged in the Arbitration action (hereinafter collectively referred to as "Third Parties") but said assignment does not revive any claims released by this document for purposes of avoiding a contribution action under S.C. Code Ann. §15-38-10, *et seq.* and Plaintiffs expressly state that all Third Parties' liability to it is extinguished by this settlement and release. Plaintiffs further agree to assist and cooperate with Defendants in the presentation and prosecution of any and all claims against such Third Parties to include all claims assigned by Plaintiffs and any and all claims otherwise available to Defendants, including but not limited to, claims for contribution and indemnity. Such cooperation shall include, but shall not to be

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limited to; Plaintiffs providing access to the Property, at reasonable times and upon reasonable advance notice to representatives, contractors, and experts of Defendants.

5. Plaintiffs expressly acknowledge and agree that this settlement and the consideration paid therefore shall completely discharge any common liabilities for Plaintiffs' alleged damages pursuant to Section 15-38-40(D)(1), South Carolina Code of Laws, 1976, as amended; and that said settlement and the consideration paid therefore shall completely extinguish all liability of Defendants to Plaintiffs and shall preserve Defendant's rights of contribution and indemnity pursuant to S.C. Code § 15-38-20(D). The foregoing language of this paragraph 4 is intended only to preserve, pursuant to the Contribution Among Tortfeasors Act, Defendants' rights against any person or entity not a party to this Agreement.

6. Plaintiffs and Defendants hereby acknowledge that this compromise and settlement is and shall be a complete bar to any subsequent action or proceeding to set aside or vacate this instrument because of a mistake in fact or otherwise.

7. Plaintiffs and Defendants declare and represent that they have read this agreement and acknowledge that they have the advice of counsel and that no promise, inducement, or agreement not herein expressed has been made to them and that this instrument contains the entire agreement between Plaintiffs and Defendants hereto and that the terms of the instrument are contractual and not a mere recital, and further, that if any paragraph or part of this agreement is found void or unenforceable, the remainder of this agreement shall not be affected.

8. This instrument shall be binding on all successors, partners, agents, insurers, subcontractors, servants, employees, heirs, purchasers and assigns of Plaintiffs and Defendants.

9. This agreement shall be construed in accordance with the laws of the state of South Carolina.

10. The parties further agree, as a consideration and inducement for this compromise settlement, that they have the sole right and exclusive authority to execute this release and to receive the sums specified herein and that they have not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to herein and each also agrees to defend, hold harmless and indemnify the other from any and all claims, demands, actions, causes of action or judgments of any type whatsoever which have been or may be brought by any parties asserting an interest in the settlement proceeds paid hereunder including any action brought by any party asserting any sort of subrogation claim or other lien, assignment or claim of any type whatsoever and they agree that they will indemnify the other and their heirs, successors and assigns for any amounts paid by them in connection with the assertion of any such claims whether these amounts are paid for settlement, verdict, defense costs, including attorneys' fees, or otherwise.

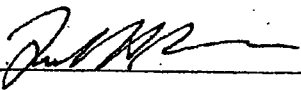
11. They further agree and understand that this settlement is a compromise of doubtful and disputed claims, and that payment is not to be construed as an admission of liability or wrongdoing by any party by whom liability is expressly denied and who have entered into this settlement agreement solely to avoid the trouble and expense of further litigation.

12. They further agree that this settlement and the amount of this settlement is confidential, and that they shall not discuss, reveal, publicize or otherwise make known or available any information concerning this settlement or the amount of this settlement other than to their financial or legal advisors as may be necessary to carry out our financial or legal affairs, to agencies of the government for income tax reporting purposes, by written agreement of the parties, upon an order of a court of competent jurisdiction, as necessary to give effect to the provisions of paragraphs 4 and 5 of this Agreement, or as otherwise required by subpoena or law. Providing information regarding this settlement or the amount of this settlement to anyone, including but not limited to any contractor,

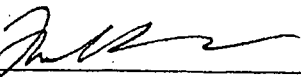
residents or agents of The Cliffs at Glassy, publisher, other attorney, representative of the media, journals, and/or periodicals in the absence of a court order or subpoena compelling the undersigned to do so is strictly forbidden unless in regard to the subsequent litigation referenced herein at paragraphs 4 and 5. The only exceptions to the foregoing shall be that (a) the undersigned will be allowed to discuss this settlement and the amount of this settlement when required to do so by legal process as set forth in this paragraph and (b) the undersigned may respond to questions from third parties asking about this matter with the specific phrase "It has been amicably settled" and no other. The parties acknowledge that this requirement of confidentiality is a material term of the settlement of this litigation and that any failure to fully and completely comply with the confidentiality requirement by one party shall render the breaching party liable to the other party for liquidated damages in the amount of Ten Thousand (\$10,000.00) Dollars. Additionally, if a party is required to initiate any action to enforce this confidentiality provision, the party, if successful, will be entitled to recover from the party breaching the obligation of confidentiality the reasonable costs of such action, including attorney's fees.

IN WITNESS WHEREOF, we hereunto set our hands and seal as of the Effective Date written above.

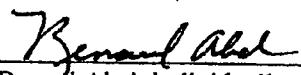
WITNESSES:



Emerson Steel



Emerson Steel



Renaul Abel, individually and as
husband of Karen Abel



Karen Abel, individually and as
wife of Renaul Abel

Tom Mideant
Amandall Gibbs

Gilliam Construction Company, Inc.

By: Phillip A. Gilliam

Its: PRESIDENT

Phillip A. Gilliam
Phillip A. Gilliam

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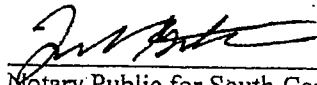
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My Commission Expires: 10/2/11

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

On this 21st day of March, 2006, before me personally came Karen V. Abel, individually and as wife of Renaul Abel, to me known and known to me to be the person who is described herein and who executed the foregoing instrument, and acknowledged to me that he executed the same, and that the same is his free act and deed.



Notary Public for South Carolina

My Commission Expires: 10/2/11

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STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

On this 18 day of ^{Mar} March, 2006, before me personally came Gilliam Construction Company, Inc., by and through its duly authorized officer, to me known and known to me to be the person who is described herein and who executed the foregoing instrument, and acknowledged to me that he executed the same, and that the same is his free act and deed.

D. M. A.
Notary Public for South Carolina

My Commission Expires: 8/30/11

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STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

On this 18 day of ^{May}~~March~~, 2006, before me personally came Phillip A. Gilliam, to me known and known to me to be the person who is described herein and who executed the foregoing instrument, and acknowledged to me that he executed the same, and that the same is his free act and deed.


Notary Public for South Carolina

My Commission Expires: 8/30/11

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STATE OF SOUTH CAROLINA)
)
COUTY OF SPARTANBURG)
)
NATIONWIDE MUTUAL)
INSURANCE COMPANY, INC.,)
and GILLIAM CONSTRUCTION)
COMPANY, INC.)

Plaintiffs,)

vs.)

EAGLE WINDOWS, AMERICAN)
ARCHITECTURAL PRODUCTS)
CORPORATION, WINDOW AND)
DOOR CONCEPTS, INC.,)
CHARLES GOAD, HOBBIT)
PLASTERING, INC., PHILLIP L.)
BENDER, UPSTATE)
WATERPROOFING, INC., DALE)
COLEMAN, and GARY)
CHURCHILL,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2007-CP-42-296

**ANSWER OF DEFENDANT EAGLE
WINDOW & DOOR, INC.**

The defendant, Eagle Window & Door, Inc. ("Eagle"), improperly designated as Eagle Windows in plaintiffs' complaint, answering the allegations of plaintiffs' complaint, alleges and says:

1. Eagle denies each and every allegation of said complaint herein after specifically admitted.
2. Eagle admits, on information and belief, the allegations of paragraph 1.
3. Eagle denies the allegations of paragraph 2.
4. Eagle denies the allegations of paragraph 3.

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5. Eagle admits, on information and belief, the allegations of paragraphs 4, 5, 6 and 7.

6. Eagle admits the allegations of paragraph 8.

7. Eagle admits the allegations of paragraph 9, but does not concede that the named defendants constitute the entire class of those sharing common liability for damages related to water intrusion.

8. Eagle admits, on information and belief, the allegations of paragraph 10, but does not concede that the named defendants constitute the entire class of those sharing common liability for damages related to water intrusion.

9. Eagle admits, on information and belief, the allegations of paragraph 11.

10. Eagle denies so much of paragraph 12 as alleges that all of the above-named defendants were invited to join in the arbitration litigation, but it admits, on information and belief, the remaining allegations of paragraph 12.

11. Eagle avers that paragraph 13 contains allegations of matters in law which this defendant is neither required to admit or deny.

12. Eagle denies the allegations of paragraph 14, constituting the remaining allegations of the complaint.

FURTHER ANSWERING SAID COMPLAINT AND AS ADDITIONAL
DEFENSES THERETO, EAGLE ALLEGES:
(Failure to State Cause of Action)
(No Successor Liability)

12. The windows alleged in the complaint to have been sold by Eagle Window and Door Concepts were sold prior to the time that this defendant, Eagle

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Window & Door, Inc., was incorporated and prior to the time that American caused the assets of its wholly owned subsidiary, Eagle & Taylor Company, d/b/a Eagle Window and Door, Inc., to be sold in Chapter 11 Bankruptcy proceedings in Ohio. The assets of Eagle & Taylor were initially sold to EWD Acquisition (EWD), a Delaware corporation, which changed its name to Eagle Window & Door, Inc.

FURTHER ANSWERING SAID COMPLAINT AND AS ADDITIONAL
DEFENSES THERETO, EAGLE ALLEGES:
(Sole Negligence of Plaintiffs)

13. The claims against Eagle are barred because the alleged damages suffered by the plaintiffs were solely due to and caused by the negligence, carelessness, recklessness, willfulness, and wantonness of the plaintiffs and/or their agents.

FURTHER ANSWERING SAID COMPLAINT AND AS ADDITIONAL
DEFENSES THERETO, EAGLE ALLEGES:
(Sole Negligence of Others)

14. The claims against Eagle are barred because the alleged damages suffered by the plaintiffs were solely due to and cause by the negligence, carelessness, recklessness, willfulness, and wantonness of an entity or entities other than Eagle.

FURTHER ANSWERING SAID COMPLAINT AND AS ADDITIONAL
DEFENSES THERETO, EAGLE ALLEGES:
(Intervening and Superseding Negligence and Recklessness of Others)

15. That the claims against Eagle are barred because, even if Eagle was negligent as alleged by plaintiffs, which is specifically denied, the intervening

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and/or superseding negligence of an entity or entities other than Eagle was the direct and proximate cause of the damages allegedly suffered by the plaintiffs.

FURTHER ANSWERING SAID COMPLAINT AND AS ADDITIONAL
DEFENSES THERETO, EAGLE ALLEGES:
(No Common Liability)

16. That the claims against Eagle for contribution are barred because there is no common liability between the defendants.

FURTHER ANSWERING SAID COMPLAINT AND AS ADDITIONAL
DEFENSES THERETO, EAGLE ALLEGES:
(Comparative Negligence and Recklessness)

17. That plaintiffs' injuries and damages are barred or, in the alternative, reduced proportionately pursuant to the doctrine of comparative negligence and recklessness.

FURTHER ANSWERING SAID COMPLAINT AND AS ADDITIONAL
DEFENSES THERETO, EAGLE ALLEGES:
(Economic Loss Rule)

18. That plaintiffs are not entitled to recover in tort for purely economic losses.

FURTHER ANSWERING SAID COMPLAINT AND AS ADDITIONAL
DEFENSES THERETO, EAGLE ALLEGES:
(Failure to Maintain)

19. That upon information and belief, plaintiffs in the underlying lawsuit failed to properly maintain the house and windows in question.

FURTHER ANSWERING SAID COMPLAINT AND AS ADDITIONAL
DEFENSES THERETO, EAGLE ALLEGES:
(Plans and Specifications)

20. That the type, kind, and brand of materials used in the construction of the house in question was developed, selected, and approved by the plaintiffs

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herein and their architects, general contractors, agents, servants, and employees, thereby relieving this defendant of any liability or responsibility for materials which may not have been suitable for incorporation into the house because of errors in preparing and designing the plans and specifications.

**FURTHER ANSWERING SAID COMPLAINT AND AS ADDITIONAL
DEFENSES THERETO, EAGLE ALLEGES:
(Misuse/Improper Use)**

21. That if underlying plaintiff and/or plaintiff has been injured and damaged by the products sold by this defendant, these injuries and damages were proximately caused by a misuse or improper use of the product.

**FURTHER ANSWERING SAID COMPLAINT AND AS ADDITIONAL
DEFENSES THERETO, EAGLE ALLEGES:
(Lack of Notice)**

22. That underlying plaintiff and/or plaintiff has failed to give this defendant notice of alleged breach of warranty within a reasonable time after discovering same, and its claims are barred by operation of law including but not limited to § 36-2-607 of the South Carolina Code.

**FURTHER ANSWERING SAID COMPLAINT AND AS ADDITIONAL
DEFENSES THERETO, EAGLE ALLEGES:
(Betterment)**

23. That underlying plaintiff and/or plaintiff is not entitled to recover for repairs which will put it in a better position than it would have been in if contracts/warranties had been properly performed and fulfilled, and plaintiff's damages must be reduced by the amount of all betterments made or to be made to the property.

**FURTHER ANSWERING SAID COMPLAINT AND AS ADDITIONAL
DEFENSES THERETO, EAGLE ALLEGES:**

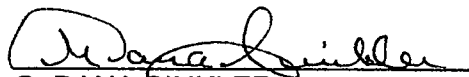
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(Reservation of Further Defenses)

24. This defendant reserves and does not waive any additional or further defenses as may be revealed by discovery.

WHEREFORE, having fully answered the complaint of the plaintiffs, Eagle prays that the same be dismissed with costs, expenses, and attorney's fees.

WARREN & SINKLER, L.L.P.



G. DANA SINKLER
171 Church Street, Suite 340
P.O. Box 1254
Charleston, SC 29402
(843) 577-0660
dsinkler@warren-sinkler.com
Attorneys for Defendant
Eagle Window & Door, Inc.

September 30, 2011
Charleston, South Carolina

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SPARTANBURG COUNTY
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CERTIFICATE OF SERVICE

The undersigned certifies that she served a copy of the foregoing Answer of Defendant Eagle Window & Door, Inc. on September 30, 2011, by mailing a copy of the same with sufficient first class postage affixed to all counsel of record at their addresses set forth below:

Jason M. Imhoff, Esquire
The Ward Law Firm
Post Office Box 5663
Spartanburg, SC 29304


Jo Davis, Legal Assistant

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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
COUTY OF SPARTANBURG)
)
NATIONWIDE MUTUAL)
INSURANCE COMPANY, INC.,)
and GILLIAM CONSTRUCTION)
COMPANY, INC.)

Plaintiffs,)

vs.)

EAGLE WINDOWS & DOORS,)
INC., AMERICAN)
ARCHITECTURAL PRODUCTS)
CORPORATION, WINDOW)
AND DOOR CONCEPTS, INC.,)
CHARLES GOAD, HOBBIT)
PLASTERING, INC., PHILLIP L.)
BENDER, UPSTATE)
WATERPROOFING, INC.,)
DALE COLEMAN, and GARY)
CHURCHILL,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2007-CP-42-296

MOTION FOR SUMMARY JUDGMENT

Pursuant to the provisions of SCRCP 56(b), the Defendant, Eagle Window & Door Manufacturing, Inc. (Eagle, Inc.), does hereby move for Summary Judgment on the grounds that the Plaintiffs cannot establish any exception to the rule of law in South Carolina that, in the absence of a statute, "a successor or purchasing company ordinarily is not liable for the ^{deeds} deeds of a predecessor or selling company." Simmons v. Mark Lift Industries, Inc., 366 S.C. 308, 622 S.E.2d 213, 215.

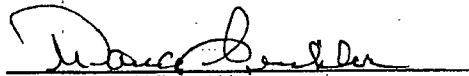
This motion will be supported by the Memorandum in Support of the Motion for

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Summary Judgment and the affidavits and exhibits attached thereto.

Respectfully submitted,

WARREN & SINKLER, L.L.P.



G. DANA SINKLER

171 Church Street, Suite 340

P.O. Box 1254

Charleston, SC 29402

(843) 577-0660

dsinkler@warren-sinkler.com

Attorneys for Defendant

Eagle Window & Door Manufacturing, Inc.

March 21, 2012
Charleston, South Carolina

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STATE OF SOUTH CAROLINA)
)
COUTY OF SPARTANBURG)
)
NATIONWIDE MUTUAL)
INSURANCE COMPANY, INC.,)
and GILLIAM CONSTRUCTION)
COMPANY, INC.)
)

Plaintiffs,)
)
)

vs.)
)
)

EAGLE WINDOWS & DOORS,)
INC., AMERICAN)
ARCHITECTURAL PRODUCTS)
CORPORATION, WINDOW)
AND DOOR CONCEPTS, INC.,)
CHARLES GOAD, HOBBIT)
PLASTERING, INC., PHILLIP L.)
BENDER, UPSTATE)
WATERPROOFING, INC.,)
DALE COLEMAN, and GARY)
CHURCHILL,)
)

Defendants.)
)
)

IN THE COURT OF COMMON PLEAS

C.A. No. 2007-CP-42-296

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Brief Review of Facts Leading to this Suit

By their complaint, Nationwide Mutual Insurance Company (hereinafter "Nationwide") and its insured, Gilliam Construction Company, Inc. (hereinafter "Gilliam"), seek to impose successor liability on Eagle Window & Door Manufacturing, Inc. (hereinafter "Eagle, Inc.") for alleged manufacturing defects in windows installed in a home constructed by Gilliam in 1999 and 2000 in Spartanburg, South Carolina for Renaul Abel and Karen Abel (hereinafter "the Abels").

After the project was completed and the named Defendants, as subcontractors and material suppliers, had completed their work, the Abels allegedly discovered

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deficiencies and defects in the home and its components and invoked the arbitration clause of the construction contract with Gilliam. None of the named Defendants participated in the arbitration proceedings, which were ultimately settled by Nationwide and Gilliam for \$210,000.00, as established by the Settlement Agreement and Mutual Release attached to the Plaintiffs' complaint as Exhibit A.

Thereafter, pursuant to S.C. Code § 15-28-20, Nationwide and Gilliam instituted the present action seeking contribution from the Defendants for "their share" of the settlement proceeds paid by Nationwide on behalf of Gilliam. All of the Defendants subsequently settled, with the exception of Eagle, Inc., which denied its responsibility for any part of the settlement based on the terms of the Asset Sale Agreement approved by the Bankruptcy Court for purchase of the assets of the company which had originally sold the windows to a distributor which, in turn, sold them to Gilliam for the Abels' home; the windows were not manufactured or sold by the Defendant Eagle, Inc.

History Leading to the Sale of the Assets of Eagle to its Present Owner

The windows, which are the subject of this claim for the imposition of successor liability, were sold to the Defendant Window and Door Concepts, Inc. by a Delaware corporation chartered under the name of Eagle & Taylor Company, which then did business as Eagle Window & Door, Inc. (a fictitious name). (See Affidavit of Andrew Wickham, Exhibit A-2)

Eagle & Taylor Company, the Delaware corporation, was one of a number of wholly owned subsidiaries of American Architectural Products Company ("AAPC"), a publicly traded Delaware corporation. (See Exhibit A-2)

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During the years August 1997 through August 1, 2003, Jonathan K. Schoenike was employed by AAPC as its General Counsel. During all relevant times he was also the General Counsel for each and every subsidiary company of AAPC. In October 1997, he became Secretary of AAPC and each and every subsidiary company of AAPC and held that position through August 1, 2003. (See Affidavit of Jonathan K. Schoenike, Exhibit B-2)

Beginning in 1996, AAPC was headquartered in Boardman, Ohio until 2000 when the headquarters were relocated to Miami, Florida. In May 2001, AAPC returned its headquarters to Boardman, Ohio. (See Exhibit B-3)

Commencing in August 1997, the officers of Eagle & Taylor Company included Frank Amedia as CEO, Dale Tucker as President, Joseph Dominijanni as Treasurer and James Phillips as Secretary. In October 1997, Jonathan Schoenike replaced James Phillips as Secretary. In 1999, David Beeken replaced Dale Tucker as President. In 1999, David Wolfe became the Assistant Secretary. In May 2001, Joseph Dominijanni replaced Frank Amedia as CEO and became CEO and Treasurer. (See Exhibit B-6)

Throughout all relevant times, Eagle & Taylor Company operated two separate divisions; Eagle Window & Door, Inc. and Taylor Building Products, Inc., both fictitious entities. Neither division was ever incorporated. (See Exhibit B-7)

Other individuals were identified as officers of Eagle Window & Door, Inc., but none of those officers, except for David Beeken, served as an officer of Eagle & Taylor Company. (See Exhibit B-8)

In December of 2000, AAPC filed for reorganization under the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio.

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Ohio, Eastern Division. As part of the bankruptcy case, AAPC, through its wholly owned subsidiary Eagle & Taylor Company sought and obtained permission from the Bankruptcy Court to sell to EWD Acquisition Co., a Delaware corporation wholly owned by Linsalata Capital Partners Fund IV, L.P. ("LinCap IV"), an Ohio Limited Partnership, substantially all of the assets of its division, Eagle Window & Door, Inc. (See Order of Bankruptcy Court dated April 19, 2002, Exhibit C) In May of 2002, the assets of Eagle & Taylor were sold to EWD Acquisition Co., the Delaware corporation created and wholly owned by LinCap IV. At that time, there were only two Directors of AAPC, to wit: George Hofmeister and Joseph Dominijanni. Mr. Hofmeister owned between 72% and 73% of the company. Mr. Dominijanni owned 5% of the company. Neither David Beeken, nor any of the other officers of the fictitiously named division Eagle Window & Door, Inc. had any control of AAPC and if any of those officers had any stock in AAPC at all, it would not have amounted to more than between one tenth of one-hundredth percent to one-hundredth percent of AAPC. (See Exhibit B-9-11)

All equity interests in AAPC were eliminated through the plan of reorganization approved by the Bankruptcy Court in the Bankruptcy case for the benefit of the creditors of AAPC. (See Exhibit B-12)

The purchaser of the assets of Eagle & Taylor was LinCap IV through EWD Acquisition Co. (See Exhibit C, page 2 and Press Release of AAPC dated May 8, 2002, Exhibit D). None of the partners of Linsalata had any connection with or ownership of Eagle & Taylor Company or AAPC. (See Exhibit A-11 and Exhibit B-14).

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Title to the assets was conveyed to EWD Acquisition Co. ("EWD"), a Delaware corporation created by LinCap IV. Thereafter, EWD changed its name to Eagle Window & Door, Inc.

In 2005, Andersen Corporation purchased Eagle, Inc. from Linsalata and it is now a wholly owned subsidiary of Andersen. In 2007, Eagle Window & Door, Inc. changed its name to Eagle Window & Door Manufacturing, Inc.

The Applicable Law

Successor liability was first considered by the Supreme Court of South Carolina in the case of Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924). In that suit, Brown, a customer of the Southern Express Company, brought an action against American to recover damages for the failure of Southern to deliver part of a shipment of automobile tires received by Southern for delivery to him. The trial court "held substantially that because the defendant [American] had acquired and taken over the business of [Southern] it should be held liable as a matter of law for the delicts and debts of its predecessor on grounds of public policy." 123 S.E. 98. The Supreme Court reversed, holding that:

In the absence of statute, in order to render a purchasing company liable for the debts of the selling corporation, it must appear: (a) that there was an agreement to assume such debts; (b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation of the two corporations; (c) or that the purchasing corporation was a mere continuation of the selling corporation; or (d) that the transfer was pretensive or the transaction fraudulent in fact." 123 S.E. 98,99.

Not until 2005 did the Supreme Court have another occasion to consider the issue of successor liability. In Simmons v. Mark Lift Industries, Inc., 366 S.C. 308, 622

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S.E.2d 213 (2005), in response to a request from the United States District Court of South Carolina, pursuant to Rule 228, SCACR, the Court granted certification from the District Court to address the following questions which are pertinent to the Motion for Summary Judgment filed by counsel for Eagle, Inc.

1. May a plaintiff maintain a product liability claim in South Carolina under a successor liability theory against a defendant which purchased only assets of a voluntarily bankrupt selling company in an arms-length and court-approved bankruptcy sale and the purchasing company did not approve of, participate in, cause, or contribute to the selling company's bankruptcy?

2. In the product liability context in South Carolina, what test is employed to determine whether there is successor liability of a company which purchased the assets of an unrelated company?

In Simmons, Plaintiff brought a products liability suit for injuries he sustained on August 9, 1999, when an elevated scissorlift aerial work platform supporting him collapsed. The platform had been designed, manufactured and sold in 1990 by Mark Industries, Inc. (Mark), a California corporation.

In July of 1991, Mark filed for bankruptcy and the bankruptcy court entered an order on November 6, 1991 granting Mark's motion to sell specified assets for adequate consideration. Terex Corporation (Terex) was the winning bidder of the assets at an auction the next day. Following the auction, Mark and Terex entered into a purchase agreement providing, inter alia, that the sale was free and clear of liens and claims and there was no assumption of liability for products manufactured or sold to Mark. The assets purchased by Terex included the inventory of supplies, raw materials, work in progress

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finished goods, trademarks, service marks, trade names, goodwill and all intellectual property, such as drawings, designs, blueprints, patents, licenses and technology.

Terex created a wholly owned subsidiary to implement the asset purchase agreement between Mark and Terex. The new corporation was named Mark Lift Industries, Inc. (Lift Industries). It continued to manufacture similar scissorlifts at the California plant for several months and then moved the operation to its manufacturing plant in Iowa. Terex did not have any business relationship with Mark until purchasing its assets in the bankruptcy court auction. There had never been any commonality of officers, directors or stockholders between Mark and Terex.

Simmons sued several equipment rental companies and Lift Industries, Mark and Terex. The only basis for the action against Terex and Lift Industries was a successor liability theory.

The Supreme Court found:

Terex did not have any business relation with Mark until purchasing its assets in the bankruptcy court auction. There has never been any commonality of officers, directors or stockholders between Mark and Terex. 622 S.E.2d 216 (Emphasis the Court's).

Prior to oral arguments, the case received considerable attention from the South Carolina Bar and business organizations. In addition to the briefs filed by the parties, amicus curiae briefs were also filed on behalf of the South Carolina Trial Lawyers Association, the South Carolina Manufacturers' Alliance and the Product Liability Advisory Council, Inc.

It is significant to note that the decision of the Supreme Court included a twelve page dissent by Justice Burnett in which he raised every argument that could have been

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articulated for successor liability including the decision of Judge Hemphill in Holloway v. John E. Smith's Sons Co., 432 F.Supp. 454 (D.S.C. 1977) (applying Continuity of Enterprise exception). The Majority had the opportunity to read and analyze Justice Burnett's dissent and held in footnote 1:

Essentially, the dissent advocates an expansion of the mere continuation exception. However, as noted by the dissent, the majority of courts interpreting the mere continuation exception has found it applicable only when there is a commonality of ownership, i.e., the predecessor and successor corporations have substantially the same officers, directors or shareholders.* We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders.** 622 S.E.2d 217 (*Emphasis the Court's) (**Emphasis added).

Three years after the decision in Simmons, the South Carolina Court of Appeals decided another case involving an attempt to impose successor liability in Walton v. Mazda of Rock Hill et al., 376 S.C. 301, 657 S.E.2d 67 (Jan. 10, 2008). In that case the Respondents, McManus and Sigmon, had purchased the assets of Mazda following the sale of a vehicle to the Appellant Walton. Walton sought to impose a warranty claim on McManus and Sigmon contending that they were liable under the mere continuation exception to the general rule that a successor company is not ordinarily liable for the debts of a predecessor company under a theory of successor liability. Noting that the Asset Purchase Agreement did not provide for the assumption of the predecessor's debts and that the uncontradicted evidence was that McManus and Sigmon never had an interest in Mazda prior to the asset purchase, the Court, in a per curiam decision without oral argument, affirmed the issuance of Summary Judgment below, holding

In *Simmons v. Mark Lift Industries, Inc.*, the South Carolina Supreme Court declined to extend the mere continuation exception to situations where there is no commonality

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between officers, directors, and shareholders of the seller and purchaser.

The establishment of successor liability in this case is thus dependent on Plaintiffs' proof that the predecessor corporations, Eagle & Taylor Company and American Architectural Products Corporation, its parent at the time of the assets sale, had substantially the same officers, directors and shareholders as the successor entity, Linsalata Capital Partners Fund IV, L.P. The affidavits of Schoenike and Wickham conclusively establish that there was no such commonality of ownership at the time of the assets sale. None of the officers of AAPC or its wholly owned subsidiary, Eagle & Taylor, Company were officers, directors and shareholders of Linsalata Capital Partners Fund IV, L.P., an Ohio venture capital group. Nor were the partners, officers, directors and shareholders of Linsalata, officers, directors and shareholders of Eagle & Taylor Company or its parent, AAPC. (Exhibits A and B) There was no relationship between predecessor and successor prior to the assets purchase.

On the basis of the foregoing, it is respectfully submitted that Eagle, Inc.'s Motion for Summary Judgment must be granted and the case dismissed.

WARREN & SINKLER, L.L.P.



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March 21, 2012
Charleston, South Carolina

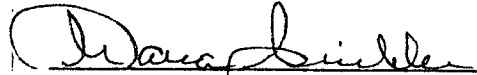
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CERTIFICATE OF SERVICE

The undersigned certifies that he served a copy of the foregoing Defendant Eagle Window & Door Manufacturing, Inc.'s Motion for Summary Judgment and Memorandum in Support of said motion on March 26, 2012, by hand delivering a copy of the same to Jason M. Imhoff, counsel for Plaintiffs, while at a status conference at the Spartanburg County Courthouse.


G. Dana Sinkler

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ASSET SALE AGREEMENT

among

Eagle Window & Door, Inc.,

Eagle & Taylor Company and

American Architectural Products Corporation

* * *

SECURITIES PURCHASE AGREEMENT

with

Massachusetts Mutual Life Insurance Company,

MassMutual Corporate Investors and

MassMutual Participation Investors

* * *

CREDIT AND SECURITY AGREEMENT

with

Harris Bank

May 6, 2002

Volume 1 of 2



CALFEE, HALTER & GRISWOLD LLP

1400 McDonald Investment Center • 800 Superior Avenue • Cleveland, Ohio 44114 • 216/622-8200

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Certain abbreviations:

Buyer	Eagle Window & Door, Inc., a Delaware corporation formerly known as EWD Acquisition Co.
Holding	Eagle Window & Door Holding Company, a Delaware corporation formerly known as EWD Holdings Company
Services	Eagle Window & Door Services, Inc., a Delaware corporation formerly known as EWD Services Co.
Lincap IV	Linsalata Capital Partners Fund IV, L.P., an Ohio limited partnership
Seller	Eagle & Taylor Company, a Delaware corporation d/b/a Eagle Window & Door, Inc.
Parent	American Architectural Products Corporation, a Delaware corporation
Harris Bank	Harris Trust and Savings Bank
Senior Subordinated Lenders	Massachusetts Mutual Life Insurance Company, MassMutual Corporate Investors and MassMutual Participation Investors, collectively

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ABP ~~EXHIBIT C~~ *97D*

CONFIDENTIAL

ASSET SALE AGREEMENT

Between

AMERICAN ARCHITECTURAL PRODUCTS CORPORATION

And

EAGLE & TAYLOR COMPANY,

As the Seller Parties

And

EWD ACQUISITION CO.

As Buyer

Dated as of

April 15, 2002 *ABP* *97D*

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<u>Schedule</u>	<u>Subject Matter</u>
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10.15	Bonds and Letters of Credit
13.12	Releases

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EXHIBITS

- A. Definitions
- B. Form of Escrow Agreement
- C. Example of Working Capital Adjustment and Description of Past Accounting Practices
- D. Form of Lease Agreement

~~[Except as set forth on Exhibit A, no changes are proposed to be made to the Exhibits or the Disclosure Schedules to this Agreement.]~~

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ASSET SALE AGREEMENT

THIS ASSET SALE AGREEMENT (this "Agreement") is entered into as of April 15, 2002, by and among (i) American Architectural Products Corporation, a Delaware corporation ("AAPC"), (ii) Eagle & Taylor Company, doing business as Eagle Window & Door, Inc., a Delaware corporation and a wholly-owned subsidiary of AAPC ("Seller", and together with AAPC, the "Seller Parties"), and (iii) EWD Acquisition Co., an Iowa corporation ("Buyer"). Linsalata Capital Partners Fund IV, L.P., an Affiliate of Buyer ("Lincap") has agreed to be a party to this Agreement solely for the purposes of Section 3.2(b) of this Agreement.

RECITALS

WHEREAS, capitalized terms not otherwise defined in this Agreement shall have the meanings assigned to them in Exhibit A;

WHEREAS, Seller is engaged in the Business;

WHEREAS, Buyer wishes to purchase and acquire from Seller, and Seller wishes to sell, assign and transfer to Buyer, the Transferred Assets (as defined in Section 2.1) free and clear of all Liens (other than Permitted Encumbrances), and Buyer has agreed to assume the Assumed Liabilities (as defined in Section 2.3), with approval of the Bankruptcy Court pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, all for the Purchase Price (as defined in Section 3.2), and upon the terms and subject to the conditions hereinafter set forth;

WHEREAS, Seller, among others, filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code on December 18, 2000 (the "Filing Date"), which Bankruptcy Case is being jointly administered as Case No. 00-43726 by the Bankruptcy Court;

WHEREAS, Seller expects to implement the Contemplated Transactions through the Bankruptcy Case and in accordance with the Bankruptcy Code; and

WHEREAS, the Contemplated Transactions involve a sale, other than in the ordinary course of business, of certain of Seller's assets and properties from Seller's bankruptcy estate pursuant to Bankruptcy Code Sections 363 and 365.

NOW, THEREFORE, in consideration of the premises and the representations, warranties and covenants hereinafter set forth, and intending to be legally bound hereby, the parties agree as follows:

ARTICLE 1 DEFINITIONS

1.1 Definitions. The definitions set forth in Exhibit A are incorporated herein by reference.

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ARTICLE 2
SALE AND PURCHASE OF THE ASSETS

2.1 Transferred Assets. Subject to and upon the terms and conditions set forth in this Agreement, as of the Effective Time, Seller shall sell, assign, transfer, convey and deliver to Buyer, and Buyer shall purchase and acquire from Seller, all right, title and interest in and to the properties, assets, Contracts and rights of Seller used or held for use in the Business, other than the Excluded Assets (collectively, the "Transferred Assets"), free and clear of all Liens (other than Permitted Encumbrances and the Assumed Liabilities). The Transferred Assets include, without limitation, the following:

(a) all tangible personal property used or held for use in the Business, including, without limitation, all of the Fixed Assets listed on Schedule 2.1(a);

(b) all accounts receivable (other than Intercompany Receivables) arising out of the operation or conduct of the Business, whether billed or unbilled, including, without limitation, that certain note receivable owing to Seller from Exclusive North in the amount of \$141,756 as reflected on the Reference Balance Sheet (the "Note Receivable");

(c) all rights of Seller with respect to the Transferred Intellectual Property;

(d) subject to Section 3.7, all rights of Seller under the Contracts to which Seller is a party or by which Seller is bound that are listed on Schedule 4.13, and all other Contracts to which Seller is a party or by which Seller is bound that are used or held for use or that arise out of, the operation or conduct of the Business (the "Assumed Contracts"), but specifically excluding the Excluded Contracts;

(e) all inventories of raw materials, finished products, work in process, goods, and office and other supplies located at the Transferred Facilities or in transit to or from the Transferred Facilities or those in possession of third parties used or held for use in connection with the Business;

(f) all prepaid expenses and security deposits that relate to the Business, the Assumed Contracts or the Transferred Facilities, other than those prepaid expenses and security deposits set forth in Section 2.2(q);

(g) all of the Books and Records;

(h) subject to Section 3.7, all Consents and Permits that are used or held for use in the operation or conduct of the Business;

(i) subject to Section 3.7, all rights under express or implied warranties from or rights against Seller's suppliers with respect to the Transferred Assets or the Assumed Contracts;

(j) all rights to causes of action, lawsuits, claims and demands of any nature available to Seller with respect to the Transferred Assets, the Assumed Liabilities or the

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Business, other than (i) avoidance actions under the Bankruptcy Code and (ii) causes of action, lawsuits, claims and demands referred to in Sections 2.2(d), 2.2(e), 2.2(f) and 2.2(j);

(k) subject to Section 3.7, all guarantees, warranties, indemnities, bonds, letters of credit and similar arrangements that run in favor of Seller in connection with the Transferred Assets;

(l) all of Seller's rights and interests under all outstanding purchase orders entered into by Seller for the purchase of goods or services used or held for use in connection with the Business;

(m) subject to Section 3.7, all other or additional privileges, rights, interests, properties and assets of Seller of every kind and description and wherever located, including without limitation the real estate leases listed on Schedule 2.1(m), that are used or held for use in connection with, or that are necessary to the continued conduct of, the Business as conducted since the Filing Date; and

(n) all goodwill generated by or associated with the Business.

2.2 Excluded Assets. Notwithstanding anything contained in Section 2.1 hereof to the contrary, the Transferred Assets do not include and Buyer shall not purchase or acquire any right, title or interest of Seller in or to any of the following (herein referred to collectively as the "Excluded Assets");

(a) subject to Buyer's rights set forth in Section 10.12, the names and marks "American Architectural Products Corporation" and "AAPC" and any name or mark derived from or including the foregoing, including all corporate symbols or logos incorporating "American Architectural Products Corporation" or "AAPC" (the "Excluded Intellectual Property");

(b) Intercompany Receivables, including, without limitation, any prepaid assets associated with AAPC's insurance policies;

(c) (i) all books and records relating to or used in the business of Seller and that are not Books and Records and (ii) Seller's corporate franchise and stock record books, corporate seal, corporate record books containing minutes of meetings of directors and stockholders, Tax returns and records, books of account and ledgers, and other records relating to Seller's organization and stock capitalization;

(d) all rights to any insurance policies, maintained by or on behalf of or covering Seller and specific to the Business, and all rights of action, lawsuits, claims and demands, rights of recovery and set-off, premiums and proceeds, under or with respect to such insurance policies;

(e) all rights which accrue or will accrue to Seller under this Agreement and any and all claims and causes of action arising under Sections 544, 545, 547, 548, 549, 550, 551, 552, 553(b) of the Bankruptcy Code or under comparable state law provisions;

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(f) all right, title and interest of Seller in and to and any Tax deposit, claim for any refund, credit, rebate or abatement with respect to Taxes of the Business for any period or portion thereof prior to the Effective Time;

(g) fee title to the real property listed on Schedule 2.2(g);

(h) leasehold interest in and to the real property listed on Schedule 2.2(h);

(i) the Benefit Plans and all assets and Contracts relating thereto;

(j) all claims against third parties for Losses suffered in connection with Excluded Assets and Excluded Liabilities;

(k) all cash and cash equivalents and similar type investments on hand or in transit (such as certificates of deposit, treasury bills and other marketable securities);

(l) all Consents and Permits of Seller not included within Section 2.1(h);

(m) all Contracts rejected pursuant to Section 365 of the Bankruptcy Code by Seller prior to the Closing, which shall not include the leases relating to the Transferred Facilities, and all Contracts listed on Schedule 2.2(m) hereto (the "Excluded Contracts");

(n) all collateral posted by Seller or its Affiliates associated with bonds, letters of credit, performance bonds, bid bonds, surety bonds and similar arrangements in favor of others;

(o) any shares of capital stock, debentures or other securities of Seller;

(p) any projections, descriptive brochures or other documents prepared in connection with the sale of the Transferred Assets; and

(q) all prepaid insurance expenses, all prepaid Ohio franchise taxes and that certain security deposit related to the IBM AS400.

2.3 Assumption of Certain Liabilities. Subject to the terms and conditions set forth herein, as of the Effective Time, Buyer shall assume and pay, honor, perform and discharge when due the following Liabilities, other than any Excluded Liabilities:

(a) all post-Closing performance obligations of Seller under the Assumed Contracts, including without limitation any guaranty by AAPC or an Affiliate of AAPC with respect to post-Closing obligations under an Assumed Contract, provided that Buyer specifically does not assume any Liabilities of Seller or AAPC or any Affiliate of AAPC relating to or arising out of any breach of any Assumed Contract occurring prior to the Closing Date or any damage to third parties resulting from acts, events or omissions occurring prior to the Closing Date, except as otherwise set forth in Section 2.3(c);

(b) the management bonus payments for the year 2000 under Seller's 2000 management bonus plan in an aggregate amount not to exceed \$630,000, all bonus payments for

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the year 2001, and the year 2002, if any, (prior to the Effective Time) under Seller's management bonus plan, all profit sharing obligations of Seller with respect to the employees of the Business for the year 2001, and the year 2002, if any, (prior to the Effective Time) and all accrued Liabilities set forth in Section 6.3;

(c) all Liabilities with respect to warranty claims relating to the Business arising solely out of the express terms of Seller's warranty Contracts with its customers that are in the form of (and solely in the form of) the express warranties identified on Schedule 4.21 hereto, and that relate solely to products sold by Seller with respect to the Business on or after the Filing Date, excluding Liabilities for personal injury or damage to property other than the windows and doors manufactured by Seller and sold to such customers;

(d) all Liabilities relating to or arising out of the conduct of the Business on or after the Effective Time;

(e) all Liabilities prorated to Buyer pursuant to Section 10.10;

(f) all unpaid payroll obligations of the Business with respect to vacation, salaries, wages and commissions of all days prior to the Effective Time to the extent reflected on the final Closing Schedule; and

(g) all accounts payable of Seller arising from the conduct of the Business incurred in the ordinary course of business since the Filing Date to the extent reflected on the final Closing Schedule.

The Liabilities described in clauses (a) through (g) are collectively referred to as the "Assumed Liabilities."

2.4 Excluded Liabilities. Notwithstanding Section 2.3 or any other provision of this Agreement and regardless of any disclosure to Buyer, Buyer shall not assume or in any way be responsible for, and Seller shall remain responsible for, all debts, claims, commitments and Liabilities of Seller that are not specifically included in the Assumed Liabilities (the "Excluded Liabilities"). Excluded Liabilities shall include, without limitation, the following:

(a) all Tax Liabilities, including penalties and interest, in respect of periods prior to the Effective Time;

(b) any and all indebtedness of the Seller Parties for borrowed money;

(c) Liabilities arising out of or under the Excluded Assets;

(d) intercompany payables between the Business and the balance of LAPC's business arising from the conduct of the Business prior to the Effective Time;

(e) except as specifically provided in Section 2.3(b) and 2.3(f), any Liabilities under Benefit Plans, including, without limitation, employee health care insurance and related claims;

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- (f) the Liabilities, if any, listed on Schedule 2.4;
- (g) any Liabilities relating to pending or threatened litigation, warranty claims (other than those included in the Assumed Liabilities), or bankruptcy and any Liability of Seller for costs and expenses incurred in connection with the Contemplated Transactions, including, without limitation, any broker's or finder's commission, fee or similar compensation;
- (h) any Environmental Liabilities related to or arising out of (i) the acts or omissions of either of the Seller Parties, (ii) the acts or omissions of any Person prior to the Effective Time related to either of the Seller Parties, the Business or the Transferred Assets, or (iii) the use, handling, storage, treatment or disposal of any Hazardous Materials related to either of the Seller Parties, the Business or the Transferred Assets prior to the Effective Time;
- (i) all payments required to be made pursuant to Section 365 of the Bankruptcy Code, which are necessary to cure defaults under the Assumed Contracts (the "Cure Obligations");
- (j) any actual or alleged violation by Seller or any of its Affiliates of any Applicable Law;
- (k) any infringement or alleged infringement of the rights of any Person arising out of the use of any of the Transferred Intellectual Property in connection with the Business prior to the Effective Time;
- (l) any Liability arising under any Contract executed on behalf of Seller solely by the officers of AAPC, including Joseph Dominijanni and Jonathan Schoenike required to be listed on Schedule 4.13 and not so listed;
- (m) all amounts owing to employees of the Seller Parties under the Key Employee Retention Program, as approved and described by the Bankruptcy Court in an order dated June 11, 2001;
- (n) any workers compensation claims relating to the Business for any period prior to the Effective Time; and
- (o) except for items specifically included in the Assumed Liabilities, all Liabilities of Seller relating to or arising out of any act, event or omission occurring prior to the Effective Time.

ARTICLE 3 THE CLOSING; PURCHASE PRICE

3.1 Place and Date. The closing of the sale and purchase of the Transferred Assets (the "Closing") and the assumption of the Assumed Liabilities shall take place at 10:00 a.m., local time, not later than (i) the second business day following the satisfaction or waiver of the conditions referred to in Articles 12 and 13 or (ii) the eleventh day after the Sale Order is obtained, whichever is later, at the offices of Calfee, Halter & Griswold LLP, or such other place upon which the parties may agree. The day on which the Closing actually occurs is sometimes

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referred to herein as the "Closing Date." Notwithstanding the actual time of Closing on the Closing Date, the Closing shall be deemed to have occurred as of 11:59 p.m., local time, on the day of the Closing (the "Effective Time").

3.2 Purchase Price and Deposit.

(a) The purchase price for the Transferred Assets shall be ^{Sixty four Seven} ~~Fifty Million One~~ Hundred Fifty Thousand Dollars (\$50,150,000.00) (the "Cash Portion") plus the assumption of the Assumed Liabilities plus or minus, as applicable, the Working Capital Adjustment plus or minus, as applicable, any adjustments as set forth in Section 10.10 (collectively, the "Purchase Price").

3.3 Buyer or Lincap shall deliver to National City Bank (the "Escrow Agent") an amount equal to Two Hundred Fifty Thousand Dollars (\$250,000.00) (the "Deposit") as a deposit towards the Purchase Price on the date hereof (the "Deposit Date"). The Deposit shall be held and invested pursuant to the terms and conditions of the Escrow Agreement dated as of the Deposit Date (the "Escrow Agreement"), among the Seller Parties, Lincap, Buyer and the Escrow Agent, in substantially the form attached hereto as Exhibit B. The Deposit, together with interest earned thereon (the "Escrowed Deposit"), shall be credited towards the Cash Portion of the Purchase Price at the Closing. If this Agreement is terminated pursuant to Section 16.1(d) solely as a result of the failure to satisfy the conditions set forth in Sections 13.1, 13.2, 13.4 (except as it relates to 13.3), 13.8, 13.9, 13.10, or 13.11 (unless such failure to satisfy Sections 13.2, 13.4, 13.8, 13.9, 13.10 or 13.11 results from a failure of any condition set forth in Article 12), then the Escrow Agent shall pay the Escrowed Deposit to Seller and if this Agreement is terminated pursuant to Section 16.1 for any other reason, then the Escrow Agent shall pay the Escrowed Deposit to Lincap.

3.4 Intentionally Omitted.

3.5 Allocation of Purchase Price.

(a) The parties shall allocate the aggregate consideration (including the assumption of Assumed Liabilities) received by Seller with respect to the Transferred Assets, in accordance with Section 1060 of the Tax Code, as mutually agreed to by the parties pursuant to the procedure described below. Subject to the requirements of any applicable Tax law or election, all such mutually agreed-to allocations shall be used by each party in preparing any filings required pursuant to Section 1060 of the Tax Code or any Applicable Law and all relevant Income Tax Returns. Neither Buyer nor Seller will take any position before any taxing authority or in any judicial proceeding with respect to Income Taxes that is inconsistent with such mutually agreed-to allocations without the prior written consent of the other party, in the consenting party's sole discretion. The parties shall exercise commercially reasonable efforts to support such mutually agreed-to reported allocations in any audit proceedings initiated by any taxing authority; provided, however, that neither Seller nor Buyer shall have any obligation to pay for an appraisal or in any other way incur unreasonable or extraordinary out-of-pocket expenses.

(b) Within thirty business days following the final determination of the Working Capital Adjustment, Buyer will provide to Seller copies of IRS Form 8594 and any required exhibits thereto with Buyer's proposed allocation of the consideration (including assumption of Assumed Liabilities) received by Seller with respect to the Transferred Assets for Seller's approval, which shall not be unreasonably withheld, conditioned or delayed. If Seller fails to respond to Buyer within 30 days of Seller receiving such IRS Form 8594, then Seller shall be deemed to have approved Buyer's allocation.

3.6 Deliveries. At the Closing, Buyer shall deliver to or as directed by Seller: (a) the Cash Portion of the Purchase Price, plus the Closing Date Addition or minus the Closing Date Reduction, as applicable, less the Escrowed Deposit by wire transfer of immediately available funds to an account or accounts designated by Seller and in a manner consistent with the Sale Order, and (b) the agreements, instruments of assumption, certificates and other documents required to be delivered by Buyer pursuant to Article 13. Seller shall deliver to Buyer the agreements, instruments of transfer, certificates and other documents required to be delivered by Seller pursuant to Article 12.

3.7 Working Capital Adjustment.

(a) If as of the Effective Time (x) the sum of (i) accounts receivable that are included in the Transferred Assets (net of allowances), (ii) inventory that is included in the Transferred Assets and (iii) prepaid expenses and security deposits that are included in the Transferred Assets (but specifically excluding the prepaid expenses and security deposits set forth in Section 2.2(q)) minus (y) the sum of (i) post-petition accounts payable relating to the Business (as reduced by all released checks which have not been paid) and (ii) the obligations relating to Employees of the Business described in Section 6.3, (iii) salaries, wages and commissions of Employees of the Business, (iv) obligations with respect to customer CO-OP advertising to the extent such obligations relate to the Business (v) obligations to Employees of the Business with respect to Christmas gifts, (vi) obligations with respect to customer rebates to the extent such rebates relate to the Business, and (vii) a current portion of capital leases constituting Assumed Contracts (the foregoing calculation referred to as "Working Capital") exceeds \$12,593,495 ("Target Working Capital"), the Cash Portion of the Purchase Price shall be increased dollar for dollar by the amount of such excess. If the Working Capital as of the Effective Time is less than the Target Working Capital, the Cash Portion of the Purchase Price shall be reduced dollar for dollar by the amount of such deficiency. The foregoing adjustment to the Cash Portion of the Purchase Price shall be referred to as the "Working Capital Adjustment." For the avoidance of doubt, the parties hereto agree that Transfer Taxes that are the subject of Section 10.6 hereof, all intercompany payables and Intercompany Receivables, and all assets and liabilities to be prorated pursuant to Section 10.10 shall be excluded from the computation of Working Capital. In addition, the obligations set forth in Section 2.3(b), workers compensation claims and health insurance claims shall be excluded from the computation of working capital. A sample Working Capital calculation is attached hereto as Exhibit C. The calculation of Working Capital as of the Effective Time (the "Closing Date Working Capital") shall be done in accordance with the past practices of Seller as identified on Exhibit C and shall be applied on a consistent basis throughout the periods identified and consistent with the preparation of the Financial Statements.

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(b) Seller shall deliver to Buyer and its accountants three business days prior to the Closing Date, written notice of Seller's good faith estimate of the Closing Date Working Capital and the Working Capital Adjustment, each signed by the President and Chief Financial Officer of Seller (and such notice shall set forth any objections or disagreements that the President and Chief Financial Officer may have with such estimate), and, based upon information reasonably available to Seller, along with the work papers and accounting records relating to the computation of the estimated Closing Date Working Capital and the estimated Working Capital Adjustment. Seller shall make available during normal business hours to Buyer all appropriate personnel to answer any questions of Buyer and its accountants relating to Seller's calculation of the such estimates. If the estimated Closing Date Working Capital exceeds the Target Working Capital (a "Surplus"), then at the Closing Buyer shall deliver to the Escrow Agent an amount (the "Surplus Escrowed Amount") equal to the lesser of (i) the Surplus and (ii) \$200,000, and the balance of the Surplus shall be paid to Seller on the Closing Date (the "Closing Date Addition") as provided under Section 3.5. If the estimated Closing Date Working Capital Adjustment is less than the Target Working Capital (a "Closing Date Reduction"), then at the Closing Buyer shall deliver to the Escrow Agent an amount (the "Deficit Escrowed Amount") equal to the lesser of (i) the Closing Date Reduction and (ii) \$200,000, and the Closing Date Reduction shall be deducted from the amount paid to Seller on the Closing Date as provided under Section 3.5. All amounts held in escrow pursuant to this Section shall be held and invested pursuant to the terms of the Escrow Agreement, together with interest earned thereon (such amount, together with such interest, the "Escrowed Adjustment").

(c) The actual Working Capital Adjustment shall be determined and paid as follows:

(i) As soon as reasonably practicable after the Closing Date, but in no event later than the forty-fifth day following the Closing Date, Seller (with the cooperation of Buyer) shall prepare and deliver to Buyer a schedule (the "Closing Schedule") detailing the amount and computation of the Working Capital Adjustment and the final Purchase Price.

(ii) Buyer will give representatives of Seller access to Buyer's books and records for the purpose of preparing the Closing Schedule and access to the appropriate personnel of Buyer for the purpose of calculating the amounts set forth in the Closing Schedule. Unless Buyer notifies Seller in writing (the "Dispute Notice") that Buyer disagrees with the amount of the Working Capital Adjustment contained in the Closing Schedule on the later of (A) 15 days after receipt of (x) the Closing Schedule and (y) all supporting and backup information reasonably requested by Buyer and (B) 60 days after the Closing Date, the Closing Schedule shall be conclusive and binding on Buyer and Seller and deemed final,

(1) and if the Working Capital Adjustment as set forth on the Closing Schedule is (A) less than or equal to the Closing Date Addition or (B) greater than or equal to the Closing Date Reduction, as the case may be, the Cash Portion of the Purchase Price shall be decreased dollar for dollar by the amount of such difference (the "Excess Payment") and Seller

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shall pay to Buyer, by wire transfer of immediately available funds within two business days after the end of the 15-day period referred to above, the Excess Payment, and the Escrow Agent shall pay to Buyer the Escrowed Adjustment.

(2) and if the Working Capital Adjustment as set forth on the Closing Schedule is (A) greater than the Closing Date Addition or (B) less than the Closing Date Reduction, as the case may be, the Cash Portion of the Purchase Price shall be increased dollar for dollar by the amount of such excess (the "Additional Payment") and Buyer shall pay to Seller, by wire transfer of immediately available funds within two business days after the end of the 15-day period referred to above, the Additional Payment, less any funds constituting the Escrowed Adjustment and the Escrow Agent shall pay to Seller the Escrowed Adjustment, provided that if the Additional Payment is less than or equal to the Escrowed Adjustment, Buyer shall have no obligation to pay any amounts to Seller pursuant to the preceding clause and in such circumstances the Escrow Agent shall pay to Seller an amount equal to the Additional Payment and pay to Buyer any remaining balance of the Escrowed Adjustment.

(iii) If Buyer notifies Seller in writing that Buyer disagrees with the Closing Schedule within the above-referenced 15-day period, then Buyer and Seller shall attempt to resolve their differences with respect thereto in good faith within 10 days after Seller's receipt of Buyer's written notice of disagreement. If Buyer and Seller are unable to resolve any disputed issues within such 10-day period, then the parties shall submit the issues in dispute to an accounting firm (the "Resolving Accountants") mutually acceptable to both parties or, in the absence of agreement, to an accounting firm of national reputation selected by lot after eliminating Seller's and Buyer's principal outside accountants and one additional firm designated as objectionable by each of Seller and Buyer. If the disputed issues are submitted to the Resolving Accountants, each party shall furnish to the Resolving Accountants such work papers and other documents and information relating to the disputed issues as the Resolving Accountants may request and are available to such party, and each party will be afforded the opportunity to present to the Resolving Accountants any material relating to the determination and to discuss the determination with the Resolving Accountants. Each party shall be entitled to request and receive information from the other which the Resolving Accountants determine is or may be relevant to the resolution of the disputed issues. The Resolving Accountants shall be required to make a decision within thirty days of the date of their acceptance of their appointment as the Resolving Accountants. The determination of the Resolving Accountants, as set forth in a written notice delivered to the parties by the Resolving Accountants (the "Notice of Determination"), shall be binding and conclusive on the parties absent fraud or manifest error. The fees and expenses of the Resolving Accountants for such determination shall be shared equally by Buyer and Seller.

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(iv) Upon resolution of such disputed issues, whether by agreement of the parties or by determination of the Resolving Accountants, the parties shall pay the amounts as determined by the parties or the Resolving Accountants, as the case may be, and Buyer and the Seller Parties shall promptly following such resolution jointly execute a direction letter to the Escrow Agent directing the Escrow Agent to release the Escrowed Adjustment, to Buyer and/or Seller, as the case may be, in accordance with this Section 3.6(c).

(v) Seller shall maintain in its bankruptcy estate \$1,000,000 until the earlier of (i) the expiration of the fifteen-day period referenced in Section 3.6(c)(ii) if Buyer has not delivered a Dispute Notice within such period and (ii) the later of (1) the resolution of any dispute described in the Dispute Notice, (2) the date of the Notice of Determination, if any, and (3) if a portion or all of the amounts in dispute described in the Dispute Notice is finally determined to be owing to Buyer (as determined by the parties or as set forth in the Notice of Determination), the date such amounts have been paid by Seller, if applicable, to Buyer; provided that if the disputed amount described in the Dispute Notice, if any, is less than or equal to \$1,000,000, then after the delivery of the Dispute Notice, Seller shall only be required to maintain such disputed amount (less the Surplus Escrowed Amount or the Deficit Escrowed Amount, as the case may be).

3.8 Consents of Third Parties. Notwithstanding anything to the contrary in this Agreement, this Agreement shall not constitute an agreement to assign or transfer any Permit or Contract, or any other claim, right or benefit arising from or in connection with the Transferred Assets, to the extent that such assignment or transfer or an attempt to make such an assignment or transfer cannot be made pursuant to Section 365 of the Bankruptcy Code without the Consent of a third party. Seller shall use commercially reasonable efforts to obtain such Consents and shall make such payments to satisfy all Cure Obligations as may be necessary to assume, assign, and transfer any of the foregoing to Buyer at Closing pursuant to Section 365 of the Bankruptcy Code. In the event any such Consent is not obtained on or prior to the Closing Date, Seller shall cooperate with Buyer in any lawful arrangement to provide that Buyer shall receive the benefits under any such Contract or Permit on and after the Closing Date, provided that Buyer shall undertake to pay, perform, discharge or satisfy the corresponding Liabilities for the enjoyment of such benefit to the extent Buyer would have been responsible therefor if such Consent had been obtained.

ARTICLE 4 REPRESENTATIONS AND WARRANTIES OF THE SELLER PARTIES

Except as set forth in the Disclosure Schedule delivered to Buyer contemporaneously herewith (the "Disclosure Schedule"), of which the Schedules referred to below are a part, and in the documents and other materials identified in the Disclosure Schedule (it being agreed that any matter disclosed in the Disclosure Schedule with respect to any section of this Agreement shall be deemed to have been disclosed with respect to all other sections of this Agreement to the extent its relevance to such other sections can be reasonably discerned from such disclosure), and subject to the limitations contained in Section 17.1, as of the date of this Agreement, the Seller Parties make to Buyer the following representations and warranties:

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4.1 Organization, Standing, Etc. of the Seller Parties. Each Seller Party is a corporation duly incorporated, validly existing and in good standing under the laws of the jurisdiction where it is organized and Seller has all requisite corporate power and authority to carry on the Business as currently conducted by it and to own or lease and to operate the properties of the Business used by it. Seller is qualified to do business in each jurisdiction in which the Business is conducted that requires such qualification and where the failure to so qualify would have a Material Adverse Effect on the Business. Each Seller Party is currently a debtor-in-possession in the Bankruptcy Case pursuant to the Bankruptcy Code, and retains full authority and power to operate its business and affairs pursuant to Sections 1107 and 1108 of the Bankruptcy Code, with no trustee, examiner, facilitator or other officer or agent with similar authority or powers to a trustee, examiner or facilitator having been appointed in such Bankruptcy Case.

4.2 Corporate Ownership Structure. AAPC owns all of the outstanding capital stock of Seller, and there are no options, rights or other grants currently outstanding for the acquisition or purchase of any shares of the capital stock of Seller. Neither AAPC nor any of its Affiliates (other than Seller) owns any assets used or held for use in the Business.

4.3 Corporate Authorization. Subject to approval by the Bankruptcy Court, the execution, delivery and performance of this Agreement and all other documents executed or to be executed pursuant to this Agreement by each Seller Party (the "Seller Ancillary Agreements"), and the consummation of the Contemplated Transactions, have been duly authorized by all necessary corporate action on the part of each Seller Party. Subject to approval by the Bankruptcy Court, this Agreement has been duly executed and delivered, and prior to Closing, each Seller Ancillary Agreement will be duly executed and delivered, in each case by a duly authorized officer of each Seller Party, as the case may be. Each Seller Party has the corporate power and authority necessary to enter into and perform its obligations under this Agreement and the Seller Ancillary Agreements to which it is a party and to carry out the Contemplated Transactions.

4.4 Enforceability. Subject to approval by the Bankruptcy Court, this Agreement constitutes and each Seller Ancillary Agreement will, when executed and delivered by the Seller Parties, constitute the valid and legally binding obligation of the Seller Parties, enforceable in accordance with their respective terms.

4.5 Governmental Authorizations and Consents. Except as set forth on Schedule 4.5, no Consent of any Person is required to be obtained or made by the Seller Parties in connection with the execution, delivery, performance, validity or enforceability of this Agreement and the Seller Ancillary Agreements or the consummation of the Contemplated Transactions, other than (a) any filing with the Federal Trade Commission and the Department of Justice under the HSR Act, and (b) Bankruptcy Court approval.

4.6 Financial Statements. Schedule 4.6 sets forth the unaudited financial statements as of and for the period ending December 31, 2001 that include: (a) an income statement of the Business and (b) a balance sheet as of December 31, 2001 (the "Reference Balance Sheet"), and together with the income statement described in clause (a), the "Financial Statements". The Financial Statements have been prepared in accordance with past practices applied on a

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consistent basis throughout the periods indicated, are true and accurate in all material respects, and fairly present the financial condition and results of operation of Seller and the Business in all material respects as of December 31, 2001, except as set forth on Schedule 4.6. The Reference Balance Sheet reflects, as of December 31, 2001, all Liabilities of Seller, including Liabilities for Taxes, to the extent such items are required to be reflected on such balance sheet under the principles identified in the preceding sentence.

4.7 Subsequent Events. Since December 31, 2001, there has not been:

(a) any change in the condition (financial or otherwise) or in the properties, assets, liabilities or business of the Business, except normal and usual changes in the ordinary course of business consistent with past practice;

(b) any breach or default by Seller or, to the Knowledge of either Seller Party, by any other party thereto, under any Material Contract or obligation under a Material Contract included in the Transferred Assets or by which Seller is bound;

(c) any damage, destruction or loss (whether or not covered by insurance) that has had a Material Adverse Effect on the Business;

(d) any cancellation of any material indebtedness with respect to the Business (individually or in the aggregate) or waiver of any claims or rights of substantial value outside the ordinary course of business;

(e) any sale, lease, license or other disposition of any assets held by Seller or used in the Business, other than inventory sold in the ordinary course of business consistent with past practice;

(f) any change in the business relationship or any dispute between any Major Customer or Major Supplier, which indirectly or in the aggregate would have a Material Adverse Effect on the Business;

(g) any notice received by Seller that any Major Customer intends to materially reduce its purchases from Seller or that a Major Supplier intends to materially reduce the sale of goods or services to Seller; or

(h) any occurrence or occurrences, event or events, or condition or conditions that has/have adversely affected the Transferred Assets or the Business, which individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect on the Business.

4.8 Title to Transferred Assets. Seller owns or has the right to use (pursuant to a valid lease or license) all assets and properties necessary for Seller to conduct the Business in the manner presently conducted by Seller, and, except for the Excluded Assets, all of such assets and properties are included in the Transferred Assets. Except as set forth on Schedule 4.8, Seller has good and marketable title to all the Transferred Assets, and pursuant to the Sale Order, Buyer shall receive good and marketable title to all the Transferred Assets, free and clear of all liens except for Permitted Encumbrances. The plants, structures, equipment, vehicles and other tangible properties included in the Transferred Assets and the tangible property leased by Seller

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under leases included in the Transferred Assets are in good operating condition and repair, normal wear and tear excepted, and are capable of being used for their intended purpose in the Business as now conducted, except where such condition or capability would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect on the Business. The Transferred Assets include all existing warranties and service Contracts with respect to any of the Transferred Assets to the extent transferable. All plants, structures, equipment, vehicles and other tangible properties included in the Transferred Assets, and the present use of all such items, conform to all Applicable Laws, except where the failure to conform or such violation would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect on the Business, and no notice of any violation of any Applicable Laws relating to such assets or their use has been received by any Seller Party. The Transferred Assets include all easements, rights of ingress and egress, and utilities and services necessary for the conduct of the Business except where the failure to possess such easements, rights of ingress and egress and utilities and services would not reasonably be expected to have a Material Adverse Effect on the Business. Neither the whole nor any portion of any real property subject to leases included in the Transferred Assets has been condemned or otherwise taken by any public authority, nor, to the Knowledge of any Seller Party, is any such condemnation or taking threatened or planned.

4.9 Intentionally Omitted.

4.10 Licenses and Permits. To each Seller Party's Knowledge, Seller has all material Permits necessary for the conduct of the Business as conducted by Seller since the Filing Date. A true and correct list of all such Permits is set forth on Schedule 4.10. Seller has delivered to Buyer true and correct copies of all such Permits. Except as set forth on Schedule 4.10, (a) each of said Permits is in full force and effect, (b) the Business is in compliance with the terms, provisions and conditions thereof, except where the failure to be in compliance would not reasonably be expected to have a Material Adverse Effect on the Business, (c) to each Seller Party's Knowledge, there are no outstanding violations, notices of noncompliance, judgments, consent decrees, orders or judicial or administrative actions, investigations or proceedings adversely affecting any of said Permits, and (d) to each Seller Party's Knowledge, no condition exists and no event has occurred which (whether with or without notice, lapse of time or the occurrence of any other event) would permit the suspension or revocation of any such Permits other than by expiration of the term set forth therein. Neither Seller Party makes any representation or warranty with respect to the transferability of the Permits to Buyer.

4.11 Environmental Compliance. Except as set forth in Schedule 4.11:

(a) Seller has at all times operated the Business and Transferred Assets in compliance with all applicable limitations, restrictions, conditions, standards, prohibitions, requirements and obligations of Environmental Laws and any related orders of any court or other Governmental Authority, except where the failure to be in compliance would not reasonably be expected to have a Material Adverse Effect on the Business.

(b) There are no existing, pending or, to the Knowledge of the Seller Parties, threatened actions, suits, claims, investigations, inquiries or proceedings by or before any court or any other Governmental Authority directed against Seller with respect to the Business or the Transferred Assets that pertain or relate to (i) any Liabilities under any applicable Environmental

Law, (ii) violations of any Environmental Law or (iii) personal injury or property damage claims relating to the use, release or disposal of Hazardous Materials, except where such matters would not reasonably be expected to have a Material Adverse Effect on the Business.

(c) Seller is not currently operating or required to be operating the Business or the Transferred Assets under any compliance order, schedule, decree or agreement, any consent decree, order or agreement, or any corrective action decree, order or agreement issued or entered into under, or pertaining to matters regulated by, any Environmental Law.

(d) To the Knowledge of the Seller Parties (i) Seller does not own or operate any underground storage tanks that are a part of or related in any manner to the Transferred Assets, and (ii) no underground storage tanks are located on or under property relating to any Transferred Facility.

(e) There has been no use, handling, storage, treatment, disposal or release of Hazardous Materials by Seller or related in any manner to the Business or the Transferred Assets that will cause Buyer to incur any Environmental Liability which would reasonably be expected to have a Material Adverse Effect on the Business.

(f) The Seller Parties have provided Buyer with copies of all environmental audits, assessments or other evaluations of the Business or the Transferred Assets prepared by or on behalf of the Seller Parties or otherwise in the possession of either Seller Party.

For purposes of this Agreement, "Environmental Laws" shall mean all Applicable Laws pertaining to (a) air and water quality, (b) Hazardous Materials, (c) disposal, (d) the control of any potential pollutant, protection of human health or protection of the environment, including air, water or land, (e) the generation, handling, treatment, storage, disposal or transportation of waste materials, (f) the regulation of or exposure to hazardous, toxic or other substances alleged to be harmful or (g) other environmental matters, including the Clean Water Act, the Clean Air Act, the Federal Water Pollution Control Act, the Solid Waste Disposal Act, the Resource Conservation Recovery Act, the Occupational Health and Safety Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Emergency Planning and Community Right to Know Act, the Toxic Substances Control Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Safe Drinking Water Act, the Hazardous Materials Transportation Act and the rules, regulations and ordinances of the cities and other jurisdictions in which the Business is located, the Environmental Protection Agency and all other applicable Governmental Authorities.

4.12 Employee Matters.

(a) Schedule 4.12(a) sets forth a true and complete list of the names of and current compensation paid by Seller to each employee of Seller utilized in connection with the operation of the Business as of the date of this Agreement, including (i) with respect to each non-salaried employee, his or her current hourly wage rate, and (ii) with respect to each salaried employee, his or her current annual salary and, if applicable, the amount of the management bonus payment under Seller's 2000 management bonus plan for the year 2000, that each employee is eligible to receive (salary and bonus to be shown separately). Seller has no

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obligation to pay or provide any type of severance benefit to any employees of Seller as a result of the consummation of the Contemplated Transactions or otherwise.

(b) Schedule 4.12(b) contains a complete and correct list as of the date of this Agreement of (i) all employee welfare benefit and employee pension benefit plans as defined in Sections 3(1) and 3(2) of ERISA, including, but not limited to, plans that provide retirement income or result in a deferral of income by employees for periods extending to termination of employment or beyond, and plans that provide medical, surgical, or hospital care benefits or benefits in the event of sickness, accident, disability, death or unemployment and (ii) all other material employee benefit agreements or arrangements, including without limitation deferred compensation plans, management bonus plans, profit sharing plans, incentive plans, bonus plans or arrangements, stock option plans, stock purchase plans, stock award plans, golden parachute agreements, severance pay plans, dependent care plans, cafeteria plans, employee assistance programs, scholarship programs, employment contracts, retention incentive agreements, consulting agreements, vacation policies, and other similar plans, agreements and arrangements that are currently in effect or were maintained within three (3) years of the date of this Agreement, or have been approved before this date but are not yet effective, for the benefit of directors, officers, employees or former employees (or their beneficiaries) of Seller, or with respect to which Seller may have any Liability (collectively referred to as "Benefit Plans").

(c) Except as set forth in Schedule 4.12(c): (i) since December 31, 2001 there has not been any labor strike, dispute, work stoppage or lockout pending, or, to the Knowledge of Seller, threatened, against the Business; (ii) to the Knowledge of Seller, no union organizational campaign is in progress with respect to the employees of the Business; (iii) Seller is not engaged in any unfair labor practice in connection with the conduct of the Business; (iv) there are not any unfair labor practice charges or complaints against Seller pending, or, to the Knowledge of the Seller Parties, threatened, before the National Labor Relations Board in connection with the conduct of the Business; (v) there are not any pending, or, to the Knowledge of the Seller Parties, threatened, union grievances against Seller in connection with the conduct of the Business; (vi) there are not any pending, or, to the Knowledge of the Seller Parties, threatened, charges in connection with the conduct of the Business against Seller or any current or former employee of the Business before the Equal Employment Opportunity Commission or any state or local agency responsible for the prevention of unlawful employment practices; and (vii) Seller has not received notice since the Filing Date of the intent of any Governmental Authority responsible for the enforcement of labor or employment laws to conduct an investigation of the Business and, to the Knowledge of the Seller Parties, no such investigation is in progress.

(d) Neither Seller nor any entity (whether or not incorporated) that was at any time during the five-year period ending on the date of this Agreement treated as a single employer together with Seller under Section 414 of the Tax Code has ever maintained, had an obligation to contribute to, contributed to, or incurred any liability with respect to, a pension plan that is or was subject to Title IV of ERISA or Section 412 of the Tax Code.

(e) Neither Seller nor any other entity has engaged in a transaction that could result in the imposition upon Seller of a civil penalty under Section 409 or 502(i) of ERISA or a

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Tax under Section 4972, 4975, 4976, 4980B or 6652 of the Tax Code with respect to any Benefit Plan, and no fact or event exists that could give rise to any such liability.

(f) Each Benefit Plan has been operated and administered in all material respects in accordance with its terms and Applicable Laws, including but not limited to ERISA and the Tax Code.

(g) (i) The terms of all Benefit Plans that are intended to qualify under Section 401(a) of the Tax Code have been determined by the IRS to qualify under Section 401(a) of the Tax Code, or (ii) the applicable remedial amendment periods under Section 401(b) of the Tax Code with respect to such Benefit Plans will not have expired prior to the Closing Date. No event or circumstance has occurred that could cause the IRS to disqualify any Benefit Plan that is intended to qualify under Section 401(a) of the Tax Code.

(h) No Benefit Plan provides medical, surgical, hospitalization, or life insurance benefits (whether or not insured by a third party) for employees or former employees of Seller for periods extending beyond their retirement or other terminations of service, other than (i) coverage mandated by Applicable Law, (ii) death benefits under any pension benefit plan as defined in Section 3(1) of ERISA, or (iii) benefits the full cost of which is borne by the current or former employee (or his beneficiary).

(i) The consummation of the Contemplated Transactions, either alone or in conjunction with another event (such as a termination of employment), will not (i) entitle any current or former employee or officer of Seller to severance pay, or any other payment under a Benefit Plan, (ii) accelerate the time of payment or vesting of benefits under a Benefit Plan (except as specifically contemplated by this Agreement), or (iii) increase the amount of compensation due any such employee or officer.

(j) There is no litigation, action, proceeding, audit, examination or claim pending, or to the Knowledge of any Seller Party, threatened or contemplated relating to any Benefit Plan (other than routine claims for benefits).

4.13 Assumed Contracts. Seller has made available to Buyer a copy or description of all Assumed Contracts constituting:

(a) All customer Contracts and open purchase orders which require or could require any party thereto to pay in excess of \$35,000 per annum;

(b) All pending bids for customer Contracts with a reasonably expected value in excess of \$35,000 per annum;

(c) All Contracts for the employment of any Person;

(d) All consulting Contracts;

(e) All joint venture, teaming and similar arrangements;

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(f) All Contracts for the purchase by Seller of equipment involving outstanding commitments in excess of \$50,000;

(g) All notes and installment obligations and other Contracts relating to any borrowing, or issuance of letters of credit or surety, performance or other bonds or similar arrangements;

(h) All leases (as lessee or lessor) of real or personal property involving payments of more than \$50,000 per annum;

(i) All agreements materially limiting the freedom of Seller to compete in the Business with any Person or in any geographical area;

(j) All Contracts with (i) an Affiliate of Seller or (ii) any current or former officer or director or employee of Seller or any of its Affiliates;

(k) All powers of attorney or agency Contracts with any Person pursuant to which such Person is granted the authority to act for or on behalf of Seller;

(l) All Contracts involving payment by Seller of more than \$50,000;

(m) All Contracts providing for the services of any dealer, distributor, sales representative or similar representative;

(n) All Contracts that are not yet fully performed or under which Seller has any continuing liability (pursuant to indemnification obligations or otherwise) and relating to any acquisition or disposition by Seller of any assets or rights, other than the disposition of inventory in the ordinary course of business consistent with past practice; and

(o) All Contracts under which (i) any Person has directly or indirectly guaranteed Liabilities of Seller or (ii) Seller has directly or indirectly guaranteed Liabilities of any other Person.

A list or description of each of the items described above (the "Material Contracts") is set forth on Schedule 4.13. Except as disclosed on Schedule 4.13, all Assumed Contracts are in full force and effect. Seller has performed or is performing in all material respects all obligations required to be performed by it under each Assumed Contract. Neither Seller Party, nor, to the Knowledge of each Seller Party, any other Person, is (with or without notice or lapse of time or both) in breach or default in any material respect under any Assumed Contract, and to the Knowledge of each Seller Party, no event has occurred which (with or without notice or lapse of time, or both) would permit termination, modification or acceleration thereunder. Neither Seller Party has received any notice that, nor to the Knowledge of the Seller Parties, does any party to any Assumed Contract intend to cancel, terminate or refuse to renew such Assumed Contract.

4.14 Effect of Agreement. The execution and delivery of this Agreement, and the Seller Ancillary Agreements by the Seller Parties and the consummation of the Contemplated Transactions will not (a) conflict with or result in any violation or breach of any of the terms or conditions of, or constitute a default under, the Certificate of Incorporation or other charter

documents or bylaws of any Seller Party, or any Contract to which any Seller Party is now a party or by which any Seller Party or any of its properties or assets may be bound or affected; (b) result in any violation of any Applicable Law applicable to any Seller Party, the Transferred Assets or the Business; (c) cause Buyer to lose the benefit of any right or privilege included in the Transferred Assets; (d) relieve any Person of any obligation (whether contractual or otherwise) or enable any Person to terminate any such obligation or any right or benefit enjoyed by Seller or to exercise any right under any agreement in respect of the Transferred Assets or the Business; or (e) require notice to or the Consent, or order of any Person (except as may be contemplated by Schedule 4.5).

4.15 Intangible Property. Schedule 4.15 lists all of the patents, inventions, trademarks, trade names, brand names, service marks, copyrights, Internet addresses, sites and domain names used or held for use in the Business as of the date of this Agreement. Except as set forth on Schedule 4.15, the operation of the Business as now conducted by Seller does not require the use of any rights under any patents, inventions, trademarks, trade names, brand names, service marks or copyrights. Except as set forth on Schedule 4.15, Seller owns and has the full and exclusive right to use in connection with the Business all of the items listed on Schedule 4.15. All of the United States Transferred Intellectual Property listed on Schedule 4.15 has been duly registered in, filed in or issued by the appropriate state or federal Governmental Authority where such registration, filing or issuance is necessary for the conduct of the Business. Seller has not transferred, encumbered or licensed to any Person any rights to own or use any portion of the items listed on Schedule 4.15 or any other intangible property included in the Transferred Assets. To the knowledge of each Seller Party, neither (a) the items listed on Schedule 4.15, (b) any other intangible property included in the Transferred Assets, nor (c) the operation of the Business as presently conducted, violates or infringes upon any patents, inventions, trademarks, trade names, brand names, service marks, copyrights, or Internet addresses, sites or domain names owned by others. To the Knowledge of each Seller Party, none of the items listed on Schedule 4.15 or any other intangible property included in the Transferred Assets is being infringed upon by any Person.

4.16 Suits, Actions and Claims. Except as set forth in Schedule 4.16 or where such matters, individually or in the aggregate, would not reasonably be expected to result in a Liability in excess of \$100,000, there are no pending, or to the Knowledge of each Seller Party, threatened, suits, actions, claims, inquiries, investigations or legal, administrative or arbitration proceedings against or affecting Seller or any of its properties, assets or business, including any such suits, actions, claims, inquiries, investigations or proceedings that question the validity or legality of the Contemplated Transactions, and there is no outstanding order, writ, injunction or decree of any Governmental Authority against or affecting Seller or any of its properties, assets or business.

4.17 Records. The Books and Records, including, but not limited to, all customer files, service agreements, quotations, correspondence, route sheets and historic revenue data of Seller, contain records of all matters required to be included therein by any Applicable Law. Seller has made available to Buyer copies of all Books and Records.

4.18 Inventory. The inventory of Seller, taken as whole, whether reflected on the Reference Balance Sheet or subsequently acquired is (a) in good and usable condition,

consistent with past practice, and (b) stated on the books and records of Seller at the lesser of cost and fair market value, with adequate reserves, all as determined in accordance with past accounting practices of Seller as reflected in Exhibit C. Since the date of the Reference Balance Sheet, there have not been any write-downs of the value of, or establishment of any reserves against, any inventory of the Business, except for write-downs and reserves in the ordinary course of business consistent with past practice.

4.19 Accounts Receivable. All notes and accounts receivable of Seller (other than the Note Receivable) that are reflected on the Reference Balance Sheet or that have arisen since December 31, 2001 ("Accounts Receivable") have arisen from bona fide transactions in the ordinary course of business. Seller has not factored or discounted or agreed to factor or discount any Accounts Receivable. The values at which the Accounts Receivable are carried reflect the accounts receivable valuation policy of Seller which is consistent with Seller's past practice consistently applied. Schedule 4.19 sets forth a true, correct and complete list of all Accounts Receivable written off by Seller, in whole or in part, as uncollectible during the two (2) years preceding the date hereof. Schedule 4.19 also sets forth a true, correct and complete aging of the Accounts Receivable of Seller as of the most recent practicable date, and, except as specifically noted on Schedule 4.19, all of such Accounts Receivable (other than Intercompany Receivables) are included in the Transferred Assets.

4.20 Compliance with Law. To the Knowledge of the Seller Parties, Seller is in compliance with all Applicable Laws, except for such non-compliance that would not reasonably be expected to have a Material Adverse Effect on the Business. To the Knowledge of the Seller Parties, Seller has not received any notice of any violation or alleged violation of any Applicable Laws.

4.21 Product Warranties. Schedule 4.21 contains a true, correct and complete copy of Seller's standard warranties and return policies for its products, and except as stated therein or provided for under any Applicable Law, there are no warranties, commitments or obligations with respect to the return, repair or replacement of Seller's products. To the Knowledge of the Seller Parties, there are no defects in design, construction or manufacture of Seller's products, which would reasonably be expected to have a Material Adverse Effect on the Business. None of Seller's products sold within the last two years have been the subject of any recall campaign, and to the Knowledge of the Seller Parties, no facts exist which would reasonably be expected to result in such a recall campaign.

4.22 Intentionally Omitted.

4.23 Intentionally Omitted.

4.24 Intentionally Omitted.

4.25 Brokers and Other Fees. With the exception of fees and expenses payable to Conway, Del Genio, Gries & Co., LLC and amounts owing to employees of the Seller Parties under the Key Employee Retention Program, as approved and described by the Bankruptcy Court in an order, dated June 11, 2001, all of which shall be paid by AAPC, no agent, broker, Person or firm acting on behalf of, Seller or any of its Affiliates is, or will be entitled to any

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commission or broker's or finder's fee from any party hereto or from any Person controlling, controlled by or under common control with any parties hereto and no bonus shall be payable to any officer, director, employee, agent or sales representative of or consultant to the Seller Parties or the Seller Parties' Affiliates in each case, in connection with or upon consummation of the Contemplated Transactions.

4.26 Taxes. Except as set forth on Schedule 4.26, with respect to Taxes:

(a) Seller has properly completed and filed or caused to be filed or shall properly complete and file or cause to be filed, within the time prescribed by Applicable Law, including extensions, all Tax Returns with respect to the Transferred Assets that are or were required to be filed under Applicable Laws with respect to any period ending on or prior to the Closing Date.

(b) Seller has, within the time and in the manner prescribed by Applicable Law, paid or caused to be paid (and until the Closing Date will, within the time and in the manner prescribed by Applicable Law, pay or cause to be paid) all Taxes that are shown to be due and payable on Tax Returns filed or to be filed with respect to any period ending on or prior to the Closing Date.

(c) Seller's filings and reporting with respect to, and payment of, Taxes with respect to all applicable sales, use, franchise, excise and similar Taxes relating to the Business are in compliance with all Applicable Laws related to such Taxes.

4.27 No Other Representations and Warranties. Except as expressly set forth in this Agreement, the Schedules and Exhibits hereto, and any certificate or instrument delivered pursuant to the terms hereof, the Seller Parties make no representations or warranties with respect to the Business or Seller's operations, assets (including, without limitation, the Transferred Assets), liabilities (including, without limitation, the Assumed Liabilities) or condition, including, with respect to the Transferred Assets, any representation or warranty of merchantability, suitability or fitness for a particular purpose, or quality as to the Transferred Assets, or any part thereof, or as to the condition or workmanship thereof, or the absence of any defects therein, whether latent or patent.

**ARTICLE 5
REPRESENTATIONS AND WARRANTIES OF BUYER**

Buyer represents and warrants to the Seller Parties as set forth below as of the date of this Agreement:

5.1 Organization, Standing, Etc. of Buyer. Buyer is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction where it is organized and has all requisite corporate power and authority to enter into this Agreement and the other documents, instruments and agreements executed or to be executed by it pursuant to this Agreement (the "Buyer Ancillary Agreements"), to carry out the Contemplated Transactions and to perform its obligations hereunder. Buyer is a "United States Person" within the meaning of the Tax Code. Buyer is qualified to do business in each state of the United States and foreign jurisdictions where the character of its assets or the nature or conduct of its business requires

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such qualification and where the failure to so qualify would materially affect Buyer's ability to consummate the Contemplated Transactions.

5.2 Corporate Authorization. The execution, delivery and performance of this Agreement and the Buyer Ancillary Agreements, and the consummation of the Contemplated Transactions have been duly authorized by all necessary corporate action on the part of Buyer. This Agreement has been and prior to Closing, the Buyer Ancillary Agreements will be duly executed and delivered by a duly authorized officer of Buyer. Buyer has the corporate power and authority necessary to enter into and perform its obligations under this Agreement and the Buyer Ancillary Agreements and to carry out the Contemplated Transactions.

5.3 Enforceability. This Agreement constitutes and the Buyer Ancillary Agreements when executed and delivered will constitute the valid and legally binding obligations of Buyer, enforceable in accordance with their respective terms.

5.4 Effect of Agreement. Except as set forth on Schedule 5.4, the execution and delivery of this Agreement and the Buyer Ancillary Agreements and the consummation of the Contemplated Transactions will not (a) conflict with or result in any violation or breach of any of the terms or conditions of, or constitute a default under, the Certificate of Incorporation or bylaws of Buyer, or any Contract to which Buyer is a party or by which Buyer or any of its assets or properties may be bound or affected; or (b) require notice to or the Consent or order of any Person (except as described in Section 5.5 or on Schedule 5.5).

5.5 Governmental Authorizations and Consents. Except as set forth on Schedule 5.5, no Consent of any Person is required to be obtained or made by Buyer in connection with the execution, delivery, performance, validity and enforceability of this Agreement other than (a) any filing with the Federal Trade Commission and the Department of Justice under the HSR Act, and (b) Bankruptcy Court approval.

5.6 Suits, Actions and Claims. No action, suit, claim, inquiry, proceeding or governmental investigation is pending or, to the knowledge of Buyer, threatened, against or affecting Buyer, its Affiliates or their respective properties, assets or business at law or in equity before any Governmental Authority that seeks to question, delay or prevent the consummation of the Contemplated Transactions.

5.7 Brokers. No agent, broker, Person or firm acting on behalf of Buyer or any of its Affiliates is, or will be, entitled to any commission or broker's or finder's fees from any of the parties hereto, or from any Person controlling, controlled by or under common control with any of the parties hereto, in connection with or upon consummation of any of the Contemplated Transactions.

5.8 Access. Buyer has received and reviewed the Financial Statements and is acquainted with the Business. Buyer has had an opportunity to review and has been given access to the assets, books, records and Contracts of the Business, and has been given the opportunity to meet with officers and other representatives of Seller for the purpose of investigating and obtaining information regarding the Business, the Transferred Assets and Assumed Liabilities and Seller's financial and legal affairs.

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5.9 **Buyer Awareness.** Based on its due diligence, Buyer is not aware of any fact, circumstance or condition which would constitute a breach of any representation or warranty of the Seller Parties contained in this Agreement, or which could reasonably be expected to have a Material Adverse Effect on the Business.

ARTICLE 6 COVENANTS RELATING TO PERSONNEL ARRANGEMENTS

6.1 Employment of Seller's Employees.

(a) Buyer shall offer employment to all of the salaried and non-salaried Employees of the Business as listed on Schedule 4.12(a), which list shall be updated as of the Closing Date, at substantially equivalent rates of pay and working conditions as those currently offered by Seller to such employees on the date of this Agreement. All employees of the Business accepting Buyer's offer of employment are hereinafter referred to as the "Hired Employees." Effective on the Closing Date, Seller shall, and hereby does, assign all confidentiality agreements previously entered into between Seller and such Hired Employees relating to the Business, to the extent assignable under the terms of such confidentiality agreements and Applicable Law.

6.2 **Seller Benefit Plans.** Except for the Assumed Liabilities set forth in Section 2.3(b), Buyer shall assume no responsibility with respect to any Benefit Plans. To the extent necessary, Seller may continue to communicate with the Hired Employees regarding their rights and entitlement to any benefits under the Benefit Plans. The parties shall cooperate with each other in the administration of all applicable employee benefit plans and programs.

6.3 **Payment Obligations; Vacation Policies.** Immediately after the Closing, Buyer shall be responsible for the payment of all unpaid salaries, wages, commissions and vacation pay to the Employees of the Business to the extent, but only to the extent, such amounts are set forth on the final Closing Schedule. If Buyer does not offer employment to the Employees of the Business set forth on Schedule 4.12(a) in the manner contemplated by Section 6.1(a) (or does not hire any such Employee of the Business that accepts such offer), then Buyer shall be responsible for all severance obligations of such Employees of the Business. Buyer also shall be responsible for all costs, expenses and Liabilities attributable to the Hired Employees accruing after the Effective Time, including, but not limited to, any costs, expenses or Liabilities incurred in connection with the termination of the employment of a Hired Employee after the Effective Time. Buyer agrees to give each Hired Employee credit for prior years of service with Seller for purposes of calculating vacation pay that may be received pursuant to the vacation pay policy of Buyer as may be in effect from time to time after the Effective Time, and will waive any eligibility requirements of such policy with respect to the Hired Employees. Buyer shall allow the Hired Employees to take any unused vacation for the calendar year in which the Closing Date occurs and an expense accrual for any such unused vacation shall be included as a current liability of Seller for purposes of calculating the Closing Date Working Capital pursuant to Section 3.6 above. Buyer agrees to maintain for the one year period after the Closing Date for the benefit of the Hired Employees vacation policies no less generous than those provided by Seller immediately prior to the Effective Time.

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6.4 Severance Policies. Because all employees of the Business will be offered employment with Buyer, the parties intend that no such employee will be entitled to receive severance pay, whether or not such employee accepts such employment. Failure to accept employment with Buyer shall be deemed to be a voluntary resignation by the employee.

6.5 Buyer Benefit Plans. Each Hired Employee shall receive credit for prior years of service with Seller for all purposes of Buyer's benefit plans (except for purposes of benefits accrued under a defined benefit plan) and shall be entitled to participate in Buyer's employee benefit plans without the application of any applicable waiting periods. Buyer shall also permit the Hired Employees and their eligible dependents to participate in its applicable group medical plans. Buyer shall recognize all medical expenses incurred by the Hired Employees and eligible dependents during the calendar year of the Closing and prior to the Effective Time for purposes of satisfying the existing calendar year deductibles and such calendar year's co-payment limitations, if any.

6.6 Employee Files. To the extent permitted by Applicable Law, on the Closing Date, or as soon as practicable thereafter, Seller shall deliver to a designee of Buyer a copy of all historical personnel records of each of the Hired Employees, including, but not limited to, employment agreements, confidentiality and non-competition agreements (which shall be included in the Transferred Assets), employment applications, corrective action reports, disciplinary reports, notices of transfer, notices of rate changes and other similar documents.

6.7 Profit Sharing Obligations. Buyer shall pay to all employees of the Business who are entitled thereto, the management bonus payments for the year 2000 under Seller's 2000 management bonus plan in an aggregate amount not to exceed \$630,000, and all bonus and profit sharing obligations required to be paid by Seller to employees of the Business for the year 2001 and the year 2002, if any (prior to the Effective Time).

6.8 COBRA Obligations. Buyer will be solely responsible for any obligations for continuation coverage under Section 4980B of the Tax Code and part 6 of Subtitle B of Title I of ERISA with respect to Hired Employees.

6.9 Post-Closing Transition Matters. After Closing, Buyer and Seller will cooperate with each other and provide each other such information as is required concerning Hired Employees in order to determine whether a Hired Employee is entitled to compensation from either party or benefits under any plan, program or arrangement sponsored or maintained by either party. In addition, as soon as reasonably practicable after the Closing Date, the Seller Parties will take such actions as are necessary to cause Seller's 401(k) plan assets attributable to the Hired Employees who elect such transfer (with such election to be a one-time election), including outstanding loans to participants, to be transferred in a direct trustee-to-trustee transfer that is subject to the requirements of Section 414(l) of the Tax Code; *provided, however, that* Buyer shall have no obligation to accept such transfer if Buyer does not receive from the Seller Parties proof (which is satisfactory to Buyer) that Seller's 401(k) plan will be fully qualified under Section 401(a) of the Tax Code at the time of such transfer.

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6.10 Employees Not Third Party Beneficiaries. No provision in this Article 6 shall create any third-party beneficiary rights in any employee or former employee (including any beneficiary or dependent thereof) of Buyer, Seller or any of their respective Affiliates.

6.11 No Limits on Employee Policies. Except as otherwise specifically set forth in Sections 6.3, 6.5 and 6.7, nothing in this Agreement shall in any way limit Buyer's right at any time after the Effective Time to establish, eliminate or modify, for any or all Hired Employees any rates of pay, employee benefits, work rules or other employee policies in any way Buyer may determine appropriate or desirable in its sole discretion.

**ARTICLE 7
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**ARTICLE 8
COVENANTS OF SELLER**

8.1 Conduct of Business.

(a) Except as set forth on Schedule 8.1 or as may be otherwise expressly permitted by this Agreement or with the prior written consent of Buyer, which shall not be unreasonably withheld, from the date hereof and prior to the Closing, Seller will:

(i) operate the Business only in the ordinary course of business consistent with the past practices of Seller since the Filing Date;

(ii) use commercially reasonable efforts to preserve intact the organization of the Business;

(iii) continue in full force and effect all existing insurance policies (or comparable insurance) of or relating to the Business;

(iv) use commercially reasonable efforts to preserve Seller's relationships with its suppliers, customers, licensors and licensees and others having business dealings with Seller relating to the Business;

(v) maintain the Transferred Assets in good working order and condition, ordinary wear and tear excepted;

(vi) perform all of its obligations under Contracts relating to or affecting the Transferred Assets or the Business;

(vii) duly and timely file all reports or returns required to be filed with any Governmental Authority, and promptly pay all Taxes levied or assessed upon it or its properties or upon any part thereof, except where such Taxes are not yet due or there is a good faith dispute and adequate reserves are maintained.

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(viii) duly observe and conform to all Applicable Laws relating to the Transferred Assets or its properties or to the operation and conduct of the Business; and

(ix) remove and have released, by payment or otherwise, all Liens on the Transferred Assets, except for Permitted Encumbrances.

(b) Without limiting the generality of Section 8.1(a), and except as may be otherwise expressly permitted by this Agreement or with the prior written consent of Buyer, which shall not be unreasonably withheld, delayed or conditioned, from the date hereof through the Closing, Seller shall not, with respect to the Business:

(i) enter into any material transaction in connection with the Business outside the ordinary course of business and not consistent with past practice;

(ii) conduct the Business outside the ordinary course of business (as conducted by Seller since the Filing Date);

(iii) sell, lease, transfer, mortgage or assign any of the Transferred Assets, tangible or intangible, other than inventory in the ordinary course of business;

(iv) cancel, compromise, knowingly waive or lease any material right or claim (or series of related rights and claims) under the Material Contracts, other than modifications to product sales orders and materials and supplies purchase orders in the ordinary course of business and consistent with past practice;

(v) make any material change in the rate of compensation, commission, bonus or other direct or indirect remuneration payable, or agree to pay, conditionally or otherwise, any material bonus, incentive, retention or other compensation, retirement, welfare, fringe or severance benefit or vacation pay, to or in respect of any Employee of the Business, other than the increases and payments in the ordinary course of business consistent with past practice since the Filing Date;

(vi) enter into or assume any Contract related to the Business or the Transferred Assets other than in the ordinary course of business and consistent with past practice;

(vii) enter into or assume (whether or not in the ordinary course of business) any Contract or obligation related to the Business or the Transferred Assets (or of a type included in the Transferred Assets) that can be expected to (i) have a term lasting more than 90 days after the Closing Date or (ii) generate gross revenues or payments in excess of \$100,000;

(viii) enter into or assume any pledge, conditional sale or other retention agreement or Lien upon any of the Transferred Assets;

(ix) engage in any activities or transactions that would reasonably be expected to have a Material Adverse Effect on the Business;

(x) make or agree to make any capital expenditures in excess of \$100,000;

(xi) make any investment in (including by purchase of stock or securities, contributions to capital, property transfers or otherwise), or loan or advance to, any Person;

(xii) enter into any transactions with any of its Affiliates;

(xiii) reject any Contracts pursuant to Section 365 of the Bankruptcy Code other than such Contracts which are not part of the Transferred Assets; and

(xiv) agree to do any of the foregoing.

(c) In the event that Seller wishes to engage in any act which falls within the provisions of Section 8.1(b), Seller shall provide notice thereof to Buyer who shall advise Seller within three business days of any objection Buyer has with such action. If Buyer fails to object within such period, Buyer shall be deemed to have waived any objection to such act. Notwithstanding anything contained in this Agreement to the contrary, Seller shall not be required to obtain Buyer's consent under Section 8.1(b) for any repair or replacement made pursuant to Section 15.

8.2 Access. Subject to reasonable notice and as permitted by Applicable Law, Seller shall afford to Buyer and its accountants, counsel, lenders and other agents and representatives full access during normal business hours throughout the period prior to the Closing Date to all of the properties, Contracts, and Books and Records of the Business, which access shall include the right to conduct environmental assessments of such properties, including soil and groundwater sampling and, during such period, Seller shall furnish promptly to Buyer and its representatives access to all information concerning the Business, including its properties and personnel, as Buyer may reasonably request. Seller shall promptly upon request provide Buyer access to a true, complete and correct copy of each written Contract, together with all amendments or clarifications thereto, and a true, complete and correct summary of the terms and conditions of each oral agreement, related to the Business. If access is restricted due to a term in any such Contract or by Applicable Law, Seller shall use its commercially reasonable efforts to secure consent from the other party(ies) to the Contract to provide such access prior to Closing with sufficient time for Buyer review. Buyer will treat the documents and other material and information referred to in this Section 8.2 as confidential in compliance with Section 10.9.

8.3 Notification of Certain Matters. Seller shall give prompt notice to Buyer of (i) any breach by Seller of any of its representations or warranties at any time from the date of this Agreement to the Closing Date, or (ii) any failure of Seller to comply with or satisfy any of its covenants or conditions in a timely manner under this Agreement. If Seller becomes aware of any event requiring any change in the Disclosure Schedule, Seller will promptly deliver to Buyer a supplement to the Disclosure Schedule specifying such change. Notwithstanding the

foregoing, no such notice or supplement to the Disclosure Schedule shall have any effect for the purpose of determining the satisfaction of the conditions set forth in Article 12.

ARTICLE 9 COVENANTS OF BUYER

9.1 **Investigation.** In conducting its review of the Business, Buyer shall conduct itself so as to not unreasonably interfere with the Business or with the performance of Seller's employees.

9.2 **Assistance with Respect to Excluded Assets.** Following the Closing, upon request of Seller, Buyer will use its commercially reasonable efforts, at Seller's sole expense, to assist Seller in connection with the collection, maintenance or liquidation of the Excluded Assets. If Buyer receives payment in respect of such items following the Closing, Buyer shall promptly pay such amounts to Seller and shall notify promptly each such payor that any and all payments by that payor to Seller in the future should be made directly to Seller.

ARTICLE 10 COVENANTS OF THE PARTIES

10.1 **Commercially Reasonable Efforts.** Subject to the terms and conditions of this Agreement, each party will use its commercially reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary or desirable under Applicable Law and the terms of this Agreement to consummate the Contemplated Transactions, including the execution and delivery of any further instruments or documents which are reasonably requested by a party or its counsel in order to evidence or facilitate the consummation of the Contemplated Transactions.

10.2 HSR Filing; Other Filings.

(a) Not later than ten business days after the date of this Agreement, and pursuant to the applicable requirements of the HSR Act and the rules and regulations thereunder, Buyer and Seller shall cause to be filed with the Federal Trade Commission and the Antitrust Division of the Department of Justice all requisite documents and notifications in connection with the Contemplated Transactions. Buyer and Seller shall diligently and expeditiously comply with the HSR Act in connection with securing all necessary approvals or waivers thereunder. In furtherance thereof, Buyer and Seller shall each (i) promptly file a premerger notification and report form under the HSR Act and (ii) use reasonable efforts to obtain early termination of the waiting period and to respond to any request for information under the HSR Act.

(b) Buyer and Seller shall cooperate with one another (i) in determining whether any other action by or in respect of, or filing with, any Governmental Authority is required, or any actions or Consents are required to be obtained from parties to any Material Contracts, in connection with the consummation of the Contemplated Transactions and (ii) in taking such actions or making any such filings, in furnishing such information as may be required in connection therewith, and in seeking timely to obtain any such actions or Consents.

(c) Seller shall reimburse Buyer for one-half of the filing fee under the HSR Act with respect to the filing contemplated by this Section 10.2 within five business days following the payment of such fee by Buyer. Except as contemplated by the preceding sentence, each party shall bear its own expenses of complying with this Section 10.2.

10.3 Public Announcements. Neither Buyer, Seller nor any of their Affiliates will issue any press release or make any public statement with respect to this Agreement or the Contemplated Transactions, or disclose the existence of this Agreement to any Person, prior to the Closing and, after the Closing, will not issue any such press release or make any such public statement without the prior consent of Buyer, in the case of a statement by a Seller Party, or by the Seller Parties in the case of a statement by Buyer (any of which consent shall not be unreasonably withheld, conditioned or delayed), subject to any applicable disclosure obligations pursuant to Applicable Law (including Seller's and Buyer's requirement to issue a press release promptly after the execution of this Agreement, Seller's obligation to file a Form 8-K with the U.S. Securities and Exchange Commission, and disclosures required in furtherance of the overbid process in connection with the Bankruptcy Case or as contemplated by this Agreement), provided that the party proposing to issue any press release or similar public announcement or communication in compliance with any such disclosure obligations shall use commercially reasonable efforts to consult in good faith with the party(ies) whose consent would have been required otherwise before doing so. In addition, Buyer acknowledges that Seller has informed certain of its employees and may inform other employees of the Contemplated Transactions.

10.4 Consents; Cooperation. Seller and Buyer will use their commercially reasonable efforts:

(a) to obtain prior to the earlier of the date required (if so required) or the Closing Date, all Consents of all Governmental Authorities (including, without limitation, the approval of the Bankruptcy Court) and any other Persons that are required on their respective parts, for the consummation of the Contemplated Transactions;

(b) to defend, consistent with applicable principles and requirements of Applicable Law, any lawsuit or other legal proceeding, whether judicial or administrative, whether brought derivatively or on behalf of third Persons (including Governmental Authorities) challenging this Agreement or the Contemplated Transactions;

(c) to furnish to each other such information and assistance as may reasonably be requested in connection with the foregoing; and

(d) to reasonably assist each other as necessary with regard to the determination of contract or order closeouts or other issues which affect the Assumed Contracts, to notify Buyer of additional disallowances or potential adverse audit findings, and to consult and reach agreement with respect to advanced coordination of negotiating positions, offers of compromise, or final agreements or settlements, all such cooperation to be without charge to any party to this Agreement.

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10.5 Communications with Customers and Suppliers. Seller and Buyer will mutually agree upon all communications with suppliers and customers of the Business relating to this Agreement and the Contemplated Transactions prior to the Closing Date.

10.6 Liability for Transfer Taxes.

(a) The parties shall cooperate and use commercially reasonable efforts to avail themselves of the exemption from transfer taxes contained in Section 1146(c) of the Bankruptcy Code. Buyer and Seller shall each be responsible for and pay in a timely manner one-half of all sales, use, value added, documentary, stamp, gross receipts, foreign withholding, registration, transfer, conveyance, excise, recording, license and other similar Taxes and fees ("Transfer Taxes") arising out of or in connection with or attributable to the Contemplated Transactions. Each party hereto shall prepare and timely file all Tax Returns required to be filed in respect of Transfer Taxes that are the primary responsibility of such party under Applicable Law, provided, however, that such party's preparation of any such Tax Returns shall be subject to the other party's approval which approval shall not be unreasonably withheld, conditioned or delayed.

(b) The Transferred Assets are composed of (i) assets as to which the "isolated, casual or occasional sale" exemption or similar exemption from Transfer Taxes is or may be applicable and (ii) other assets as to which other exemptions from Transfer Taxes are or may be applicable. In order to obtain any exemption or favorable tax rate, Buyer shall, to the extent consistent with Applicable Law, provide Seller with any exemption or resale certificate, permit, license or such other documentation as may be applicable and required by any taxing authority to establish the right to such exemption or tax rate.

10.7 Books and Records. Subject to the confidentiality provisions hereof, Seller shall have the right to retain copies of the Books and Records. From and after the Closing and until the sixth anniversary thereof, (a) Seller agrees to grant to Buyer, upon reasonable notice and during normal business hours, reasonable access to any books and records that pertain to the Business, but which are not Books and Records; to the extent it is operating and has books and records in its possession, and (b) Buyer agrees to grant to Seller or its estate, upon reasonable notice and during normal business hours, reasonable access to any Books and Records included in the Transferred Assets that pertain to the operations of the Business on or prior to the Closing Date, including without limitation for the purpose of the calculation of the Working Capital Adjustment, to the extent Buyer has such Books and Records in its possession, subject to the retention requirements set forth in Section 10.8.

10.8 Tax Matters.

(a) Seller and Buyer shall provide each other and its Affiliates with such assistance and documents, without charge and in a timely fashion, as may be reasonably requested by either of them in connection with (i) the preparation of any Tax Return related to the Business, or (ii) the conduct of any proceeding relating to Taxes arising in connection with the Business. Such assistance shall include, without limitation: (i) the provision on demand of reasonable books, records, Tax Returns, documentation or other information in such parties' possession relating to any relevant Tax Return ("Tax Data"); (ii) the execution of any reasonable

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document that may be necessary or reasonably helpful in connection with the filing of any Tax Return, or in connection with any proceeding relating to Taxes, including, without limitation, the execution of powers of attorney and extensions of applicable statutes of limitations; and (iii) the use of reasonable efforts to obtain any reasonable documentation from any Governmental Authority or other Person that may be necessary or reasonably helpful in connection with the foregoing. Such cooperation shall include, without limitation, making their respective employees and independent auditors reasonably available on a mutually convenient basis for all reasonable purposes, including, without limitation, to provide explanations and background information and to permit the copying of books, records, schedules, workpapers, notices, revenue agent reports, settlement or closing agreements and other documents containing the Tax Data ("Tax Documentation"). If a third party is retained in connection with any review hereunder, the party retaining such third party shall be responsible for any fees and expenses for such third party.

(b) Seller and Buyer shall retain or cause to be retained (or shall give notice and permit copying as set forth in the last two sentences of this Section 10.8(b)) the Tax Data, the Tax Documentation, all Tax Returns relating to the Business, schedules and workpapers, and all material records or other documents relating thereto, until one year after the expiration of all applicable statutes of limitations (including any waivers or extension thereof) with respect to the taxable periods to which such Tax Returns and other documents relate or until the expiration of any additional period that either Buyer or Seller, as the case may be, may reasonably request in writing with respect to specifically designated material records or documents; provided, however, that in the event an audit, examination, investigation or other proceeding has been instituted prior to the expiration date of an applicable statute of limitations, the Tax Data and Tax Documentation relating thereto shall be retained until there is a final determination thereof (and the time for any appeal has expired). After the expiration of the time when the Tax Data and the Tax Documentation must be retained pursuant to this Section 10.8, then any such material may be destroyed. Seller shall give Buyer not less than thirty (30) days' prior written notice before Tax Data or Tax Documentation in the possession or control of any member of the consolidated group of which AAPC is the common parent is destroyed and shall give Buyer an opportunity to copy any such material during such thirty (30) day period. Buyer shall give Seller not less than thirty (30) days' prior written notice before any Tax Data or Tax Documentation in the possession or control of Buyer is destroyed and shall give Seller an opportunity to copy any such material during such thirty (30) day period.

10.9 Confidentiality.

(a) Each Seller Party recognizes and acknowledges that it has and will have access to certain confidential information of Seller that is included in the Transferred Assets (including, but not limited to, financial, accounting, marketing or management reports, employee and jobs data, salary structure, market data surveys, customer lists, internal memoranda, reports, business plans, analyses, forecasts, projections, confidential technology, intellectual property, trade secrets, know-how and any other materials, records and/or information of a proprietary nature) that after the consummation of the Contemplated Transactions will be valuable, special and unique property of Buyer. Each Seller Party agrees that it will not and will cause its Affiliates and representatives not to disclose on or after the Closing Date any such confidential information to any Person for any purpose or reason whatsoever, except to authorized

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representatives of Buyer. Each Seller Party recognizes and agrees that a violation of any of the agreements contained in this Section 10.9(a) will cause irreparable damage or injury to Buyer, the exact amount of which may be impossible to ascertain, and that, for such reason, among others, Buyer shall be entitled to an injunction, without the necessity of posting bond therefor, restraining any further violation of such agreements. Such rights to any injunction shall be in addition to, and not in limitation of, any other rights and remedies Buyer may have against any Seller Party. Buyer acknowledges that such information shall not be deemed to be confidential information if it becomes public information through no fault of a Seller Party, and that any such confidential information shall be subject to the same qualifications and conditions contained in Section 10.9(b)(ii) and (iii).

(b) Between the date of this Agreement and the Closing Date, Buyer and Seller will maintain in confidence, and will cause their respective Affiliates, directors, officers, employees, agents and advisors to maintain in confidence, and not use to the detriment of another party any written, oral, or other information obtained in confidence from each other in connection with this Agreement or the Contemplated Transactions, unless (i) such information is already known to such party or to others not bound by a duty of confidentiality or such information becomes publicly available through no fault of such party, (ii) the use of such information (including the filing of this Agreement) is necessary or appropriate in making any filing or obtaining any Consent or financing required in connection with the consummation of the Contemplated Transactions or any analysis thereof (including, without limitation, Bankruptcy Court approval of any of the Contemplated Transactions), or (iii) the furnishing or use of such information is required by legal proceedings, provided, however, that the party required to disclose the confidential information shall first notify the other party of such order and afford the other party the opportunity to seek a protective order relating to such disclosure. Notwithstanding anything herein to the contrary, Seller shall not be under any restrictions with respect to disclosures to the Committee, CIT Business Group ("CIT") or any prospective purchasers of the Business (and their respective agents and representatives) (provided that any such prospective purchaser enters into a confidentiality agreement with terms substantially similar to the Prior Confidentiality Agreement) and Buyer acknowledges that Seller will file this Agreement with the Bankruptcy Court in furtherance of obtaining the Sale Order or other appropriate relief from the Bankruptcy Court.

(c) If the Contemplated Transactions are not consummated, each party will immediately return or destroy all such confidential information and any and all copies thereof, however stored, and, if requested by the other party, shall certify conformity with this Section 10.9(c) in writing and shall continue to hold in confidence all such data and information in accordance with the terms of this Section 10.9.

(d) The provisions of this Article 10 are in addition to, and not in lieu of, the provisions of the Confidentiality Agreement dated November 13, 2000, among the Seller Parties and Lincap related to the Contemplated Transactions (the "Prior Confidentiality Agreement"). From and after the Closing Date, the Prior Confidentiality Agreement shall be of no further force or effect.

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10.10 Pro Rata Adjustments.

(i) To the extent not included in the Assumed Liabilities, Utility Charges, Rental Charges, Furniture and Equipment Charges, Real Property Taxes and Personal Property Taxes including, without limitation, accruals or prepayments thereof (all as individually defined below and collectively called the "Proration Items"), shall be prorated directly between Seller and Buyer as provided in this Section 10.10.

(ii) For purposes of this Section 10.10, the capitalized terms set forth below shall have the following meanings:

(A) "Utility Charges" shall mean water, sewer, electricity, gas and other utility charges, if any, applicable to the Transferred Facilities;

(B) "Rental Charges" shall mean common area maintenance charges, merchant association dues, insurance reimbursement and rental charges payable or receivable and other payments or receipts (other than Real Property Taxes) applicable to the Transferred Facilities;

(C) "Furniture and Equipment Charges" shall mean rental charges payable or receivable and other payments or receipts applicable to the furniture and equipment comprising the Transferred Assets;

(D) "Real Property Taxes" shall mean ad valorem taxes imposed upon the Transferred Assets, general assessments imposed with respect to the Transferred Facilities and special assessments upon the Transferred Facilities, whether payable in full or by installments prior to the Effective Time; and

(E) "Personal Property Taxes" shall mean ad valorem taxes imposed upon the personal property comprising the Transferred Assets other than any real property.

(iii) As soon as practicable after the Closing Date, all Utility Charges, Rental Charges, Furniture and Equipment Charges, Real Property Taxes and Personal Property Taxes (including amounts owed pursuant to transferable state licenses applicable to the Transferred Assets and transferred to Buyer hereunder) which are not included in the Assumed Liabilities shall be apportioned to the Closing Date, and representatives of Seller and Buyer will examine all relevant Books and Records as of the Closing Date in order to make the determination of the apportionments, which determinations shall be calculated in accordance with past practices. Payments in respect thereof shall be made to the appropriate party by check within thirty (30) days after such determination, except that payments for Real Property Taxes and Personal Property Taxes shall initially be determined based on the previous year's taxes and shall later be adjusted to reflect the current year's taxes when the tax bills are finally rendered. The parties shall fully cooperate with each other to avoid, to the extent legally possible, the payment of

duplicate Personal Property Taxes, and each party shall furnish, at the request of the other, proof of payment of any Personal Property Taxes or other documentation which is a prerequisite to avoiding payment of a duplicate tax. Any disputes arising under Section 10.10 shall be resolved by the Resolving Accountants. If the disputed issues under this Section 10.10 are submitted to the Resolving Accountants, each party shall furnish to the Resolving Accountants such work papers and other documents and the information relating to the disputed issues as the Resolving Accountants may request and are available to such party, and each party will be afforded the opportunity to present to the Resolving Accountants any material relating to the determination and to discuss the determination with the Resolving Accountants. The Resolving Accountants shall be required to make a decision within thirty days of the date of their acceptance of their appointment as the Resolving Accountants. The determination of the Resolving Accountants, as set forth in a written notice shall be binding and conclusive on the parties absent fraud or manifest error. The fees and expenses of the Resolving Accountants for such determination shall be shared equally by Buyer and Seller.

(iv) In the event that either party (the "Payor") pays a Proration Item (other than if and to the extent included in the Assumed Liabilities) for which the other party (the "Payee") is obligated in whole or in part under this Section 10.10, the Payor shall present to the Payee evidence of payment and a statement setting forth the Payee's proportionate share of such Proration Item, and the Payee shall promptly pay such share to the Payor. In the event either party (the "Recipient") receives payment of a Proration Item to which the other party (the "Beneficiary") is entitled in whole or in part under this Agreement, the Recipient shall promptly pay the Beneficiary's share to the Beneficiary.

10.11 Intentionally Omitted.

10.12 Use of Business Names by Buyer.

(a) Buyer acknowledges that Seller has asserted the absolute and exclusive proprietary right to all names, marks, trade names, trademarks, service names and service marks (collectively, "Names") incorporating "American Architectural Products Corporation" or "AAPC" or any similar Name and to all corporate symbols or logos (collectively, "Logos") incorporating "American Architectural Products Corporation" or "AAPC" or any similar Name. All rights of Seller and its Affiliates to the same and the goodwill represented thereby and pertaining thereto are being retained by Seller or its Affiliates. Buyer agrees that it will not, and will cause the Business not to, use the American Architectural Products Corporation or AAPC Name or any similar Name or any Logo incorporating such Name or any similar Name in any manner, including in connection with the sale of any products or services or otherwise in the conduct of the Business, except as expressly permitted by subsection (b) of this Section 10.12.

(b) For a period of 90 days after the Closing Date (the "Window Period"), Seller hereby grants, effective as of the Closing Date, on a fully-paid, non-exclusive, royalty-free basis, to Buyer, the right to use the American Architectural Products Corporation and AAPC

Logos and the American Architectural Products Corporation and AAPC Names (i) to market and sell all services and products of the Business as currently conducted and (ii) in connection with the use of the Transferred Assets to the extent that such Logos and Names shall be printed on any of the Transferred Assets, including, without limitation, any catalogs, invoices, packaging material or stationery (provided, however, that Buyer shall use its commercially reasonable efforts to cease its use of the American Architectural Products Corporation and AAPC Names and the American Architectural Products Corporation and AAPC Logos as soon as reasonably practicable prior to the expiration of the Window Period). Immediately upon the expiration of the Window Period, Buyer shall cease to use in any manner the American Architectural Products Corporation and AAPC Names and the American Architectural Products Corporation and AAPC Logos incorporating such Names and remove or obliterate such Names and the American Architectural Products Corporation and AAPC Logos from any products or other assets.

(c) If this Agreement is terminated for any reason, Buyer shall and shall cause its Affiliates to cease using, and thereafter refrain from using, all names that include the word "Eagle," including the names "Eagle and Taylor Co." and "Eagle Window and Door, Inc." and all derivations thereof, and Buyer immediately will take all actions necessary to change its corporate name to a name that does not include the word "Eagle" or "Eagle and Taylor Co." or any derivation thereof and its assumed name to a name that does not include the word "Eagle" or "Eagle Window and Door, Inc." or any derivation thereof.

10.13 Transition Period Assistance. The Seller Parties agree that during the 90-day period beginning on the Closing Date they will reasonably cooperate, and cause their respective officers, directors and other representatives to reasonably cooperate, with Buyer (at no cost to Buyer) in transitioning payroll and other general corporate services pertaining to the Business to Buyer and its designated Affiliates.

10.14 Assignment of Confidentiality Agreements. At the Closing, AAPC and Seller shall assign to Buyer all rights under all confidentiality agreements entered into by AAPC or Seller (to the extent not otherwise included in the Assumed Contracts) with any Person in connection with the Business (including without limitation in connection with the sale of the Business (or any portion thereof)) to the extent assignable under such confidentiality agreements and Applicable Law. Copies of all such confidentiality agreements shall be made available to Buyer on or prior to the Closing Date.

10.15 Reimbursement for Certain Amounts Relating to Performance, Bonds, Surety Bonds and Letters of Credit. Buyer shall reimburse the Seller Parties for any and all amounts that the Seller Parties have paid to the issuers of the performance bond, surety bond and letter of credit (but only to the extent and in the amount paid to RLI Insurance Company or The Weitz Company, Inc.) set forth on Schedule 10.15 as a result of Buyer's failure to satisfy Buyer's post-Closing performance obligations under that certain Construction Contract, dated October 24, 2000, between Seller and The Weitz Company, Inc. (the "Liberty Media Contract"). Buyer shall also reimburse the Seller Parties for any and all amounts (other than attorney's fees) that the Seller Parties have paid to Liberty Media or to other Persons who are engaged to perform Buyer's post-Closing performance obligations under the Liberty Media Contract as a result of Buyer's failure to satisfy Buyer's post-Closing performance obligations under the Liberty Media Contract. Buyer and the Seller Parties agree to give each other prompt written notice of any act,

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omission, event, or circumstance that could rise to any claim against the Seller Parties by Liberty Media, The Weitz Company, Inc. or the issuers of the performance bond, surety bond and letter of credit listed on Schedule 10.15, in each case to the extent such claim relates to the Liberty Media Contract. After the Closing Date, Buyer shall manage, control and defend any such claim and take all commercially reasonable steps to ensure that such claim does not give rise to any payment obligation of the Seller Parties under such performance bond, surety bond or letter of credit. Neither Seller Party shall settle, compromise or discharge such claim without Buyer's prior written consent (such consent not to be unreasonably withheld). The Seller Parties shall agree to any settlement, compromise or discharge of such claim which Buyer may recommend and by which by its terms obligates Buyer to pay the amounts contemplated in this Section 10.15. Seller may assume the defense of any such claim if Buyer fails to act in a commercially reasonable manner as set forth in the preceding sentence.

ARTICLE 11 BANKRUPTCY COURT APPROVALS

The obligations of Buyer and the Seller Parties to consummate the Contemplated Transactions are subject to and conditioned upon (i) the Sale Hearing occurring on or before April 19, 2002, (ii) the entry of an order (the "Sale Order") of the Bankruptcy Court, in form and substance reasonably satisfactory to Buyer, (A) approving this Agreement and the Contemplated Transactions, (B) transferring the Transferred Assets to Buyer free and clear of all Liens (except Permitted Encumbrances), and subject to the Assumed Liabilities, pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, (C) authorizing Seller to assign to Buyer and Buyer to assume all of the Assumed Contracts pursuant to Section 365 of the Bankruptcy Code, (D) finding that good and sufficient notice of the application for approval of the Sale Order has been given to all Persons to whom such notice is required under the rules and procedures of the Bankruptcy Court or otherwise to effectuate the Contemplated Transactions, and (E) finding that this Agreement was entered into in good faith by the parties and was not the result of any improper agreements or actions, such that the parties are afforded the protection set forth in Section 363(m) of the Bankruptcy Code, and (iii) such Sale Order becoming final and no longer subject to appeal on or before April 30, 2002, or, if there shall be an appeal of the Sale Order, such order shall not have been stayed pending such appeal (the conditions set forth in this Section 11.1(b) being referred to herein as the "Sale Order Approval").

ARTICLE 12 CONDITIONS TO OBLIGATIONS OF BUYER TO CLOSE

The obligations of Buyer to purchase the Business and the Transferred Assets and otherwise consummate the Contemplated Transactions at the Closing are subject to the satisfaction, as of the Closing Date, of the following conditions (any of which may be waived by Buyer, in its sole discretion, in whole or in part):

12.1 Accuracy of Representations and Warranties. The representations and warranties of the Seller Parties set forth in Article 4 that are qualified as to materiality shall be accurate and those not so qualified shall be accurate in all material respects as of the Closing, as though made on and as of the Closing Date, except to the extent that any of such representations and warranties refers specifically to a date other than the Closing Date, in which case such

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representations or warranties that are qualified as to materiality shall have been accurate as of such other date and those not so qualified shall have been accurate in all material respects as of such other date.

12.2 Performance. Each Seller Party shall have performed in all material respects all obligations required by this Agreement to be performed by it on or before the Closing Date.

12.3 No Conflict. The Contemplated Transactions and the consummation of the Closing shall not be illegal or prohibited under any Applicable Law. No temporary restraining order, preliminary or permanent injunction, cease and desist order or other order issued by any court of competent jurisdiction or any competent Governmental Authority or any other legal restraint or prohibition preventing the transfers contemplated hereby or the consummation of the Closing, shall be in effect, and there shall be no pending or threatened actions or proceedings by any Governmental Authority (or determinations by any Governmental Authority) that result, or would reasonably be expected to result, in a Material Adverse Effect on the Business.

12.4 No Material Adverse Change. A Material Adverse Change shall not have occurred between the date hereof and the Closing Date. As used herein, "Material Adverse Change" shall mean a suspension of trading, for two consecutive days in their entirety, of securities generally on the New York Stock Exchange, the American Stock Exchange, or the NASDAQ National Market as a result of acts of terrorism.

12.5 Lease Agreement. Seller shall have executed and delivered a lease in substantially the form attached hereto as Exhibit D (the "Lease Agreement") for a portion of the premises located at 375 E. 9th Street, Dubuque, Iowa 52001.

12.6 Certificate. Buyer shall have received from a duly authorized officer of each of the Seller Parties a certificate dated the Closing Date confirming that the conditions in Sections 12.1, 12.2, and to the Knowledge of the Seller Parties, 12.3 have been satisfied.

12.7 Intentionally Omitted.

12.8 Intentionally Omitted.

12.9 Intentionally Omitted

12.10 Bankruptcy Court Approval. The Bankruptcy Court shall have entered the Sale Order, in form and substance reasonably satisfactory to Buyer, and the implementation, operation or effect of such order shall not be stayed or any stay entered shall have been dissolved.

12.11 HSR Act. Any applicable waiting period under the HSR Act relating to the Contemplated Transactions shall have expired or been terminated.

12.12 Consents. The real estate leases set forth on Schedule 2.1(m) shall have been assigned and transferred to Buyer pursuant to Section 365 of the Bankruptcy Code. All Consents from Governmental Authorities required to be obtained by Seller in connection with the

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Contemplated Transactions shall have been obtained and shall be in full force and effect in form reasonably acceptable to Buyer.

12.13 Transfer Documents. Seller shall have delivered to Buyer at the Closing all documents, certificates and agreements necessary to transfer to Buyer all right and title to and interests in the Transferred Assets, including, without limitation:

(a) bills of sale, assignments and general conveyances, a trademark assignment agreement and a registrant name change agreement, in form and substance reasonably satisfactory to Buyer, dated the Closing Date, with respect to the Transferred Assets;

(b) assignments of all Assumed Contracts and any other agreements and instruments constituting Transferred Assets, dated the Closing Date, assigning to Buyer all of Seller's right, title and interest therein and thereto (and UCC financing statements evidencing the assignment of Seller's secured party's status under any Assumed Contract to Buyer); and

(c) certificates of title to all owned motor vehicles, if any, included in the Transferred Assets, duly endorsed for transfer to Buyer as of the Closing Date.

12.14 Transaction Documents. Seller shall have executed and delivered the other Transaction Documents.

12.15 Further Instruments. Seller shall deliver to Buyer such further instruments of assignment, conveyance or transfer or other documents of further assurance as Buyer may reasonably request in advance of the Closing.

12.16 Intentionally Omitted.

12.17 Intentionally Omitted.

12.18 Corporate Approval. Each Seller Party shall have taken or caused to be taken all necessary or desirable actions, steps and corporate proceedings (including director, stockholder or other corporate Consents) to approve and authorize the transfer of the Business and the Transferred Assets by Seller to Buyer, and to approve and authorize the execution and delivery of this Agreement and the Seller Ancillary Agreements by each Seller Party, and each Seller Party shall deliver to Buyer at Closing a certificate to all such effects.

12.19 Liens Released. Each Lien, if any, relating to the Transferred Assets shall have been terminated and released and proof thereof delivered to Buyer, except for Permitted Encumbrances.

ARTICLE 13 CONDITIONS TO OBLIGATIONS OF SELLER TO CLOSE

The obligation of Seller to sell the Transferred Assets at the Closing and otherwise consummate the Contemplated Transactions is subject to the satisfaction, as of the Closing Date, of the following conditions (any of which may be waived by Seller in its sole discretion, in whole or in part, after consultation with the Committee):

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13.1 Accuracy of Representations and Warranties. The representations and warranties of Buyer set forth in Article 5 that are qualified as to materiality shall be accurate and those not so qualified shall be accurate in all material respects as of the Closing, as though made on and as of the Closing Date, except to the extent that any of such representations and warranties refers specifically to a date other than the Closing Date, in which case such representations or warranties that are qualified as to materiality shall have been accurate as of such other date and those not so qualified shall have been accurate in all material respects as of such other date.

13.2 Performance. Buyer shall have performed in all material respects all obligations required by this Agreement to be performed by Buyer on or before the Closing Date.

13.3 No Conflict. The Contemplated Transactions and the consummation of the Closing shall not be illegal or prohibited under any Applicable Law. No temporary restraining order, preliminary or permanent injunction, cease and desist order or other order issued by any court of competent jurisdiction or any competent Governmental Authority or any other legal restraint or prohibition preventing the transfers contemplated hereby or the consummation of the Closing, shall be in effect, and there shall be no pending or threatened actions or proceedings by any Governmental Authority (or determinations by any Governmental Authority) that result in, or would reasonably be expected to have a material adverse effect on the Contemplated Transactions.

13.4 Certificate. Seller shall have received from a duly authorized officer of Buyer a certificate dated the Closing Date confirming, that the conditions in Sections 13.1, 13.2 and, to the knowledge of Buyer, 13.3 have been satisfied.

13.5 Bankruptcy Court Approval. The Bankruptcy Court shall have entered the Sale Order, in form and substance reasonably satisfactory to Seller, and the implementation, operation or effect of such order shall not be stayed or any stay entered shall have been dissolved.

13.6 HSR Act. Any applicable waiting period under the HSR Act relating to the Contemplated Transactions shall have expired or been terminated.

13.7 Consents. All Consents required to be obtained by Buyer in connection with the Contemplated Transactions shall have been obtained and shall be in full force and effect, except where the failure to obtain such Consents did not and would not be reasonably expected to have a material adverse effect on the Contemplated Transactions.

13.8 Assumption Agreement. Seller shall have received from Buyer an assumption agreement, in form and substance reasonably satisfactory to Seller, under which Buyer shall have assumed the Assumed Liabilities.

13.9 Transaction Documents. Buyer shall have executed and delivered the other Transaction Documents, including without limitation the Lease Agreement, unless Buyer has waived the condition set forth in Section 12.5 with respect to the Lease Agreement required to be entered into pursuant to Section 12.5.

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13.10 Further Instruments. Buyer shall deliver to Seller such further instruments of assumption or other documents of further assurance as Seller may reasonably request reasonably in advance of the Closing.

13.11 Payment. Seller shall have received the Cash Portion of the Purchase Price plus or minus the other amounts set forth in Section 3.5.

13.12 Releases. The Seller Parties shall have received releases from Buyer releasing the Seller Parties from all guarantee obligations arising under or relating to the agreements set forth on Schedule 13.12. Notwithstanding the foregoing, this condition shall be deemed to have been satisfied if the guarantee obligations set forth on Schedule 13.12 have been assumed and assigned to Buyer pursuant to Section 365 of the Bankruptcy Code.

ARTICLE 14 POST-CLOSING COVENANTS

14.1 Delivery of Funds and Other Assets Collected by the Seller Parties; Power of Attorney. Following the Closing, to the extent any Seller Party receives any funds or other assets in payment of accounts receivable, or in connection with any other Transferred Assets, sold to Buyer pursuant hereto, such Seller Party shall immediately deliver such funds and assets to Buyer and take all steps necessary to vest title to such funds and assets in Buyer. Each Seller Party hereby designates Buyer and its officers as such Seller Party's true and lawful attorney-in-fact, with full power of substitution, to execute or endorse for the benefit of Buyer any checks, notes or other documents included in the Transferred Assets or received by Seller in payment of or in substitution or exchange for any of the Transferred Assets. Each Seller Party hereby acknowledges and agrees that the power of attorney set forth in the preceding sentence is coupled with an interest, and further agrees to execute and deliver to Buyer from time to time any documents or instruments reasonably requested by Buyer to evidence such power of attorney.

14.2 Change of Name of Seller. Immediately upon the occurrence of the Closing, each Seller Party shall cease using, and thereafter refrain from using, all names that include the word "Eagle," including the names "Eagle and Taylor Co." and "Eagle Window and Door, Inc." and all derivatives thereof, and as soon as possible after the Closing, Seller will take all actions necessary to change its corporate name to a name that does not include the word "Eagle" or "Eagle and Taylor Co." or any derivation thereof and its assumed name to a name that does not include the word "Eagle" or "Eagle Window & Door, Inc." or any derivation thereof.

14.3 Agreement Not to Compete.

(a) Each Seller Party understands that Buyer shall be entitled to protect and preserve the going concern value of the Business to the extent permitted by Applicable Law and that Buyer would not have entered into this Agreement absent the provisions of the provisions of this Section 14.3 and, therefore, for a period of one year from the Closing Date, the Seller Parties shall not, and shall cause each of their Affiliates not to, directly or indirectly:

(i) Engage in activities or business, or establish any new businesses, that are in competition with the Business as conducted as of the Closing Date,

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including (A) selling goods or services of the type sold by the Business as of the Closing Date, (B) soliciting any customer or prospective customer of the Business as of the Closing Date to purchase any goods or services sold by the Business as of the Closing Date, and (C) assisting any Person in any way to do or attempt to do anything prohibited by clause (A) or (B) above; and

(ii) Solicit, recruit or hire any of the Hired Employees or encourage any of the Hired Employees to leave the Business; provided that the foregoing shall not apply to general solicitations made by third party recruiters acting on behalf of the Seller Parties or their Affiliates.

(b) The provisions of Section 14.3(a) shall not apply and shall be of no force and effect with respect to any successor or assign of the Seller Parties and their Affiliates by virtue of any sale, merger, exchange, lease or other reorganization (other than a sale, merger, exchange or other reorganization to an Affiliate of the Seller Parties).

ARTICLE 15 DAMAGE TO TRANSFERRED ASSETS

15.1 Damage or Destruction to Transferred Assets. If, prior to the Closing Date, any of the Transferred Assets are damaged or destroyed, the Seller Parties will immediately notify Buyer of such damage or destruction. If the total cost of repairing or replacing any such damage or destruction (as reasonably estimated by a majority of David Beeken, Charlie Daoud, Ron Vander Weerd and Steve Stoppelmoor and in a manner reasonably consistent with the past practice of the Business) (i) is less than or equal to \$100,000 in the aggregate, Seller shall use commercially reasonable efforts prior to the Closing Date to repair or replace such damage or destruction in the ordinary course in a prompt manner, (ii) is greater than \$100,000, the Purchase Price will be reduced on a dollar for dollar basis by the full amount of the lesser of the estimated replacement or repair cost up to a maximum of \$1,500,000. If Seller makes the repairs or replacements contemplated in clause (i) of the immediately preceding sentence or the Purchase Price will be reduced as contemplated in clause (ii) of the immediately preceding sentence, then Buyer shall be precluded from asserting or claiming that (i) the Seller Parties were in breach of Section 4.7, or any other representation or covenant in this Agreement solely as any such representation or covenant relates to the condition of such asset damaged or destroyed and (ii) Buyer's consent was required to make any repair or replacement under this Section 15.1. Notwithstanding anything contained in this Agreement, such \$1,500,000 threshold in this Article 15, shall have no implication, or be used, for purposes of interpreting any other provision or sentence of this Agreement, including, without limitation, interpreting whether Material Adverse Effect on the Business has occurred with respect to matters other than as set forth in this Article 15.

ARTICLE 16 TERMINATION

16.1 Right to Terminate Agreement. This Agreement may be terminated and the Contemplated Transactions may be abandoned at any time prior to the Closing (the actual date on which this Agreement is terminated being referred to herein as the "Termination Date");

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(a) by Buyer if the Closing has not occurred by May 15, 2002 (the "Outside Date"), unless such failure to close is due to a material breach by Buyer of this Agreement; or

(b) by Seller if the Closing has not occurred by the Outside Date, unless such failure to close is due to a material breach by Seller of this Agreement; or

(c) by Buyer if any of the conditions set forth in Article 12 have not been satisfied or if satisfaction of any such condition becomes impossible by the Outside Date (other than through the failure of Buyer to comply with Buyer's obligations under this Agreement); or

(d) by Seller if any of the conditions set forth in Article 13 have not been satisfied or if the satisfaction of any such condition becomes impossible by the Outside Date (other than through the failure of Seller to comply with Seller's obligations under this Agreement); or

(e) by mutual written consent of Buyer and Seller, subject to any necessary Bankruptcy Court approval; or

(f) Intentionally Omitted.

(g) by Buyer if the Board of Directors or sole stockholder of Seller does not approve this Agreement and the Contemplated Transactions; or

(h) Intentionally Omitted.

(i) by Buyer if Seller or the Committee fails to advocate the consummation of the Contemplated Transactions, except if (i) Seller acknowledges in writing to Buyer that the failure to advocate the consummation of the Contemplated Transactions arises from either of the Seller Parties being in breach of this Agreement (a "Breach Notice"), which breach would give rise to a failure of a condition set forth in Section 12.1 or 12.2), and (ii) Buyer has not waived such breach; or

(j) By Buyer upon receipt of a Breach Notice.

16.2 Remedies. Notwithstanding anything herein to the contrary, (a) Buyer's exclusive remedies for any breach of this Agreement prior to Closing shall be its right to the Escrowed Deposit as contemplated in Section 3.2(b); provided, however, such amounts shall be due and payable only under the terms and conditions described therein and (b) subject to Section 10.15, Seller's exclusive remedies for any breach of this Agreement by Buyer (or against any of Buyer's Affiliates in connection with this Agreement) prior to Closing shall be its right to the Escrowed Deposit as contemplated in Section 3.2(b); provided, however, such amount shall be due and payable only under the terms and conditions described therein. Notwithstanding anything in this Agreement to the contrary, the provisions set forth in this Section 16.2 shall survive the termination of this Agreement.

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ARTICLE 17 MISCELLANEOUS

17.1 Expiration of Representations, Warranties and Covenants. The representations and warranties set forth in this Agreement shall terminate and expire, and shall cease to be of any force or effect, on the Closing Date, except that either Buyer or the Seller Parties may at any time after the Closing Date use and rely upon the representations and warranties of the other Person(s) to establish or provide evidence of fraud or willful misconduct on the part of such other Person(s). Except as specifically provided for in this Agreement or the Transaction Documents, all covenants and agreements of the parties hereto set forth in the Transaction Documents that are intended to continue or begin after the Closing shall continue in effect until such time as any such obligation has been fulfilled or waived by the other parties to this Agreement. IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT BUYER ACCEPTS THE CONDITION OF THE BUSINESS, THE TRANSFERRED ASSETS AND THE ASSUMED LIABILITIES WITHOUT ANY IMPLIED REPRESENTATION, WARRANTY OR GUARANTEE AS TO MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR AS TO THE CONDITION OF THE BUSINESS OR THE TRANSFERRED ASSETS, OR AS TO THE CONDITION, SIZE, EXTENT, QUANTITY, TYPE OR VALUE OF SUCH PROPERTY, EXCEPT ONLY AS MAY BE OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT, AND THE SELLER PARTIES HEREBY EXPRESSLY DISCLAIM ANY AND ALL SUCH IMPLIED REPRESENTATIONS, WARRANTIES OR GUARANTEES.

ARTICLE 18 AGREEMENT CONVENTIONS

18.1 Further Assurances. The parties agree, at any time and from time to time after the Closing Date, upon reasonable request from any other party, to do, execute, acknowledge and deliver, as appropriate, such further acts, deeds, assignments, transfers, conveyances, assumptions, and powers of attorney as may reasonably be required for (a) the better assigning, transferring, granting, conveying, assuming, assuring and confirming to such other party, or its successors and assigns, of any of the assets, properties or liabilities to be assigned to it, or (b) the reassignment or return to Seller of assets that may have been inadvertently assigned, transferred or delivered to Buyer but should not have been so assigned, transferred or delivered, in each case as provided in the Transaction Documents.

18.2 Notices. All notices, requests, demands, waivers and other communications required or permitted to be given under the Transaction Documents shall be in writing and shall be deemed to have been duly given if (a) delivered personally, (b) mailed by first-class, registered or certified mail, return receipt requested, postage prepaid, (c) sent by next-day or overnight mail or courier or (d) sent by facsimile transmission. All such notices, requests, demands, waivers and other communications shall be deemed to have been received (i) if by personal delivery, upon delivery, (ii) if by certified or registered mail, on the third business day after the mailing thereof, (iii) if by next-day or overnight mail or courier, on the business day after such mailing, and (iv) if by facsimile, three hours after the sender receives a fax confirmation, unless the fax is sent after 5:00 p.m. on a business day or on a non-business day, in which case it shall be deemed received on the next business day.

If to Buyer:

Linsalata Capital Partners Fund IV, L.P.
Landerbrook Corporate Center One
Suite 280
5900 Landerbrook Drive
Mayfield Heights, Ohio 44124
Attn: Stephen B. Perry
Tel: (440) 684-1400
Fax: (440) 684-0984

with a copy to:

Calfee, Halter & Griswold LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114-2688
Attn: Ronald H. Neill, Esq.
Tel: (216) 622-8200
Fax: (216) 241-0816

If to a Seller Party, to:

Eagle & Taylor Company
6500 Brooktree Road
Suite 102
Wexford, PA 15090
Attention: Joseph Dominijanni
Tel: (724) 940-2330
Fax: (724) 940-2340

with a copy to:

American Architectural Products Corporation
860 Boardman-Canfield Road
Suite 107
Boca Building
Boardman, Ohio 44512
Attention: Jonathan Schoenike, Esq.
Tel: (330) 965-9910
Fax: (330) 965-9915

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and

Squire, Sanders & Dempsey L.L.P.
Two Renaissance Square
40 North Central Avenue, Suite 2700
Phoenix, AZ 85004-4498
Attention: Jordan A. Kroop, Esq.
Tel: (602) 528-4024
Fax: (602) 253-8129

or, in each case, to such other address as may be specified in writing to the other parties.

Any party may give any notice, instruction or communication in connection with the Transaction Documents using any other means (including ordinary mail), but no such notice, instruction or communication shall be deemed to have been delivered unless and until it is actually received by the party to whom it was sent. Any party may change the address to which notices, instructions, or communications are to be delivered by giving the other parties to the Transaction Documents notice thereof in the manner set forth in this Section 18.2.

18.3 Assignment; Binding Effect. This Agreement may not be assigned by any party hereto. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective representatives and successors, including any trustee appointed pursuant to the Bankruptcy Code. This Agreement is for the sole benefit of the parties hereto and nothing herein expressed or implied shall give or be construed to give any Person, other than the parties hereto, any legal or equitable rights hereunder.

18.4 Entire Agreement; Amendment; Governing Law; Etc. Except for the Prior Confidentiality Agreement, the Transaction Documents (together with the Exhibits and Schedules thereto) embody the entire agreement and understanding among the parties hereto with respect to the subject matter thereof and supercede all prior agreements, letters and understandings. The Transaction Documents may be amended, modified, waived, discharged or terminated only by (and any consent hereunder shall be effective only if contained in) an instrument in writing signed by the party against which enforcement of such amendment, modification, waiver, discharge, termination or consent is sought. The Transaction Documents shall be construed in accordance with and governed by the laws of the State of Ohio as it applies to contracts to be performed entirely within Ohio.

18.5 Consent to Jurisdiction. EXCEPT AS EXPRESSLY SET FORTH IN SECTION 3.6, THE BANKRUPTCY COURT SHALL HAVE EXCLUSIVE JURISDICTION OVER ALL MATTERS (INCLUDING, BUT NOT LIMITED TO, ANY LEGAL ACTION, SUIT OR PROCEEDING) INVOLVING ANY OF THE PARTIES HERETO AND THEIR RESPECTIVE AFFILIATES ARISING OUT OF OR RELATING TO THIS AGREEMENT, ANY RELATED AGREEMENTS, OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY AND THE INTERPRETATION, IMPLEMENTATION AND ENFORCEMENT OF THIS AGREEMENT, AND THE PARTIES HERETO IRREVOCABLY SUBMIT AND CONSENT TO SUCH JURISDICTION.

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Each of Buyer and the Seller Parties further agrees that service of any process, summons, notice or document by U.S. registered mail to such party's respective address set forth in Section 18.2 of this Agreement shall be effective service of process for any action, suit or proceeding with respect to any matters to which it has submitted to jurisdiction as set forth above. Each of Buyer and the Seller Parties irrevocably and unconditionally waives any objection to the laying of venue of any action, suit or proceeding arising out of this Agreement in the Bankruptcy Court, and irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum.

18.6 Severability. Any term or provision of the Transaction Documents that is invalid or unenforceable in any jurisdiction, as to such jurisdiction, shall be ineffective to the extent of such invalidity or unenforceability, without rendering invalid or unenforceable the remaining terms and provisions of the Transaction Documents or affecting the validity or enforceability of any of the terms or provisions of the Transaction Documents in any other jurisdiction.

18.7 Reliance on Counsel and Other Advisors. Each party has consulted such legal, financial, technical or other experts as it deems necessary or desirable before entering into the Transaction Documents. Each party represents and warrants that it has read, knows, understands and agrees with the terms and conditions of the Transaction Documents.

18.8 Exhibits and Schedules. Each of the Exhibits and Schedules referred to in the Transaction Documents and attached thereto is an integral part of the Transaction Documents and is incorporated in the respective Transaction Documents by this reference.

18.9 Rules of Construction. Unless the context otherwise requires: (a) a term has the meaning assigned to it; (b) references in the singular or to "him," "her," "it," "itself," or other like references, and references in the plural or the feminine or masculine reference, as the case may be, shall also, when the context so requires, be deemed to include the plural or singular, or the masculine or feminine reference, as the case may be; (c) the use of the words "include" and "including" and any derivations thereof shall be deemed to have the words "without limitation" added thereafter, with regard to the items listed thereafter, and shall be interpreted as introducing a non-exclusive listing and not an exclusive listing; (d) provisions apply to successive events and transactions; (e) references to Articles, Sections, Schedules and Exhibits in a Transaction Document shall refer to Articles, Sections, Schedules and Exhibits of that Transaction Document, unless otherwise specified; (f) the headings in the Transaction Documents are for convenience and identification only and are not intended to describe, interpret, define or limit the scope, extent, or intent of the respective Transaction Documents or any provision thereof; (g) the Transaction Documents shall be construed without regard to any presumption or other rule requiring construction against the party that drafted and caused the Transaction Documents to be drafted; (h) the use of the term "specific" in relation to a subject means relating exclusively to that subject; and (i) references to "commercially reasonable efforts" in the Transaction Documents shall require the efforts that a prudent person desirous of achieving a commercially reasonable result would use in similar circumstances to achieve a result within a commercially reasonable time.

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18.10 Counterparts. The Transaction Documents may be executed in several counterparts, each of which shall be an original, but all of which shall constitute one instrument.

18.11 Telecopy Execution and Delivery. A facsimile, telecopy or other reproduction of this Agreement may be executed by one or more parties hereto, and an executed copy of this Agreement may be delivered by one or more parties hereto by facsimile or similar electronic transmission device pursuant to which the signature of or on behalf of such party can be seen, and such execution and delivery shall be considered valid, binding and effective for all purposes. At the request of any party hereto, all parties hereto agree to execute an original of this Agreement as well as any facsimile, telecopy or other reproduction hereof.

18.12 Joint and Several Liability. All liabilities and other obligations of either Seller Party hereunder shall constitute the joint and several liability and obligation of the other Seller Party.

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IN WITNESS WHEREOF, the parties hereto have duly caused this Agreement to be executed as of the date first above written.

BUYER:

EWD ACQUISITION CO.

By: [Signature]

Name: STEPHEN B. PERRY

Title: CHAIRMAN

SELLER PARTIES:

SELLER:

EAGLE & TAYLOR COMPANY

By: [Signature]

Name: Joseph Dominijanni

Title: CEO

AAPC:

**AMERICAN ARCHITECTURAL
PRODUCTS CORPORATION**

By: [Signature]

Name: Joseph Dominijanni

Title: PRESIDENT + CEO

LINCAP:

**LINSALATA CAPITAL PARTNERS FUND
IV, L.P.**

By: [Signature]

Name: STEPHEN B. PERRY

Title: Sr. Vice President

A party solely for purposes of Section 3(b)
of this Agreement

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EAGLE WINDOW & DOOR, INC.**Written Action of the Sole Director**

Pursuant to the authority of Section 141(f) of the Delaware General Corporation Law, the undersigned, being the Sole Director of EAGLE WINDOW & DOOR, INC., a Delaware corporation (the "Corporation"), does hereby adopt the following resolution:

RESOLVED: That all of the existing officers of the Corporation are hereby removed from office, effective immediately, and each of the following persons is hereby appointed to serve in the office or offices of the Corporation set forth opposite his name below, to serve at the pleasure of the Board of Directors:

Stephen B. Perry	-	Chairman
David Beeken	-	President
Charles A. Daoud	-	Executive Vice President
Steven R. Stoppelmoor	-	Vice President of Finance
Ronald Vander Weerd	-	Vice President of Engineering
Gregory L. Taber	-	Treasurer and Assistant Secretary
Ronald H. Neill	-	Secretary
Andrew Wickham	-	Controller


Stephen B. Perry

Effective Date: May 6, 2002

(CHS1087.DOC;1)

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EAGLE WINDOW & DOOR, INC.

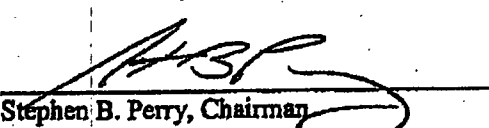
Written Action of the Sole Stockholder

Pursuant to the authority of Section 228 of the Delaware General Corporation Law, the undersigned, being the sole Stockholder of EAGLE WINDOW & DOOR, INC., a Delaware corporation (the "Corporation"), does hereby adopt the following resolution:

RESOLVED: That all of the existing Directors of the Corporation are hereby removed from office, effective immediately, and the following persons are hereby nominated and elected as Directors of the Corporation, to serve until the next annual meeting of the stockholders of the Corporation and until their respective successors shall have been elected and qualified:

Stephen B. Perry - Chairman
Frank N. Linsalata
Ronald H. Neill

EAGLE WINDOW & DOOR HOLDING COMPANY
("Sole Stockholder")

By: 
Stephen B. Perry, Chairman

Effective Date: May 7, 2002

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SEND IN RECEIPT AND PAYMENT ONLY - NO ATTACHMENTS - NO ADDITIONAL PAGES

NATURE OF BUSINESS Mfg/Sale of Windows & Doors		PRINCIPAL PLACE OF BUSINESS OUTSIDE OF DELAWARE 2045 Kerper Blvd., Dubuque, IA 52001	
DIRECTORS		DATE TERM EXPIRES	
1. Stephen B. Perry Chairman	Linsalata Capital Partners, 5900 Landerbrook Dr., Mayfield Hts., OH 44124		
2. Frank N. Linsalata	Linsalata Capital Partners, 5900 Landerbrook Dr., Mayfield Hts., OH 44124		
3. Eric Bacon	Linsalata Capital Partners, 5900 Landerbrook Dr., Mayfield Hts., OH 44124		
4. David Beeken	Eagle Window & Door, 2045 Kerper Blvd., Dubuque, IA 52001		
5. Ronald H. Neill	Calfee, Halter & Griswold, 300 Superior Ave., Cleveland, OH 44114		
6. Donald H. Pratt	433 Ward Parkway, Kansas City, MO 64112		

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OFFICERS		DATE TERM EXPIRES	
1. Steven Stoppelmoor	Eagle Window & Door, 2045 Kerper Blvd., Dubuque, IA 52001		
2. Gregory Taber	Linsalata Capital Partners, 5900 Landerbrook Dr., Mayfield Hts., OH 44124		
ORIGINAL SIGNATURE OF OFFICER, DIRECTOR OR INCORPORATOR		DATE	
X <i>Gregory Taber</i>		1-27-12	
TITLE			
President			

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STATE OF SOUTH CAROLINA)
)
 COUTY OF SPARTANBURG)
)
 NATIONWIDE MUTUAL)
 INSURANCE COMPANY, INC.,)
 and GILLIAM CONSTRUCTION)
 COMPANY, INC.)

Plaintiffs,)

vs.)

EAGLE WINDOWS, AMERICAN)
 ARCHITECTURAL PRODUCTS)
 CORPORATION, WINDOW AND)
 DOOR CONCEPTS, INC.,)
 CHARLES GOAD, HOBBIT)
 PLASTERING, INC., PHILLIP L.)
 BENDER, UPSTATE)
 WATERPROOFING, INC., DALE)
 COLEMAN, and GARY)
 CHURCHILL,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2007-CP-42-296

AFFIDAVIT OF ANDREW WICKHAM

Personally appeared before me, Andrew Wickham, who being duly sworn, deposes and says:

1. He is currently the Finance and Business Integration Manager of Eagle Window & Door Manufacturing, Inc., a Delaware corporation originally created on April 10, 2002 by Linsalata Capital Partners Fund, IV, L.P. as EWD Acquisition Co. By amendment dated May 1, 2002, EWD Acquisition Co. changed its name to Eagle Window & Door, Inc. (Eagle Inc.).

2. In December of 2001, when American Architectural Products Company (AAPC) filed for bankruptcy, he was the Controller of Eagle Window & Door, Inc. the

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fictitious division through which Eagle & Taylor Company, a Delaware corporation, wholly owned by AAPC, did part of its business. (Eagle)

3. The other officers of Eagle, at the time of the bankruptcy, were Ronald Vander Weerd, Vice President of Engineering and Quality Assurance; Charles Daoud, Executive Vice President; Steven Stoppelmoor, Vice President of Finance. David Beeken was President of Eagle & Taylor Company and President of Eagle.

4. Following the filing for bankruptcy, he was very much involved in the effort to attract a purchaser for the assets, carried as assets of Eagle, but actually owned by Eagle & Taylor which, in turn, was wholly owned by AAPC.

5. There were a number of entities that were interested in acquiring the assets of Eagle/Eagle & Taylor and on May 6, 2002, Linsalata Capital Partners Fund IV, L.P. (LinCap), an Ohio Limited Partnership, became the successful bidder at auction for \$64,750,000.00. (See Asset Sale Agreement dated May 6, 2002 attached as Exhibit 1)

6. Title to the assets was initially taken in the name of EWD Acquisition Co., a Delaware corporation created by LinCap. EWD Acquisition Co. changed its name to Eagle Window & Door, Inc. LinCap created two other Delaware corporations in connection with the sale, Eagle Window & Door Holding Company and Eagle Window & Door Services, Inc.

7. None of the officers of Eagle were officers, directors or shareholders of LinCap or any of the three corporations created by it in conjunction with the Eagle asset purchase until after the sale of the assets to EWD Acquisition, Inc. which changed its name to Eagle Window & Door, Inc.

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8. Effective May 6, 2002, Stephen B. Perry, the Senior Vice President and CFO of Linsalata Capital Partners Fund IV, LP, the then sole Director of Eagle Window & Door, Inc. (Eagle, Inc.), which was the successor by name change of EWD Acquisition, Inc., removed the existing officers of Eagle, Inc. and appointed himself as Chairman and the following officers:

David Beeken	-	President
Charles A. Daoud	-	Executive Vice President
Steven R. Stoppelmoor	-	Vice President of Finance
Ronald Vander Weerd	-	Vice President of Engineering
Gregory L. Taber	-	Treasurer and Assistant Secretary
Ronald H. Neill	-	Secretary
Andrew Wickham	-	Controller

(See Exhibit 2)

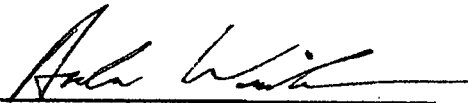
9. Effective May 7, 2002, Stephen B. Perry then removed from office the Directors of Eagle, Inc. and appointed himself, Chairman, and Frank N. Linsalata and Ronald H. Neill, an attorney for Linsalata, as Directors. (See Exhibit 3)

10. Not until sometime prior to January 27, 2003 was David Beeken made a Director of Eagle Window & Door, Inc. (See Exhibit 4)

11. There was no commonality of ownership between LinCap and AAPC or Eagle & Taylor Company, nor did AAPC or Eagle & Taylor Company and LinCap have substantially the same officers, directors and shareholders.

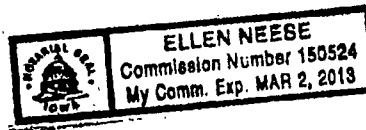
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FURTHER AFFIANT SAYETH NOT.


ANDREW WICKHAM

Sworn to before me this 29
day of February, 2012.


Notary Public for Iowa
My Commission Expires:
02.02.13



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STATE OF SOUTH CAROLINA)
)
 COUTY OF SPARTANBURG)
)
 NATIONWIDE MUTUAL)
 INSURANCE COMPANY, INC.,)
 and GILLIAM CONSTRUCTION)
 COMPANY, INC.)
)

Plaintiffs,)
)

vs.)
)

EAGLE WINDOWS & DOORS,)
 INC., AMERICAN)
 ARCHITECTURAL PRODUCTS)
 CORPORATION, WINDOW AND)
 DOOR CONCEPTS, INC.,)
 CHARLES GOAD, HOBBIT)
 PLASTERING, INC., PHILLIP L.)
 BENDER, UPSTATE)
 WATERPROOFING, INC., DALE)
 COLEMAN, and GARY)
 CHURCHILL,)
)

Defendants.)
)

STATE OF OHIO:)
)

COUNTY OF MAHONING:)
)

IN THE COURT OF COMMON PLEAS

C.A. No. 2007-CP-42-296

AFFIDAVIT OF JONATHAN SCHOENIKE

The undersigned Jonathan K. Schoenike, after being duly sworn, states that I am an adult over the age of 18 and am competent to testify as follows.:

1. I am 51 years old and an Attorney at Law living and practicing in Mahoning County, Ohio.

2. During the years August 1997 through August 1, 2003, I was employed by American Architectural Products Company ("AAPC") as its General Counsel, a publically traded corporation organized and existing under the laws of the State of

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Delaware. During all relevant times I was also the General Counsel of each and every subsidiary company of AAPC. In October 1997, I became Secretary of AAPC and each and every subsidiary company of AAPC and held that position through August 1, 2003.

3. Beginning in 1996, AAPC was headquartered in Boardman, Ohio until 2000 when the headquarters was relocated to Miami, Florida. In May 2001, AAPC relocated its headquarters back to Boardman, Ohio.

4. At all relevant times, Eagle & Taylor Company, a corporation organized and existing under the laws of the State of Delaware, was a wholly owned subsidiary of AAPC, doing business as Eagle Window & Door, Inc., a fictitious name, and Taylor Building Products, Inc., also a fictitious name.

5. Frank Amedia was the sole director of Eagle & Taylor Company from August 1997 through May 2001. In May 2001, Joseph Dominijanni became the sole director, until the liquidation of Eagle & Taylor Company.

6. Commencing in August 1997, the officers of Eagle & Taylor Company included Frank Amedia as CEO, Dale Tucker as President, Joseph Dominijanni as Treasurer and James Phillips as Secretary. In October 1997, Jonathan Schoenike replaced James Phillips as Secretary. In 1999, David Beeken replaced Dale Tucker as President. In 1999, David Wolfe became the Assistant Secretary. In May 2001, Joseph Dominijanni replaced Frank Amedia as CEO and became CEO and Treasurer.

7. Throughout all relevant times, Eagle & Taylor Company operated as two separate divisions; Eagle Window & Door, Inc. and Taylor Building Products, Inc. Each

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division was operated under their fictitious names and were never incorporated entities while under the ownership of AAPC.

8. Other individuals were identified as officers of Eagle Window & Door, Inc. however, none of those individuals, except for David Beeken as stated above, served as officers of Eagle & Taylor Company.

9. In December 2000, AAPC filed a petition for reorganization under the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division (the "Bankruptcy Case".)

10. As part of the Bankruptcy Case, AAPC, through its wholly owned subsidiary Eagle & Taylor Company, sought and obtained permission from the Bankruptcy Court to sell substantially all of the assets and business of Eagle Window & Door, Inc. to Linsalata Capital Partners Fund IV, L.P. in May 2002 (the "Bankruptcy Sale".)

11. At the time of the Bankruptcy Sale, AAPC had only 2 directors, to wit: George Hofmeister and Joseph Dominijanni. Mr. Hofmeister, either personally or through a series of trusts or other holding companies, owned between 72% and 73% of AAPC. Mr. Dominijanni owned approximately .5% of AAPC. At the time of the Bankruptcy Sale, neither David Beeken nor any of the other officers of the fictitiously named, Eagle Window & Door, Inc., had control of AAPC, and if such persons had any ownership interest in AAPC at all, such ownership interest would not have amounted to more than between one-tenth to one one-hundredth percent of AAPC.

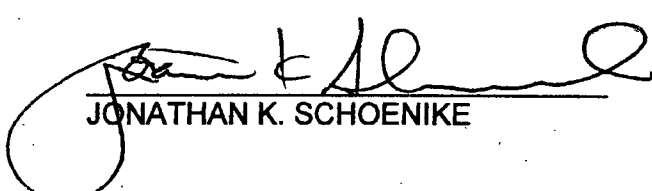
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12. All equity interests in AAPC were eliminated through the plan of reorganization approved by the Bankruptcy Court in the Bankruptcy Case for the benefit of the creditors of AAPC.

13. I am not aware of any relationship between David Beeken and each of the officers of the fictitiously named Eagle Window & Door, Inc. on the one hand and the Officers and Directors of Linsalata Capital Partners Fund IV, L.P. on the other.

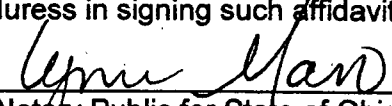
14. There was no commonality of ownership between AAPC and Linsalata Capital Partners Fund IV, L.P.

FURTHER AFFIANT SAYETH NOT.


JONATHAN K. SCHOENIKE

State of Ohio)
) SS:
County of Mahoning)

Before me on this 20th day of February 2012, a notary public in and for said County and State, appeared Jonathan K. Schoenike, known to me personally, who upon taking an oath, did swear that the above affidavit was derived from his own personal knowledge and that he was under no duress in signing such affidavit.


Notary Public for State of Ohio
My Commission Expires:

~~Lynn Marie, Attorney At Law~~
~~Notary Public, State of Ohio~~
~~My Commission has no expiration date~~
~~Sec. 147.03 R.C.~~

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U.S. BANKRUPTCY COURT

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

In re

AMERICAN ARCHITECTURAL
PRODUCTS CORPORATION, *et al.*

Debtors.

Jointly Administered Under
Case No. 00-43726

Chapter 11

Chief Judge William T. Bodoh

**ORDER APPROVING: (1) ASSET SALE AGREEMENT WITH EWD
ACQUISITION CO.; (2) SALE OF ESTATE PROPERTY FREE AND
CLEAR OF ALL INTERESTS; AND (3) ASSUMPTION AND
ASSIGNMENT OF CERTAIN RELATED EXECUTORY CONTRACTS**

This matter is before the Court on the "Debtors' Motion for Order Approving: (1) Asset Sale Agreement With Eagle Window & Door, Inc.; (2) Sale Of Estate Property Free And Clear Of All Interests; and (3) Assumption And Assignment Of Certain Related Executory Contracts" filed on March 12, 2002 (the "Motion") by American Architectural Products Corporation and Eagle & Taylor Company (d/b/a Eagle Window & Door, Inc., "Eagle"), debtors and debtors-in-possession in these Chapter 11 cases (the "Debtors"). The Motion sought, among other things, an order of the Court authorizing the Debtors to consummate a sale of substantially all the assets of Eagle (the "Assets") to Eagle Window & Door, Inc. ("EWDI"), a newly-created Delaware corporation and affiliate of Long Point Capital, Inc. ("LPC"), or such higher and better bidder as the Court may approve. In accordance with the "Asset Sale Agreement" between the Debtors and EWDI attached to the Motion (the "Original Agreement"), EWDI's purchase price for the Assets was \$48,500,000, subject to certain adjustments as provided in the Original Agreement.

On March 19, 2002, the Court entered its "Order: (1) Scheduling Date and Time for Hearing on Sale of Eagle Assets; (2) Approving Procedures for Notice of Sale and Submission of

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Competing Bids; and (3) Approving Break-Up Fee" (the "Bidding Procedures Orders"), which provided, among other things, for the solicitation and submission of competing bids for the Assets by no later than April 9, 2002 (the "Bid Deadline"). One competing bidder, Linsalata Capital Partners Fund IV, L.P. ("Linsalata"), submitted a Qualified Bid (as defined in the Bidding Procedures Order) for the Assets by the Bid Deadline.

In accordance with the Bidding Procedures Order and the Debtors' "Notice of Date, Time and Procedures For Auction of Eagle Assets" filed and served on the parties on April 10, 2002, the Debtors conducted an auction for the Assets between EWDI and Linsalata (which had by then designated a newly-created affiliate entity, EWD Acquisition Co. ("EWD Acquisition"), as its buyer entity) on April 15, 2002. At the conclusion of the auction, the Debtors determined that EWD Acquisition had submitted the highest and best bid for the Assets at \$64,750,000 (the "Purchase Price").

On April 16, 2002, the Court conducted a hearing on the Motion (the "Sale Hearing"), during which the Court heard and considered statements of counsel for the Debtors, counsel for EWD Acquisition, counsel for the Official Committee of Unsecured Creditors (the "Committee"), and counsel for Taylor Building Products and Taylor Building Products, Inc. and Ignazio Cangialosi (collectively, the "Taylor Group"), which had filed its "Limited Objection" to the Motion (the "Objection"). Counsel for the Debtors also informed the Court of the process and results of the auction that took place the day before and orally modified the Motion such that the Debtors requested authorization to consummate a sale of the Assets to EWD Acquisition rather than EWDI.

After consideration of: (a) the Motion and "Asset Sale Agreement" executed between the Debtors and EWD Acquisition attached to this Order (the "Final Agreement"); (b) the "Declaration of Joseph Dominijanni," the Debtors' CEO, filed contemporaneously with the Motion and counsel's proffer of the contents of that declaration as Mr. Dominijanni's direct testimony; (c) the Taylor Group's Objection and the Debtors' written response to it;

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(d) statements of all counsel at the Sale Hearing; (e) the certificate of service of the Motion filed with the Court; and (f) the entire record of these Chapter 11 proceedings;

THE COURT FINDS AND CONCLUDES THAT:

A. The Court has jurisdiction over the Motion under 28 U.S.C. §§ 157 and 1334, and this matter is a core proceeding under 28 U.S.C. § 157(b)(2). Venue of these cases and the Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

B. The statutory predicates for the relief sought in the Motion are sections 105(a), 363(b), (f), (m), and (n), 365, and 1146(c) of Title 11 of the United States Code, §§ 101 *et seq.* (the "Bankruptcy Code"), and Fed. R. Bankr. P. 2002, 6004, 6006, 9014 and 9019.

C. Unless otherwise defined in this Order, all capitalized terms retain the meanings set forth in the Motion. If the Motion does not define a capitalized term, such term retains the meaning set forth in the Final Agreement.

D. Proper, timely, adequate and sufficient notice of the Motion has been provided in accordance with Sections 102(1), 363 and 365 of the Bankruptcy Code and Fed. R. Bankr. P. 2002, 6004, 6006, 9014 and 9019, and in accordance with any applicable order of this Court.

E. Notice of the Motion is adequate under the circumstances and no further notice is necessary or appropriate.

F. A reasonable opportunity to object or be heard with respect to the Motion and the relief requested in it has been afforded to all interested persons and entities, including: (1) the Office of the United States Trustee; (2) counsel for the Debtors' postpetition lender; (3) the non-debtor parties to the executory contracts and unexpired leases sought to be assumed and assigned to EWD Acquisition in accordance with the Motion and the Final Agreement (the "Assigned Contracts"); (4) all entities known to have asserted any Interests (as defined below) in any of the Assets; (5) the Committee, and (6) all other parties on the Official Service List of these cases.

G. The Objection is based on the premises that the Original Agreement: (1) includes in its definition of "Assigned Contracts" certain supply agreements between the Debtors and the Taylor Group (the "Supply Agreements" and, together with all contractual obligations owed to

the Taylor Group by any of the Debtors and/or owed by the Taylor Group to any of the Debtors, collectively the "Taylor Contracts"), which, among other things, may permit Eagle to use designs and other intellectual property of the Taylor Group relating to decorative glass for entry doors and garage doors; (2) includes in its assigned causes of action a counterclaim filed by certain of the Debtors against the Taylor Group in Case No. 00-653173-CK in the Circuit Court of Ogemaw County, Michigan (the "Counterclaim"); (3) the Original Agreement may contemplate a transfer to the buyer of certain of Eagle's alleged indemnification obligations for warranty claims to the Taylor Group (the "Warranty Indemnification Obligations"); (4) may contemplate a sale of certain real property located in Michigan that Eagle owns and that the Taylor Group occupies (the "Michigan Property").

H. The Debtors, EWD Acquisition, and the Taylor Group all now acknowledge that: (1) neither the Supply Agreements nor any other Taylor Contract nor any rights under any of them including without limitation the right to use designs and other intellectual property owned by the Taylor Group relating to decorative glass for entry doors and garage doors, is included in the definition of "Assigned Contracts" in the Final Agreement; (2) the Counterclaim is not an assigned cause of action under the Final Agreement; (3) nothing in the Motion, this Order, or the Final Agreement contemplates or authorizes the Debtors' assumption and assignment of the Supply Agreements or any other Taylor Contract or the assignment of the Counterclaim to EWD Acquisition or any other party; (4) nothing in the Motion, this Order, or the Final Agreement contemplates or authorizes a transfer of any kind of the Warranty Indemnification Obligations to EWD Acquisition or any other party; and (5) nothing in the Motion, this Order, or the Final Agreement contemplates or authorizes a sale or transfer of any kind of the Michigan Property to EWD Acquisition or any other party.

I. The sale, conveyance and assignment of the Assets under the Final Agreement, except as otherwise specified in the Final Agreement, are free and clear of all liens, claims, encumbrances, and interests, including without limitation, mortgages, deeds of trust, security interests, conditional sale or title retention agreements, pledges, liens, judgments, demands,

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encumbrances, easements, restrictions, constructive or resulting trusts, or charges of any kind, including but not limited to any restriction on the use, voting, transfer, receipt of income, or other exercise of any attribute of ownership and all debts arising in any way in connection with any acts of the Debtors, claims (as that term is defined in Bankruptcy Code § 101(5)), obligations, demands, guarantees, options, rights, contractual commitments, claims related to the design, manufacture, sale or distribution of products sold by the Debtors or their predecessors, and claims related to pollution or other adverse effects on human health or the environment, including but not limited to the release in connection with any of the Debtors' (or their predecessors') operations or any of the Assets or a hazardous substance, pollutant, contaminant, or other substance regulated under any local, state, or federal law, ordinance, or regulation, and claims related to the Debtors' (or their predecessors') failure to comply with any such law, statute, regulation, or ordinance restrictions, interests in matters of any kind or nature, arising before closing of the sale of the Assets (the "Effective Time," as further defined in the Final Agreement), and whether imposed by an agreement, understanding, law, equity, or otherwise (collectively, "Interests"), with all such Interests released, terminated, and discharged as to the Assets and EWD Acquisition and to attach and be satisfied from the proceeds of the sale of the Assets authorized by this Order.

J. Subject to the provisions of this Order, the Debtors may sell the Assets free and clear of all Interests because, in each case, one or more of the standards set forth in Bankruptcy Code § 363(f)(1)-(5) has been satisfied. Those holders of Interests and non-debtor parties to Assigned Contracts who did not object to the sale of the Assets or the relief requested in the Motion are deemed to have consented under Section 363(f)(2) of the Bankruptcy Code.

K. EWD Acquisition is only a purchaser of the Assets and is not a successor in interest to Eagle or any other Debtor, nor does EWD Acquisition's purchase of the Assets reflect a substantial continuity of the operations of the Debtors' businesses. Accordingly, except as otherwise specifically and expressly provided in the Final Agreement, transfer of the Assets to EWD Acquisition and assumption and assignment to EWD Acquisition of the Assigned

Eagle Sale Order_v2

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Contracts, will not subject EWD Acquisition to any liability whatsoever with respect to the operation of Eagle's business before the Effective Time based, entirely or partly, directly or indirectly, on any theory of law or equity including without limitation any theory of antitrust or successor or transferee liability.

L. The Debtors' sale of the Assets to EWD Acquisition is reasonable and in the best interests of the Debtors, their estates and their creditors.

M. EWD Acquisition's offer for the Assets as set forth in the Final Agreement is the highest and best offer available to the Debtors for those Assets.

N. EWD Acquisition is a "good-faith purchaser" within the meaning of Bankruptcy Code § 363(m), as the Court is unaware of any evidence in the record that would tend to demonstrate that EWD Acquisition engaged in anything other than arms length negotiations in good faith or in any conduct that would permit the Final Agreement to be avoided under Bankruptcy Code § 363(n). The Auction was conducted in accordance with procedures and requirements authorized in the Bidding Procedures Order and the Court is unaware of any evidence in the record that would tend to demonstrate that the Auction was in any way flawed, unfair, or conducted improperly or in bad faith. Accordingly, EWD Acquisition and the Debtors are, therefore, entitled to the protection of Bankruptcy Code § 363(m). The Final Agreement and all its covenants and conditions, as well as the relief requested in the Motion, contemplates and are to be considered an integrated transaction and are subject to and protected by Bankruptcy Code § 363(m).

O. The Debtors' assumption and assignment to EWD Acquisition of the Assigned Contracts, effective as of the Effective Time, is supported by sound business reasons and is in the best interests of the Debtors, their estates, and creditors.

P. The Court has before it no evidence of any cure obligations under Bankruptcy Code § 365 arising with respect to any Assigned Contract. Accordingly, no cure obligations are required to be met as a condition to the Debtors' assumption and assignment to EWD Acquisition of the Assigned Contracts.

Q. Applicable law does not excuse a non-debtor party to an Assigned Contract from accepting performance from or rendering performance to an entity other than the Debtors, including EWD Acquisition.

R. The Debtors and EWD Acquisition have provided all non-debtor parties to the Assigned Contracts adequate assurance of future performance of the Assigned Contracts.

S. It is in the best interests of all parties that the sale of the Assets be immediately closed, the ongoing expenses to the estates terminated, and the Court waive the 10-day automatic stay of this Order provided in Bankruptcy Rules 6004(g) and 6006(d).

T. LPC is entitled to the payment of its Break-Up Fee in accordance with the terms and conditions previously approved in the Bidding Procedures Order.

In light of the foregoing findings of fact and conclusions of law, **THE COURT ORDERS THAT:**

1. The Motion is **GRANTED** as modified orally at the Sale Hearing.
2. The Final Agreement, and its terms and conditions, including the sale of the Assets and assignment of the Assigned Contracts to EWD Acquisition in accordance with the Final Agreement, are **APPROVED**.
3. The Objection, in light of the findings of fact set forth in paragraphs G and H above, is withdrawn as moot. No rejection, assumption, or assignment of the Supply Agreements or any other Taylor Contract or any rights under any of them, including but not limited to any designs and other intellectual property rights relating to decorative glass for entry doors and garage doors, or the assignment of the Counterclaim, or the Warranty Indemnification Obligations, or the Michigan Property, to EWD Acquisition or any other party is contemplated or authorized by this Order. The Debtors and the Taylor Group reserve all their respective rights with respect to the Supply Agreements or any other Taylor Contract and any other contractual relationship, dispute, claims, or litigation between them.

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4. Any other objections to the Motion or the relief requested in it that have not been withdrawn, waived, or settled, and all reservations of rights included in such objections, are overruled on the merits.

5. The sale of the Assets to EWD Acquisition is free and clear of all Interests under Bankruptcy Code § 363(f). All such Interests are released, terminated, and discharged as to the Assets and EWD Acquisition. Any such Interests, to the extent valid, legal, and enforceable, attach to, and are to be satisfied from, the proceeds of such sale in the same force, validity, effect, priority, and enforceability as such Interests had before such sale.

6. Except as expressly otherwise provided for in the Final Agreement, all holders of Interests are forever barred, estopped, and permanently enjoined from asserting against EWD Acquisition, its successors or assigns, its property, or the Assets, such Interests.

7. The Debtors and EWD Acquisition are entitled to the protections afforded under Bankruptcy Code § 363(m).

8. The Debtors' assumption and assignment to EWD Acquisition of the Assigned Contracts under Bankruptcy Code § 365 is APPROVED, effective as of the Effective Time under the Final Agreement.

9. The Debtors are authorized in accordance with Bankruptcy Code §§ 105(a) and 365 to: (a) assume and assign to EWD Acquisition, effective upon the Effective Time, the Assigned Contracts; and (b) execute and deliver to EWD Acquisition any documents or other instruments necessary to assign and transfer the Assigned Contracts to EWD Acquisition.

10. The Assigned Contracts are, as of the Effective Time, transferred to, and remain in full force and effect for the benefit of, EWD Acquisition in accordance with their respective terms, notwithstanding any provision in any such Assigned Contract (including those of the type described in Bankruptcy Code § 365(b)(2) and (f)) that prohibits, restricts, or conditions such assignment or transfer. Under Bankruptcy Code § 365(k), the Debtors are relieved from any further liability with respect to the Assigned Contracts after such assignment.

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11. No cure obligation of any kind or nature is necessary as a condition to the Debtors' assumption and assignment to EWD Acquisition of the Assigned Contracts. As of the Effective Time, EWD Acquisition and Linsalata have absolutely no liability or obligations arising or accruing under any Assigned Contract before the Effective Time, except as expressly otherwise provided for in the Final Agreement.

12. Each non-Debtor party to an Assigned Contract is forever barred, estopped, and permanently enjoined from asserting against the Debtors, EWD Acquisition, Linsalata, or any of their property any default existing as of the Effective Time or, against EWD Acquisition or Linsalata, any counterclaim, defense, setoff, or any other claim asserted or assertable against the Debtors.

13. The failure of the Debtors or EWD Acquisition to enforce at any time one or more terms or conditions of any Assigned Contract does not waive either such terms or conditions or the Debtors' and EWD Acquisition's rights to enforce every term and condition of the Assigned Contracts.

14. Each and every federal, state, and local governmental agency or department must accept any documents and instruments necessary and appropriate to consummate the transactions contemplated by the Final Agreement.

15. If any person or entity that has filed financing statements, mortgages, mechanic's liens, *lis pendens*, or other documents or agreements evidencing any Interest in the Debtors or the Assets has not delivered to the Debtors before the Effective Time, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, releases of all Interests that the person or entity has with respect to the Debtors or the Assets or otherwise, the Debtors are authorized to file, register, or otherwise record a certified copy of this Order, which, once filed, registered, or otherwise recorded, constitute conclusive evidence of the release of all Interests in the Assets of any kind or nature whatsoever.

16. All entities who are presently, or at the Effective Time may be, in possession of some or all of the Assets must surrender possession of those Assets to EWD Acquisition no later than the Effective Time.

17. Under no circumstances may EWD Acquisition or Linsalata be deemed a successor of Eagle or the Debtors with respect to any Interest of others against or in the Debtors or the Assets. No holder of an Excluded Liability (as defined in the Final Agreement) may commence, continue or otherwise pursue or enforce any remedy, claim or cause of action against EWD Acquisition or Linsalata and is permanently enjoined from doing so.

18. The consideration provided by EWD Acquisition under the Final Agreement is deemed to constitute reasonably equivalent value and fair consideration under the Bankruptcy Code and under the laws of the United States, any state, territory, possession, or the District of Columbia and is fair and reasonable and may not be avoided under Bankruptcy Code § 363(n).

19. Squire, Sanders & Dempsey L.L.P. ("Squire Sanders"), counsel for the Debtors, is directed to return immediately to Linsalata by wire transfer \$900,000 of the \$1,150,000 bid deposit Linsalata paid to Squire Sanders on April 9, 2002 in accordance with the Bidding Procedures Order and to retain the remaining \$250,000 as EWD Acquisition's Deposit under the Final Agreement. Squire Sanders is further directed to remit by wire transfer such \$250,000 to an escrow agent retained by the Debtors and EWD Acquisition in connection with the closing of the sale authorized by this Order in accordance with instructions from such escrow agent. Upon Squire Sanders' material satisfaction of its obligations under this paragraph, Squire Sanders is released and discharged from all claims and causes of action asserted or assertable by any party with respect to Squire Sanders' holding and disposition of the \$1,150,000 bid deposit from Linsalata.

20. On the Closing Date (as defined in the Final Agreement), EWD Acquisition must remit by wire transfer to LPC \$1,150,000, which constitutes a portion of the Purchase Price and also constitutes LPC's Break-Up Fee as approved by the Bidding Procedures Order. Immediately upon LPC's receipt of the Break-Up Fee, the Debtors, EWD Acquisition, and Linsalata are

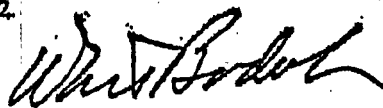
released and discharged from all claims and causes of action asserted or assertable by LPC or EWDI with respect to the Break-Up Fee.

21. The Debtors are authorized to execute any documents and take any action to facilitate the performance and discharge of all obligations and rights under the Final Agreement or this Order without further order of the Court.

22. The Court retains jurisdiction to enforce and implement the terms and provisions of the Final Agreement, all amendments to it, any waivers and consents under it, and of each of the agreements executed in connection with it in all respects, including but not limited to retaining jurisdiction to resolve any disputes arising under or related to the Final Agreement (except as provided otherwise in the Final Agreement) and interpret, implement, and enforce the provisions of this Order.

23. The 10-day stay on this Order's effectiveness imposed by Fed. R. Bankr. P. 6004(g) and 6006(d) is annulled and vacated.

Dated: 4/19 2002.



CHIEF UNITED STATES BANKRUPTCY JUDGE

Wednesday May 8, 2:55 pm Eastern Time

Press Release

SOURCE: American Architectural Products Corporation

American Architectural Products Corporation Completes the Sale of Eagle Window & Door To Linsalata Capital Partners

BOARDMAN, Ohio, May 8 /PRNewswire-FirstCall/ — American Architectural Products Corporation (OTC Bulletin Board: AAPCE - news; "AAPC") completed the sale of substantially all the assets of its wholly owned subsidiary, Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. ("Eagle") to a company controlled by Linsalata Capital Partners ("Linsalata"). Linsalata emerged as the successful bidder through a competitive bidding process authorized by Section 363 of the U.S. Bankruptcy Code and approved by the Bankruptcy Court. Conway, Del Genio, Gries & Co., LLC ("CDG") served as financial advisor to AAPC in the transaction.

Linsalata is a Cleveland, Ohio-based private equity fund, founded in 1984 by Frank Linsalata. Linsalata is a leading private equity firm focused on acquiring middle market companies and using its expertise and resources to accelerate the growth of these businesses.

Eagle, founded in 1977 and acquired by AAPC in 1996, is a leader in the fenestration industry, providing premium aluminum-clad and wood windows and doors. AAPC filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code on December 18, 2000. The completion of the sale marks a major milestone in AAPC's restructuring efforts.

Earlier this year, AAPC completed the sale of substantially all of the assets of American Glassmith Inc., Binnings Pan American, and the aluminum extrusion businesses of American Weather-Seal Company.

Conway, Del Genio, Gries & Co., LLC is acting as financial advisor to AAPC during its reorganization. For further information, please contact Robert A. Del Genio of CDG, a firm specializing in corporate finance advisory services with a focus on restructurings and mergers and acquisitions. Mr. Del Genio's telephone number is (212) 813-1300.

AAPC manufactures and markets a broad range of fenestration products, including windows and doors, primarily for light commercial and residential applications, through its wholly owned subsidiaries located throughout the United States.

Certain matters discussed herein are "forward-looking statements" within the meaning of the Private Securities Litigation Reform Act of 1995. Such forward-looking statements are subject to risks, uncertainties and other factors that could cause actual results to differ materially from future results expressed or implied by such forward-looking statements. For additional information about the Company and its various risk factors, see the Company's filings with the Securities and Exchange Commission.

SOURCE: American Architectural Products Corporation

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

Nationwide Mutual Insurance Company,)
Inc. and Gilliam Construction Company,)
Inc.)
☐ Plaintiff)

v.)

Eagle Window & Door, Inc.)

☒ Defendant)

check box above indicating submitting party)

CASE NO.

2007-CP-42-296

**MOTION INFORMATION FORM
AND COVER SHEET**

name, S.C. Bar no. and address of plaintiff's attorney
Jason M. Imhoff, S.C. Bar No. 69355
The Ward Law Firm, PA
Post Office Box 5663
Spartanburg, SC 29304
telephone: 864-582-3075 fax: 864-585-3090
e-mail: jimhoff@wardfirm.com other:

name, S.C. Bar no. and address of defendant's attorney
G. Dana Sinkler, S.C. Bar No. 5138
Warren & Sinkler, L.L.P.
Post Office Box 1254
Charleston, SC 29402
telephone: 843-577-0660 fax: 843-577-6843
e-mail: dsinkler@warren-sinkler.com other:

- ☒ **MOTION HEARING REQUESTED** (attach written 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: FOR SUMMARY JUDGMENT

Estimated Time Needed: 1 Hour

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 / Defendant

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$25.00**

☐ **EXEMPT:**

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in 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

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

DATE FILED

Collected by: _____

(print name)

☐ **MOTION FEE COLLECTED:** _____

☐ **CONTESTED - AMOUNT DUE:** _____

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STATE OF SOUTH CAROLINA)
)
COUTY OF SPARTANBURG)
)
NATIONWIDE MUTUAL)
INSURANCE COMPANY, INC.,)
and GILLIAM CONSTRUCTION)
COMPANY, INC.)

Plaintiffs,)

vs.)

EAGLE WINDOWS & DOORS,)
INC., AMERICAN)
ARCHITECTURAL PRODUCTS)
CORPORATION, WINDOW)
AND DOOR CONCEPTS, INC.,)
CHARLES GOAD, HOBBIT)
PLASTERING, INC., PHILLIP L.)
BENDER, UPSTATE)
WATERPROOFING, INC.,)
DALE COLEMAN, and GARY)
CHURCHILL,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2007-CP-42-296

**SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

As this Court is aware, this case has already been to the Supreme Court on a prior occasion on appeal from the Circuit Court's decision granting a motion to dismiss based on bankruptcy issues. That decision was reversed by the Supreme Court in an opinion filed on August 22, 2011, in which the Court concluded that: "If appellants can establish that respondent's conduct meets one or more of the Brown tests, then respondent may be liable to them. Simmons, supra." Nationwide Mutual Insurance Company, Inc. v. Eagle Windows & Doors, Inc., 394 S.C. 54, 714 S.E.2d 322 (2011).

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Simmons v. Mark Lift Industries, Inc., 366 S.C. 308, 622 S.E.2d 213 (2005) is the controlling precedent for this case. It was decided in response to three certified questions from the United States District Court of South Carolina in the case of Simmons v. Mark Lift Industries, Inc., Civil Action No. 3:02 CV 02748, two of which are pertinent to this case. Senior United States District Judge Matthew J. Perry, Jr. certified these two questions to the Court:

1. May a plaintiff maintain a product liability claim in South Carolina under a successor liability theory against a defendant which purchased only assets of a voluntarily bankrupt selling company in an arms-length and court-approved bankruptcy sale and the purchasing company did not approve of, participate in, cause or contribute to the selling company's bankruptcy?
2. In the product liability context in South Carolina, what test is employed to determine whether there is successor liability of a company which purchased the assets of an unrelated company?

In considering these two questions, the Supreme Court found the following facts:

1. Simmons brought a product liability action in state court against Mark Industries, Inc., Terex Corp. (Terex), Lift Industries, Inc. and BPS.
2. Simmons was injured in a construction accident which occurred on August 9, 1999, when an aerial work platform collapsed.
3. The aerial work platform was designed, manufactured and sold by Mark Industries, Inc. (Mark) in 1990.
4. On July 15, 1991, Mark filed for Chapter 11 Bankruptcy.

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5. The Bankruptcy Court entered a written order dated November 6, 1991 granting Mark's motion to sell certain assets and proceeded to hold a court-supervised public auction of assets.

6. Terex submitted the highest bid at public auction.

7. Terex and Mark entered into an arms-length Purchase Agreement for specified assets. Under the Agreement, the assets purchased by Terex included the inventory of supplies, raw materials, work in progress, finished goods, trademarks, service marks, trade names, goodwill, all intellectual property such as drawings, blueprints, patents, licenses and technology.

8. On November 13, 1991, the Bankruptcy Court approved the auction.

9. On December 5, 1991, Terex created Lift Industries, a separately incorporated subsidiary, and assigned its rights under the Purchase Agreement to Lift Industries.

10. Between December 10, 1991 and September 1992, Terex, through its wholly owned subsidiary Lift Industries, rehired many former Mark employees and started the construction of aerial work platforms that were comparable to the one involved in Simmons' accident.

11. Prior to the bankruptcy auction and order, neither Terex nor Lift Industries had any business relationship with Mark until purchasing its assets in the Bankruptcy Court auction. There has never been any commonality of officers, directors, or stockholders between Mark and Terex. (Emphasis the Court's)

Based on these facts, the Supreme Court advised the United States District Court that it could decide the case in accordance with existing South Carolina authority.

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assigning a footnote to Exception (3) (the successor company was a mere continuation of the predecessor). The footnote referenced the 12 page dissent of Justice Burnett and stated:

Essentially, the dissent advocates an expansion of the mere continuation exception. However, as noted by the dissent, the majority of courts interpreting the mere continuation exception have found it applicable **only when there is commonality of ownership, i.e., the predecessor and successor corporations have the same officers, directors, or shareholders.** (Emphasis the Court's) We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders. (Emphasis added)

In Simmons, after the certified questions were answered by the Supreme Court, Judge Perry granted the motion of Terex for summary judgment, holding, on the basis of Simmons:

The 'mere continuation' exception arises in situations where the purchasing company is merely a continuation of the selling entity. This exception is 'applicable **only when there is commonality of ownership, i.e., the predecessor and successor corporations have substantially the same officers, directors or¹ shareholders.**' Simmons (Emphasis in original).

In the present case, there is no commonality of officers, directors, and shareholders. The parties have certified that Terex did not have any business relationship with Mark until the purchase of assets supervised by the Bankruptcy Court. In addition, there is no, nor has there ever been, commonality of the officers, directors or stockholders between Terex or Lift Industries and Mark. Therefore the facts cannot support a finding that a 'mere continuation' exception applies. (Emphasis added)

See Opinion of Judge Perry, Exhibit A.

¹ Actually, the Supreme Court in Simmons held "substantially the same officers, directors, and shareholders." (Emphasis added)

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In their brief before the Supreme Court in Nationwide, Appellants argued that by virtue of the fact that David Beeken was President of Eagle & Taylor Company at the time of the sale of its assets and subsequently became the President of Eagle Window & Door, Inc. after the bankruptcy sale, commonality of ownership was thereby established. (See Brief of Appellants attached as Exhibit B at pages 10 and 11). Appellants misunderstand the holding in Simmons. Their argument is precisely the same as one of the arguments Justice Burnett urged the majority to adopt in Simmons. 622 S.E.2d 213, 216-217. Justice Burnett recited the argument advanced by counsel for Appellant, Simmons, as follows:

Simmons asserts the Court should adopt either of two exceptions to the general rule that a successor corporation which purchases the assets of a predecessor corporation is not liable for the predecessor's obligations and liabilities. Both exceptions – continuity of enterprise and product line – are grounded in the premise that a person who is injured by a defective product should be able to bring a product liability action against a company which purchases the assets of an unrelated company and then continues manufacturing and distributing essentially the same produce using the predecessor's assets, equipment, intellectual property and goodwill.

Justice Burnett then followed with the argument advanced by the purchasing entity, Terex, as follows:

Terex contends we should reject both exceptions and instead apply the four traditional exceptions to the rule that a successor corporation, in an asset purchase, usually does not assume the liabilities of the predecessor entity. Terex argues that none of the four exceptions apply in this case, and Simmons' lawsuit should be dismissed on a motion for judgment as a matter of law.

As previously set forth, the majority opinion in Simmons summarily rejected Justice Burnett's entreaty.

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Simmons, and other cases in which a successor entity purchases the assets of a predecessor and continues the business of the predecessor, hold that a purchaser is not subject to successor liability if the predecessor and successor entities do not share the same officers, directors and shareholders. Here, AAPC and Eagle & Taylor are the predecessor or seller parties and EWD, a wholly owned subsidiary of Linsalata is the successor or buyer. (See Asset Sale Agreement attached to Corrected Affidavit of Andrew Wickham – Tab I). Neither one has ever had any commonality of ownership with the other. (See Affidavits of Shoenike and Wickham attached to Defendant's first memorandum in support of its Motion for Summary Judgment, and Affidavit of Stephen B. Perry of Linsalata and EWD attached hereto as Exhibit C). These three affidavits, two from the seller parties and one from the buyer parties, clearly establish that the requisite commonality of ownership is not present in this case.

See also the following excerpts from the decisions of other courts and treatises on the same issue:

The mere continuation exception applies when the purchasing corporation is merely a continuation or reincarnation of the selling corporation. [citing authority] In other words, the purchasing corporation is merely a 'new hat' for the seller, with the same or similar management and ownership. [citing authority] In determining whether one corporation is a continuation of another, the test is whether there is a continuation of the corporate entity of the seller - - not whether there is a continuation of the seller's business operation. [citing authority] Therefore, "the key element of a 'continuation' is a common identity of the officers, directors and shareholders in the selling and purchasing corporation." Leannais v. Cincinnati, Inc., 565 F2d 437, 440 (7th Cir., 1977) (Emphasis added)

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Although some of B&B's officers may have been employed by Eastern, mere employment is insufficient to warrant application of the continuation exception. Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451 (11 Cir. 1985)

* * *

In support of his contention that Thuxmore was a "mere continuation" of Thuxmore Industries, the executor alleges that Thuxmore acquired all of its predecessor's assets, including the goodwill; undertook essentially the same manufacturing operation as that of its predecessor, and at the same location; held itself out to the world as the ongoing concern of its predecessor; maintained, for a time, essentially the same personnel; made an active effort to maintain the same customers; required its predecessor to cease its ordinary business operation and to liquidate its business as soon as practicable; and assumed some of its predecessor's liability.

A common identity of the officers, directors, and stockholders in the selling and purchasing corporation is the key element of a "continuation." [citing precedent] When, however, the purchaser of all the assets of a corporation is a bona fide arm's-length transaction the "mere continuation" exception does not apply." Harris v. T.I., Inc., 413 S.E.2d 605, 609 (VA. 1992)

* * *

In the instant case there was presumably a continuity of actual manufacturing operations. The lands, buildings, machinery and trade names were sold, and it is apparent that the purchaser intended to make use of all these in the manufacture of the same type of product. It was also stipulated in the contract of sale that the purchaser would employ the vice-president, secretary and treasurer of Seybold at the respective individual's request. The length of required employment was one year. However, this provision was merely to insure the economic stability of those officers immediately after the transfer. The contract did not state the capacity in which they were to be employed. In short, there is no evidence of continuity of management. As stated previously, there was also no continuity of stockholder investment, and the selling corporation retained its separate identity well after the sale took place. Neither were there common directors or officers at the time of the sale. When

one company purchases all the assets of another, it is to be expected that the purchasing corporation will continue the operations of the former, but this does not by itself render the purchaser liable for the obligations of the former. For liability to attach, the purchasing corporation must represent merely a 'new hat' for the seller. *Bergman & Lefkow Insurance Ag. v. Flash Cab Co.*, 110 Ill. App. 2d 415, 24 N.E.2d 729 (App. Ct. 1969). The purchaser-movant was not such a continuation of Seybold as to render it liable for the latter's torts. *McKee v. Harris-Seybold Company*, 264 A.2d 98, 106 (NJ 1970)

* * *

It is equally well settled when the sale is a bona fide transaction, and the selling corporation receives money to pay its debts, . . . equal to the fair value of the property conveyed by it, the purchasing corporation will not, in the absence of a contract obligation or actual fraud of some substantial character, be held responsible for the debts or liabilities of the selling corporation. *West Texas Refining & D. Co. v. Comm'r of Internal Revenue*, 68 F.2d 77, 81 (10 Cir. 1933).

* * *

Continuation or reincarnation of the predecessor in the successor, such as would warrant imposition of liability for products liability claims on the successor, exists when there is such a continuity of ownership and control between the corporations that the transfer constitutes an arrangement whereby the same persons establish another corporation in order to take over and concentrate the control of the predecessor's property, or when the successor merely represents a new hat for the predecessor. The gravamen of the mere continuation exception to nonliability of a successor entity is continuation of the corporate entity rather than continuation of business operations. The focus is almost wholly on what happens to the corporate forms of the parties participating in the asset transaction; continuity of business, name, and management alone is not a sufficient basis for imposing liability.

The indicia of continuation include a common identity of the officers, directors, and stockholders in the selling and purchasing corporations; continuation of the business

operations of the predecessor, evidenced by the use of the same name, the same location, and the same employees; and the existence of only one corporation at the conclusion of the transaction, that is, the predecessor corporation must be extinguished. In order to recover under the mere continuation theory, it must appear that the successor corporation is the same legal entity, or the same legal person, as the predecessor.

AMERICAN LAW OF PRODUCTS LIABILITY 3D: Liability of Successor for Injury
Caused by Product of Predecessor (Chapter 7)

§ 12 Liability of Successor for Harm Caused by Defective
Products Sold Commercially by Predecessor

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

- (a) is accompanied by an agreement for the successor to assume such liability; or
- (b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or
- (c) constitutes a consolidation or merger with the predecessor; or
- (d) results in the successor becoming a continuation of the predecessor.

COMMENTS & ILLUSTRATIONS: Comment:

a. History. The rule that a corporation or other business entity is not, in the absence of the circumstances described in Subsections (a) through (d), subject to liability for harm caused by defective products sold by a corporation from which it purchases productive assets derives from both products liability and corporate law principles. When the alleged successor purchases the assets piecemeal with little or no further continuity of operations between the two

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corporations or other business entities, the nonliability of the alleged successor derives primarily from the fact that the successor is not within the basic liability rule in § 1 of this Restatement: 'one . . . who sells or distributes a defective product is subject to liability for harm . . . caused by the defective product.' (Emphasis added.) Thus, when one corporation commercially sells products, some of which are defective, and later transfers its productive assets to another corporation that uses those assets to manufacture products of its own, the purchaser of the assets is not liable for harm caused by a defective product sold earlier by the transferor because the transferee did not 'sell or distribute' the defective product that caused the harm. When the alleged successor receives value in the form of the transferor's goodwill and continues to manufacture products of the same sort as manufactured earlier by the predecessor, and thus to some extent constitutes a continuation of the predecessor, the general rule of nonliability derives primarily from the law governing corporations, which favors the free alienability of corporate assets and limits shareholders' exposures to liability in order to facilitate the formation and investment of capital.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, § 12

In this case, Linsalata paid \$64,750,000.00 for the assets, and the Bankruptcy

Court found in its order authorizing the sale that:

EWD Acquisition is a "good-faith purchaser" within the meaning of Bankruptcy Code § 363(m), as the Court is unaware of any evidence in the record that would tend to demonstrate that EWD Acquisition engaged in anything other than arms length negotiations in good faith or in any conduct that would permit the Final Agreement to be avoided under Bankruptcy Code § 363(n).

See Order Approving Asset Sale, Exhibit C, page 6, ¶ (n), to original memorandum in support.

Eagle & Taylor Company did not survive. Indeed its demise was required by

Article 14 § 14.2 of the Asset Sale Agreement which provided:

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14.2 Change of Name of Seller. Immediately upon the occurrence of the Closing, each Seller Party shall cease using, and thereafter refrain from using, all names that include the word 'Eagle' including the names 'Eagle and Taylor Co.' and 'Eagle Window and Door, Inc.' and all derivatives thereof, and as soon as possible after the Closing, Seller will take all actions necessary to change its corporate name to a name that does not include the word 'Eagle' or 'Eagle and Taylor Co.' or any derivation thereof and its assumed name to a name that does not include the word 'Eagle' or 'Eagle Window & Door, Inc.' or any derivation thereof.

§ 14.3 also contains an agreement not to compete as to each of the seller parties.

In short, this case is identical to the Simmons case and the case of Walton v. Mazda of Rock Hill et al., 376 S.C. 301, 657 S.E.2d 67 (2008). Both require this Court to dismiss the case against Eagle for contribution.

Respectfully submitted,

WARREN & SINKLER, L.L.P.



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Attorneys for Defendant
Eagle Window & Door Manufacturing, Inc.

September 17, 2012

Charleston, South Carolina

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CERTIFICATE OF SERVICE

The undersigned certifies that he served a copy of the foregoing Defendant Eagle Window & Door Manufacturing, Inc.'s Supplemental Memorandum in Support of Motion for Summary Judgment on September 18th, 2012, on all counsel of record by mailing a copy of the same, postage prepaid, addressed as follows:

Jason M. Imhoff, Esquire
The Ward Law firm, P.A.
P.O. Box 5663
Spartanburg, SC 29304-5663
Attorney for Plaintiffs



Jo Davis, Legal Assistant

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Presiding Judge Seventh Judicial Circuit

Case No.: 2007-CP-42-296

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

COPY

Nationwide Mutual Insurance Company,
and Gilliam Construction Company, Inc. Appellants,

v.

Eagle Window & Door, Inc., American Architectural Products Corporation,
Window and Door Concepts, Inc., Charles Goad, Hobbit Plastering, Inc.,
Phillip L. Bender, Upstate Waterproofing, Inc., M. Dale Coleman, and
Gary Churchill, ...Defendants,

Of which Eagle Window & Door, Inc. is Respondent.

BRIEF OF APPELLANTS

THE WARD LAW FIRM, P.A.
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ATTORNEYS FOR RESPONDENT

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...[I]f I'm to address in the order the issues that Mr. Imhoff raises regarding the factors to consider if it's a mere continuation or not, then clearly they would be entitled to discovery on that issue...But I didn't recall the fact that the defendant, Eagle Windows, had not responded to discovery which would have precluded Mr. Imhoff from gathering the necessary information or evidence that would support a claim that Eagle Windows is a mere continuation of the bankrupt business...I mean, because my reaction to that is if you need discovery to respond to the motion, then I would never dismiss the case without the parties have engaged in the proper discovery that would allow, you know, a position to be made on the motion.

(R.p. 129-line 10-p.130-line 6).

Principles of equity and fairness required that Gilliam be given an opportunity to gather the relevant information and evidence upon which it could base its arguments and position for analysis by the Court. Without that information, Gilliam was unable to fully apprise the Court of all relevant facts and be given full and fair opportunity to argue its position. Due to that error the Court's ruling was premature and the order of dismissal should be overturned.

II. The Circuit Court erred in granting Eagle's motion to dismiss for lack of subject matter jurisdiction.

Due to the current status of corporate successor liability as defined by the South Carolina Supreme Court, the South Carolina Circuit Court has subject matter jurisdiction over Eagle Window & Door, Inc. in this product liability case despite the order of the Ohio Bankruptcy Court. In South Carolina, a plaintiff may maintain a state-based product liability claim under a successor liability theory against a successor corporation which purchased a predecessor's assets in a voluntary sale approved by the Federal Bankruptcy Court. Simmons v. Marklift Industries, Inc. 366 S.C. 308, 622 S.E.2d 213 (2005); Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924). The South Carolina Supreme Court in Brown stated:

In the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless (1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrants a finding of a consolidation or merger of the

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corporations, (3) *the successor company was a mere continuation of the predecessor*, or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims.

Id. at 123 S.E.2d 97 (emphasis added). A successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, or shareholders. Simmons v. Marklift Industries, Inc. 366 S.C. 308, 313, 622 S.E.2d 213, 216 (2005).

In this case, Eagle Window & Door, Inc. is a mere continuation of Eagle & Taylor Company, d/b/a Eagle Window & Door, Inc. as it appears that the two corporations have substantially the same officers and/or directors as the President and CEO are the same.

In Simmons v. Marklift Industries, Inc. the Court was asked to address three certified questions from the United States District Court of South Carolina:

- I. May a plaintiff maintain a product liability claim in South Carolina under a successor liability theory against a Defendant which purchased only assets of a voluntarily bankrupt selling company in an arms-length and court-approved bankruptcy sale, and the purchasing company did not approve of, participate in, cause or contribute to the selling company's bankruptcy?
- II. In the product liability context in South Carolina, what test is employed to determine whether there is successor liability of a company which purchased the assets of an unrelated company?

Id. at 622 S.E.2d 213-214.

In that case, the Plaintiff, Simmons, brought a product liability action in South Carolina State Court, which was later removed to Federal Court, against Marklift Industries, Inc. and others, alleging that he was injured on an elevated scissor lift manufactured by the predecessor of Marklift Industries, Inc. That predecessor corporation had filed for bankruptcy in the Federal Bankruptcy Court and sold its assets to Marklift pursuant to a Federal Bankruptcy Court Order.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

James Simmons,

Plaintiff,

vs.

MarkLift Industries, Inc., Mark Industries,
Inc., Terex Corporation, BPS Equipment
Rental and Sales, Inc., Prime Equipment
and Rental Service Corporation,

Defendants.

Civil Action No. 3:02 CV 02748

**ORDER GRANTING MOTION FOR
SUMMARY JUDGEMENT BY
DEFENDANT TEREX
CORPORATION, INDIVIDUALLY
AND AS SUCCESSOR BY MERGER
OF MARK LIFT INDUSTRIES, INC.**

FACTUAL BACKGROUND

This matter is before the Court on a Motion for Summary Judgment filed by Defendant Terex Corporation ("Terex"), individually and as the successor by merger of Defendant Mark Lift Industries, Inc. ("Lift Industries"). The matter raises the issue of corporate successor liability in the products liability context. The motion requires this Court to determine the extent to which potential liability of a bankrupt manufacturer may be visited upon a company, which although formally unrelated to the bankrupt manufacturer, purchased certain assets of the bankrupt manufacturer.

Plaintiff James Simmons was injured in a construction accident which occurred on August 9, 1999, while he was working on a building project at Beaufort High School Beaufort, South Carolina. Plaintiff was injured when an aerial work platform collapsed.

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The subject aerial work platform involved in this accident was designed, manufactured and sold by co-defendant Mark Industries Inc. ("Mark") in 1990. On July 15, 1991, Mark filed a petition for relief under Chapter 11 of Title 11 of the United States Code in the Bankruptcy Court for the Central District of California ("Bankruptcy Court").

The Bankruptcy Court entered a written order dated November 6, 1991, granting Mark's Motion to sell certain specified assets and proceeded with a court-supervised, public auction of assets. Terex submitted the highest bid at public auction for certain physical assets and intellectual property of Mark. Subsequent to the auction, on November 7, 1991, Terex and Mark entered into an arms-length Purchase Agreement for specified assets identified in the Purchase Agreement, which also provided, in part:

Except as otherwise specifically provided in this Agreement, at the Closing (as such term is defined in Section 5.1, below), all of the Assets shall be transferred from Seller [Mark] to Buyer [Terex] free and clear of all security interests, liens, claims, encumbrances, restrictions or rights of others of every kind and description, including, without limitation, tax liens. Nothing herein shall be construed as the assumption of or by Buyer [Terex] of any of the liabilities of the Seller [Mark], including, without limitation, any liability for products manufactured or sold by Seller [Mark].

On November 13, 1991, the Bankruptcy Court issued an Order Approving Auction of Assets Free and Clear of Liens and Encumbrances and incorporated the underlying Purchase Agreement. The Bankruptcy Court ruled that:

the Debtor [Mark Industries] is authorized to sell the assets of its estate to Terex Corporation, the maker of the highest and best offer at the auction, on terms and conditions consistent with the Purchase Agreement and related attachments

These assets were ordered free and clear "of any and all lines and encumbrances as may presently attach" Through this Order, Terex purchased certain assets of Mark.

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On or about December 5, 1991, Lift Industries, a Delaware corporation was formed as a result of the asset purchase by Terex of Mark's assets. Lift Industries was a wholly-owned, separately-incorporated subsidiary of Terex. Terex then assigned all of its rights and liabilities under the November 7, 1991 Purchase Agreement to Lift Industries in order to implement the transfer of the assets from Mark to Terex. Effective September 30, 1992, Lift Industries was then merged with and into Terex and Lift Industries ceased to exist.

Between December 10, 1991 and September 30, 1992, Terex, through its wholly owned subsidiary, Lift Industries, re-hired many former Mark employees and started the production of aerial work platforms that were comparable to the one involved in Plaintiff's accident. During this time frame, Terex/Lift Industries began winding down operations at the Mark's California facility and began removing all the assets it purchased from Mark's plant in California to the Terex plant in Iowa. By September 30, 1992 – nine months after restarting production at the Mark facility – all the assets Terex/Lift Industries purchased from Mark were finally in Iowa and the former Mark manufacturing plant was closed.

Prior to the bankruptcy auction and Order, neither Terex nor Lift Industries had any business relationships with Mark. There has never been any commonality of officers, directors or stockholders between Mark and Terex or Lift Industries. After the September 30, 1992 California plant closure, only three former Mark employees, none of whom were officers or directors, continued to work for Terex.

PROCEDURAL HISTORY

On July 11, 2002, Plaintiff James Simmons brought this product liability action against Mark,¹ Terex, Lift Industries, BPS Equipment Rental and Sales, Inc., ("BPS Equipment"),

¹ Plaintiff has not served Mark or its Bankruptcy Trustee, with a copy of the summons and complaint.

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Prime Equipment and Rental Services Corporation² alleging negligence, strict liability and breach of implied warranty arising from the injury he sustained on August 9, 1999. Terex removed this case to Federal Court based on diversity jurisdiction.

Plaintiff's claims against Terex and Lift Industries are based on the theory of successor liability.³ Plaintiff's successor liability theory hinged on whether South Carolina law adopted "continuity of enterprise" or "product line" exceptions to the general rule of no successor liability proposed by Plaintiff.

On May 27, 2003, Defendant Terex, individually and as successor by merger of Lift Industries, filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure contending that neither Terex nor Lift Industries were the successor to Mark. Plaintiff opposed Terex's motion.

Because of the unsettled nature of South Carolina law, on July 28, 2004 this Court submitted a Certified Question to the South Carolina Supreme Court regarding what test South Carolina would apply in a products liability setting to determine successor liability. Specific to Terex's Motion for Summary Judgment, this Court posed the following question to the South Carolina Supreme Court: "In the product liability context in South Carolina, what test is employed to determine whether there is successor liability of a company which purchased the assets of an unrelated company?"

On October 24, 2005, the South Carolina Supreme Court confirmed that South Carolina law embraces the traditional exceptions to the general rule of no successor liability espoused in *Brown v. American Railway Express Co.*, 123 S.E. 97 (S.C. 1924), and expressly rejected both

² Plaintiff voluntarily dismissed Prime Equipment and Rental Services Corporation.

³ Plaintiff's claims against the other named defendants do not hinge on successor liability; this Order does not affect Plaintiff's causes of action against Mark or BPS Equipment.

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the "continuity of enterprise" and the "product line" exceptions. *Simmons v. Mark Lift Indus., Inc., et al.*, 622 S.E.2d 213 (S.C. 2005).

DISCUSSION

A. Legal Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The rule "mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

As discussed below, there remains no genuine issue of material fact and the moving parties are entitled to judgment as a matter of law.

B. Successor Liability

Plaintiff argues that Terex should be held liable for his injuries under the theory of "successor liability." In the context of a products liability action, and regardless of whether the actions sounds in negligence, strict liability or breach of warranty, the South Carolina Supreme Court held that:

in the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company **unless** (1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrants a finding of a consolidation or merger of the two corporations, (3) the successor company was a mere continuation of the predecessor, or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims.

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Simmons, 622 S.E.2d at 215 (emphasis in original; citing *Brown v. American Railway Express Co.*). In so holding, the South Carolina Supreme Court expressly rejected Plaintiff's request to follow the "continuity of enterprise" exception first announced in *Cyr v. B. Offen & Co., Inc.*, 501 F.2d 1145 (1st Cir. 1974) (predicting New Hampshire law), and court rejected the "product line" exception that was first announced in *Ray v. Alad*, 560 P.2d 3 (Cal. 1977).

Now limited to the traditional four exceptions, the parties agree that Terex and Lift Industries neither expressly nor impliedly assumed Mark's product liabilities. Plaintiff does not allege fraud or that there was a consolidation or merger of Mark with Terex or Lift Industries. Thus, Plaintiff relies solely upon the "mere continuation" exception.

The "mere continuation" exception arises in situations where the purchasing company is merely a continuation of the selling entity. This exception is "applicable only when there is commonality of ownership, i.e., the predecessor and successor corporations have substantially the same officers, directors, or shareholders." *Simmons*, 622 S.E.2d at 215, n.1 (emphasis in original); accord *Kaiser Found. Health Plan v. Clary & Moore, P.C.*, 123 F.3d 201, 205 (4th Cir. 1997); *Swayze v. A.O. Smith Corp.*, 694 F. Supp. 619, 622 (E.D. Ark. 1988); *Bernard v. Kee Mfg. Co., Inc.*, 394 So.2d 552, 555 (Fla. Dist. Ct. App. 1981 *aff'd*, 409 So.2d 1047 (1982); *Bullington v. Union Tool Corp.*, 328 S.E.2d 726, 728 (Ga. 1985); *Nissen Corp. v. Miller*, 594 A.2d 564, 570 (Md. 1991); *Harris v. T.I. Inc.*, 413 S.E.2d 605, 609 (Va. 1992); *Jordan v. Ravenswood Aluminum Corp.*, 455 S.E.2d 561 (W. Va. 1995).

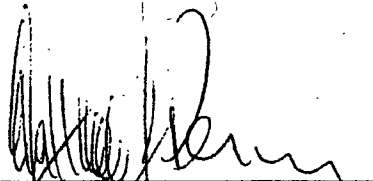
In the present case, there is no common identity of officers, directors, and stockholders. The parties have certified that Terex did not have any business relationship with Mark until purchase of assets supervised by the Bankruptcy Court. In addition, there is no, nor has there ever been, commonality of the officers, directors or stockholders between Terex or

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Industries and Mark. Therefore, the facts cannot support a finding that the "mere continuation" exception applies. There is no genuine dispute as to a material fact. Terex and Lift Industries are entitled to summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure.

WHEREAS the Defendants Terex, Individually and as Successor By Merger of Lift Industries, has pointed out to the trial court that there is an absence of evidence to support the Plaintiff's case, and Plaintiff has failed to present any genuine issues of material fact for trial, Plaintiff's claims fail as a matter of law, and **IT IS HEREBY ORDERED** that Terex's and Lift Industries' Motion for Summary Judgment is **GRANTED** and all claims against them are **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.



Matthew J. Perry, Jr.
Senior United States District Judge

Columbia, South Carolina

January 24 2006

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STATE OF SOUTH CAROLINA)
)
 COUTY OF SPARTANBURG)
)
 NATIONWIDE MUTUAL)
 INSURANCE COMPANY, INC.,)
 and GILLIAM CONSTRUCTION)
 COMPANY, INC.)

Plaintiffs,)

vs.)

EAGLE WINDOWS & DOORS,)
 INC., AMERICAN)
 ARCHITECTURAL PRODUCTS)
 CORPORATION, WINDOW AND)
 DOOR CONCEPTS, INC.,)
 CHARLES GOAD, HOBBIT)
 PLASTERING, INC., PHILLIP L.)
 BENDER, UPSTATE)
 WATERPROOFING, INC., DALE)
 COLEMAN, and GARY)
 CHURCHILL,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2007-CP-42-296

AFFIDAVIT OF STEPHEN B. PERRY

STATE OF OHIO:)
)
 COUNTY OF CUYAHOGA:)

Personally appeared before me, STEPHEN B. PERRY, who being duly sworn,
 deposes and says:

1. He is 57 years old and a resident of Bentleyville, Ohio. He is Co-President
 and Senior Managing Director of Linsalata Capital Partners, which is a Cleveland, Ohio
 middle market private equity buyout firm. He has firm responsibilities for administration
 of investment partnerships including Linsalata Capital Partners Fund IV, L.P. (Linsalata),
 which was the successful bidder for a substantial portion of the assets of Eagle & Taylor

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Company (E&T), which was a wholly owned subsidiary of American Architectural Products Company (AAPC).

2. In the spring of 2001, he learned from the firm of Conway, Del Genio, Gries & Co., Bankruptcy Professionals headquartered in New York who were representing AAPC, that it had filed for chapter 11 bankruptcy and that the assets of E&T were going to be placed on the auction block in the course of the bankruptcy. Lincap considered participating in the bidding for the assets but initially decided not to.

3. Not until Long Point Capital Partners (LPC), a competitor of Lincap, had made the initial bid for the assets, in March of 2002, (a "stalking horse" bid of \$48,500,000), did Lincap change its mind and get involved in the proceedings. It then performed its due diligence with the assistance of Conway, Del Genio, which arranged meetings with the management team of Eagle & Taylor d/b/a Eagle Window & Door, Inc., a fictitious entity, to acquire the necessary information to evaluate the assets. In the course of those meetings, he was told Eagle & Taylor was being cash starved by AAPC which was using its profits to try to keep its other subsidiaries afloat.

4. Prior to this, Lincap had had no business dealings, nor any contact with Eagle & Taylor d/b/a Eagle Window & Door, Inc. or its parent, AAPC. Further, Lincap had played no role in approving of, participating in, causing or contributing to AAPC's bankruptcy.

5. The Bankruptcy Court issued an Order on March 19, 2002 "(1) Scheduling Date and Time for Hearing on Sale of Eagle Assets: (2) Approving Procedures for Notice and Submission of Competing Bids: and (3) Approving Break-Up

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"Bidding Procedures" Orders), which provided, among other things, for the solicitation and submission of competing bids for the assets by no later than April 9, 2002. Lincap submitted a Qualified Bid of \$50,150,000 and was thus entitled to participate in the auction of the assets.

6. Thereafter, an auction was held in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division, in Youngstown, Ohio on April 15, 2002 and conducted by or on behalf of the Conway Del Genio Investment Banking firm of New York, AAPC'S financial advisors.

7. He, personally, was the bidder for Lincap and, after a considerable period of time and at least 15 competing bids, he emerged as the successful bidder on behalf of Lincap at a price of \$64,750,000. Immediately after the conclusion of the bidding, the parties, Lincap, by its affiliate EWD Acquisition Co., and AAPC/Eagle & Taylor d/b/a Eagle Window & Door, Inc., entered into an Asset Sale Agreement. (See page 2 of Bankruptcy Order). The Asset Sale Agreement did not assume and specifically excluded "any liability for damage to third parties resulting from acts, events, or omissions occurring prior to the Closing Date, . . ." ¶ 2.3(a)

8. The execution page of the Asset Sale Agreement, attached hereto as Exhibit A, reflects that it was signed by only two people. They were the affiant, Stephen B. Perry, who signed as chairman of EWD Acquisition Co. and as Senior Vice President and Chief Financial Officer of Lincap, and Joseph Dominijanni, the Chief Executive Officer of E&T and the President and Chief Executive Officer of AAPC.

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9. Before the auction was held, both LPC and Lincap had created Delaware corporations to acquire and manage the assets of AAPC/E&T if they should become the successful bidder. LPC created Eagle Window & Door, Inc., a Delaware corporation, as its acquiring company and made its initial bid in that name. Lincap created EWD Acquisition Co. as its acquiring company. (See Bankruptcy Court Order of April 19, 2002, page 1, attached as Exhibit B).

10. After the auction, LPC cancelled its charter of Eagle Window & Door, Inc. and on April 30, 2002, the name of EWD Acquisition Co. was changed to Eagle Window & Door, Inc. (See Certificate of Amendment to Certificate of Incorporation of EWD Acquisition Co. attached as Exhibit C).

11. The closing of the assets purchase was scheduled to be held on May 6, 2002 and, on that date, after consummation of the purchase by payment of the agreed sales price, he issued a resolution on behalf of Eagle Window & Door, Inc. removing all existing officers (only himself) and appointing the following Officers:

Stephen B. Perry	-	Chairman
David Beeken	-	President
Charles A. Daoud	-	Executive Vice President
Steven R. Stoppelmoor	-	Vice President of Finance
Ronald Vander Weerd	-	Vice President of Engineering
Gregory L. Taber	-	Treasurer and Assistant Secretary
Ronald H. Neill	-	Secretary
Andrew Wickham	-	Controller

(See Written Action of the Sole Director, May 6, 2002, attached as Exhibit D).

*Of those officers, Stephen B. Perry, Gregory L. Taber and Ronald H. Neill were all Linsalata people while the rest were former officers of Eagle & Taylor Company Eagle Window & Door, Inc.

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12. Then, on May 7, 2002, he issued another resolution removing existing Directors (only himself) and appointing the following Directors:

Stephen B. Perry	-	Chairman
Frank N. Linsalata	-	Founder of Linsalata Capital Partners
Ronald H. Neill	-	Attorney with the firm of Calfee, Halter & Griswold, LLP, Counsel for Lincap and other partnerships of Linsalata Capital Partners

(See Written Action of the Sole Stockholder, May 7, 2002, attached as Exhibit E).

13. At some time after May 7, 2002, David Beeken was added as a Director of Eagle Window & Door, Inc. but, at all times subsequent to the acquisition of the assets of Eagle & Taylor d/b/a Eagle Window & Door, Inc., Linsalata Capital Partners had total control of the operations of Eagle Window & Door, Inc., until the sale of the company to Andersen Corporation in 2005. (See Exhibit F attached).

14. To the knowledge of Affiant, prior to Lincap's acquisition of the assets, the officers of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. held no ownership interest in Eagle & Taylor Company.

15. Upon the closing and acquisition of the assets, he distributed subscribed shares of stock in Eagle Window & Door Holding Company on May 6, 2002 as follows:

Linsalata Capital Partners Fund IV, L.P. – Twenty-Three Thousand (23,000)
David Beeken – Four Hundred Fifty (450)
Charles A. Daoud – Two Hundred Seventeen and 5/10 (217.5)
Ronald Vander Weerd – Seventy-Five (75)
Dennis Thomsen – Sixty-Five (65)
Douglas Weiderman – Thirty (30)
Andrew Wickham – Fifteen (15)
Kristie Paulsen – Twenty-Five (25)
Gregory Kieler – Twenty and 00/100 (20.00)
William Lynch – Twenty (20)
John Hannan – Fifteen (15)
Jeffrey Roen – Fifteen (15)

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Charles A. Daoud – Two Hundred (200)
Massachusetts Mutual Life Insurance Company – One Thousand (1,000)
Massachusetts Mutual Life Insurance Company – Two Hundred Sixty-Two and
5/10 (262.5)
Massachusetts Mutual Life Insurance Company – Three Hundred Eighty-Seven
and 5/10 (387.5)
MassMutual Corporate Investors – Two Hundred Twenty-Five (225)
MassMutual Participation Investors – One Hundred Twenty-Five (125)

(See example of Stock Certificate attached as Exhibit G).

16. Linsalata Capital Partners Fund IV, L.P., through its wholly owned subsidiary, EWD Acquisition Co., which changed its name to Eagle Window & Door, Inc., was the successor to AAPC/Eagle & Taylor Company d/b/a Eagle Window & Door, Inc., which was its predecessor.

17. Prior to the bankruptcy proceedings, there was no commonality of ownership between the predecessor and successor entities.

Further affiant sayeth not.


STEPHEN B. PERRY

State of Ohio)
County of GEauga) SS:

Before me on this 7th day of ^{May}~~April~~, 2012, a notary public in and for said County and State, appeared Stephen B. Perry, known to me personally, who upon taking an oath, did swear that the above affidavit was derived from his own personal knowledge and that he was under no duress in signing such affidavit.


Notary Public for State of Ohio
My Commission Expires: 11/07/2012

Patricia A. Price
Notary Public, State of Ohio
My Commission Expires 11/07/12

M. HOPE BLACKLEY

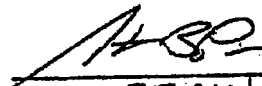
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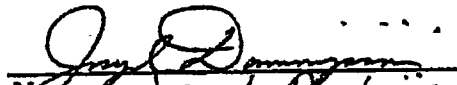
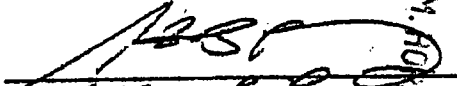
IN WITNESS WHEREOF, the parties hereto have duly caused this Agreement to be executed as of the date first above written.

BUYER:

EWD ACQUISITION CO.

By: Name: STEPHEN B. PECKTitle: CHAIRMANSELLER PARTIES:SELLER:

EAGLE & TAYLOR COMPANY

By: Name: Joseph DomkowiakTitle: CEOAAPC:AMERICAN ARCHITECTURAL
PRODUCTS CORPORATIONBy: Name: Joseph DomkowiakTitle: PRESIDENT + CEOLINCAP:LINSALATA CAPITAL PARTNERS FUND
IV, L.P.By: Name: STEPHEN B. PECKTitle: Sr. Vice PresidentA party solely for purposes of Section 3.20
of this Agreement

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

In re

AMERICAN ARCHITECTURAL
PRODUCTS CORPORATION, *et al.*

Debtors.

Jointly Administered Under
Case No. 00-43726

Chapter 11

Chief Judge William T. Bodeh

**ORDER APPROVING: (1) ASSET SALE AGREEMENT WITH EWD
ACQUISITION CO.; (2) SALE OF ESTATE PROPERTY FREE AND
CLEAR OF ALL INTERESTS; AND (3) ASSUMPTION AND
ASSIGNMENT OF CERTAIN RELATED EXECUTORY CONTRACTS**

This matter is before the Court on the "Debtors' Motion for Order Approving: (1) Asset Sale Agreement With Eagle Window & Door, Inc.; (2) Sale Of Estate Property Free And Clear Of All Interests; and (3) Assumption And Assignment Of Certain Related Executory Contracts" filed on March 12, 2002 (the "Motion") by American Architectural Products Corporation and Eagle & Taylor Company (d/b/a Eagle Window & Door, Inc., "Eagle"), debtors and debtors-in-possession in these Chapter 11 cases (the "Debtors"). The Motion sought, among other things, an order of the Court authorizing the Debtors to consummate a sale of substantially all the assets of Eagle (the "Assets") to Eagle Window & Door, Inc. ("EWDI"), a newly-created Delaware corporation and affiliate of Long Point Capital, Inc. ("LPC"), or such higher and better bidder as the Court may approve. In accordance with the "Asset Sale Agreement" between the Debtors and EWDI attached to the Motion (the "Original Agreement"), EWDI's purchase price for the Assets was \$48,500,000, subject to certain adjustments as provided in the Original Agreement.

On March 19, 2002, the Court entered its "Order: (1) Scheduling Date and Time for Hearing on Sale of Eagle Assets; (2) Approving Procedures for Notice of Sale and Submission of

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Competing Bids; and (3) Approving Break-Up Fee" (the "Bidding Procedures Order"), which provided, among other things, for the solicitation and submission of competing bids for the Assets by no later than April 9, 2002 (the "Bid Deadline"). One competing bidder, Linsalata Capital Partners Fund IV, L.P. ("Linsalata"), submitted a Qualified Bid (as defined in the Bidding Procedures Order) for the Assets by the Bid Deadline.

In accordance with the Bidding Procedures Order and the Debtors' "Notice of Date, Time and Procedures For Auction of Eagle Assets" filed and served on the parties on April 10, 2002, the Debtors conducted an auction for the Assets between EWDI and Linsalata (which had by then designated a newly-created affiliate entity, EWD Acquisition Co. ("EWD Acquisition"), as its buyer entity) on April 15, 2002. At the conclusion of the auction, the Debtors determined that EWD Acquisition had submitted the highest and best bid for the Assets at \$64,750,000 (the "Purchase Price").

On April 16, 2002, the Court conducted a hearing on the Motion (the "Sale Hearing"), during which the Court heard and considered statements of counsel for the Debtors, counsel for EWD Acquisition, counsel for the Official Committee of Unsecured Creditors (the "Committee"), and counsel for Taylor Building Products and Taylor Building Products, Inc. and Ignazio Cangialosi (collectively, the "Taylor Group"), which had filed its "Limited Objection" to the Motion (the "Objection"). Counsel for the Debtors also informed the Court of the process and results of the auction that took place the day before and orally modified the Motion such that the Debtors requested authorization to consummate a sale of the Assets to EWD Acquisition rather than EWDI.

After consideration of (a) the Motion and "Asset Sale Agreement" executed between the Debtors and EWD Acquisition attached to this Order (the "Final Agreement"); (b) the "Declaration of Joseph Dominijanni", the Debtors' CEO, filed contemporaneously with the Motion and counsel's proffer of the contents of that declaration as Mr. Dominijanni's direct testimony; (c) the Taylor Group's Objection and the Debtors' written response to

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STATE OF DELAWARE
SECRETARY OF STATE
DIVISION OF CORPORATIONS
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CERTIFICATE OF AMENDMENT
TO
CERTIFICATE OF INCORPORATION
OF
EWD ACQUISITION CO.

Pursuant to Section 242 of the
Delaware General Corporation Law

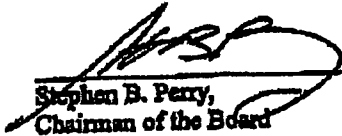
The undersigned, Stephen B. Perry, being the Chairman of the Board of EWD Acquisition Co., a Delaware corporation (the "Corporation"), hereby certifies as follows:

1. The name of the Corporation is EWD Acquisition Co..
2. The amendment of the Certificate of Incorporation as hereinafter set forth has been duly adopted in accordance with Section 242 of the Delaware General Corporation Law.
3. The Certificate of Incorporation of EWD Acquisition Co. is hereby amended so that Article FIRST shall henceforth read, in its entirety, as follows:

"FIRST

"The name of the corporation is Eagle Window & Door, Inc."

IN WITNESS WHEREOF, the undersigned subscribes this Certificate of Amendment and affirms that the facts stated herein are true under penalties of perjury, this 30th day of April, 2002.


Stephen B. Perry,
Chairman of the Board

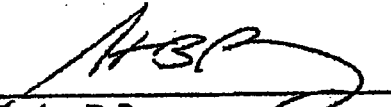
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EAGLE WINDOW & DOOR, INC.**Written Action of the Sole Director**

Pursuant to the authority of Section 141(f) of the Delaware General Corporation Law, the undersigned, being the Sole Director of EAGLE WINDOW & DOOR, INC., a Delaware corporation (the "Corporation"), does hereby adopt the following resolution:

RESOLVED: That all of the existing officers of the Corporation are hereby removed from office, effective immediately, and each of the following persons is hereby appointed to serve in the office or offices of the Corporation set forth opposite his name below, to serve at the pleasure of the Board of Directors:

Stephen B. Perry	-	Chairman
David Beeken	-	President
Charles A. Daoud	-	Executive Vice President
Steven R. Stoppelmoor	-	Vice President of Finance
Ronald Vander Weerd	-	Vice President of Engineering
Gregory L. Taber	-	Treasurer and Assistant Secretary
Ronald H. Neill	-	Secretary
Andrew Wickham	-	Controller


Stephen B. Perry

Effective Date: May 6, 2002

(CHS1087.DOC;1)

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EAGLE WINDOW & DOOR, INC.

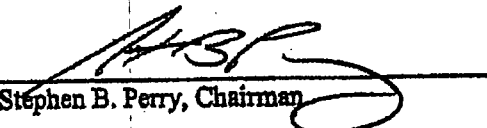
Written Action of the Sole Stockholder

Pursuant to the authority of Section 228 of the Delaware General Corporation Law, the undersigned, being the sole Stockholder of EAGLE WINDOW & DOOR, INC., a Delaware corporation (the "Corporation"), does hereby adopt the following resolution:

RESOLVED: That all of the existing Directors of the Corporation are hereby removed from office, effective immediately, and the following persons are hereby nominated and elected as Directors of the Corporation, to serve until the next annual meeting of the stockholders of the Corporation and until their respective successors shall have been elected and qualified:

Stephen B. Perry – Chairman
Frank N. Linsalata
Ronald H. Neill

EAGLE WINDOW & DOOR HOLDING COMPANY
("Sole Stockholder")

By: 
Stephen B. Perry, Chairman

Effective Date: May 7, 2002

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(CHS1086.DOC:1)

NATURE OF BUSINESS Mfg/Sale of Windows & Doors		SEND IN RECEIPT AND PAYMENT ONLY - NO ATTACHMENTS - NO ADDITIONAL PAGES	
DIRECTORS		PLACE OF BUSINESS OUTSIDE OF DELAWARE	
1. Stephen B. Perry, Chairman	Linsalata Capital Partners, 5900 Landerbrook Dr., Mayfield Hts., OH 44124	2045 Kerper Blvd., Dubuque, IA 52001	
2. Frank N. Linsalata	Linsalata Capital Partners, 5900 Landerbrook Dr., Mayfield Hts., OH 44124		
3. Eric V. Bacon	Linsalata Capital Partners, 5900 Landerbrook Dr., Mayfield Hts., OH 44124		
4. David Beeken	Eagle Window & Door, 2045 Kerper Blvd., Dubuque, IA 52001		
5. Ronald H. Neill	Calfee, Halter & Griswold, 800 Superior Ave., Cleveland, OH 44114		
6. Donald H. Pratt	433 Ward Parkway, Kansas City, MO 64112		

DO NOT WRITE IN THIS SPACE - FOR BANK USE ONLY

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OFFICERS	NAME	STREET/CITY/STATE/ZIP	DATE TERM EXPIRES
1.	Steven R. Stoppelmoor	Eagle Window & Door, 2045 Kerper Blvd., Dubuque, IA 52001	
2.	Gregory Taber	Linsalata Capital Partners, 5900 Landerbrook Dr., Mayfield Hts., OH 44124	
ORIGINAL SIGNATURE (SENDER, DIRECTOR OR INCORPORATOR)		TITLE	DATE
X <i>Paul Blackley</i>		President	1-27-02

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Certificate No. A-2 For 23,000 Shares issued to Linsalata Capital Partners Fund IV, L.P.

Transferred from Self-1, New Issue-22/999

No. Original Certificate	No. Original Shares	No. Of Shares Transferred
1	1	1 (plus new

Dated May, 2002 Receipt acknowledged

Issue of 22,999 shares

TRANSFER RESTRICTED - SEE REVERSE SIDE HEREOF

the State of Delaware



Eagle Window & Door Holding Company

Class A Common Shares, \$.01 Par Value

This Certifies that

Linsalata Capital Partners Fund IV, L.P.

is the owner of

**** Twenty-Three Thousand (23,000) ****

fully paid

and non-assessable Shares of the Capital Stock of the above named Corporation transferable only on the books of the Corporation by the holder hereof in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed.

Witness my hand, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed this 6th *day of* May A. D. 2002

M. HOPE BLACKLEY

Ronald H. Nail
Ronald H. Nail, Secretary

Stephen B. Perry
Stephen B. Perry, Chairman of the Board

IN THE COURT OF COMMON PLEAS

C.A. No.: 2007-CP-42-296

Plaintiffs,

vs.

Defendants.

**) PLAINTIFFS, NATIONWIDE MUTUAL
) INSURANCE COMPANY AND GILLIAM
) CONSTRUCTION COMPANY, INC.'S
) MEMORANDUM IN OPPOSITION TO
) DEFENDANT EAGLE WINDOWS &
) DOORS' MOTION FOR SUMMARY
) JUDGMENT**

Plaintiffs, Nationwide Mutual Insurance Company and Gilliam Construction Company, Inc., submit this Memorandum to the Court opposing Defendant Eagle Window & Door, Inc.'s Motion for Summary Judgment.

PROCÉDURAL POSTURE

The original litigation which preceded the present case was commenced by Renaul Abel and Karen Abel against Gilliam Construction Company, Inc. alleging defective construction and/or materials in a home built for them by Gilliam Construction Company, Inc. in Landrum, South Carolina at the Cliffs of Glassy. That case was transferred to arbitration and the material suppliers and subcontractors for the home were invited to participate in the arbitration, which they each declined.

The arbitration claim was settled prior to arbitration. The settlement exceeded \$250,000 which was paid by Gilliam Construction Company, Inc. and its insurer, Nationwide Mutual Insurance Company. Thereafter, Gilliam Construction Company, Inc. and Nationwide Mutual Insurance Company (hereinafter collectively referred to as "Nationwide" or "Gilliam") brought a contribution action against the various subcontractors and materials providers to recover the settlement amount paid to Renaul and Karen Abel. Specifically, based upon the testimony of engineers in the underlying construction defect case, Appellants alleged that Eagle Window & Door, Inc. manufactured and sold defective windows which allowed water intrusion into the Abel's home. The contribution Complaint was filed on January 26, 2007 and sent to Eagle Window & Door, Inc. on February 2, 2007.

In lieu of filing an Answer, Eagle Window & Door, Inc. (hereinafter "Eagle") filed a Motion to Dismiss on April 11, 2007 based upon South Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6). Eagle's motion asserted that the manufacturer of the windows, Eagle & Taylor Company, d/b/a Eagle Window & Door, Inc., no longer existed and was immune to suit due to a 2002 bankruptcy order selling the assets of Eagle & Taylor Company, d/b/a Eagle Window & Door, Inc. to EWD Acquisition Co., now doing business as Eagle Window & Door, Inc. Appellant served interrogatories and requests for production on May 7, 2007, specifically requesting information on corporate successor liability and subject matter jurisdiction arguments made by Eagle and based upon the analysis in *Simmons v. Marklift Industries, Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005). Eagle never responded to those written discovery requests.

Eagle's Motion was heard on September 6, 2007, and granted by the Honorable Judge J. Derham Cole on September 26, 2007. Judge Cole issued a form Order on September 26th, 2007,

and Eagle's counsel drafted and forwarded a proposed Order to the Court which was signed on December 21, 2007, and filed on January 2, 2008. Gilliam filed a motion to reconsider on October 2, 2007. Counsel for Gilliam served Eagle with requests for admissions on November 12, 2007. Those requests for admissions were also directly related to Eagle's Motion to Dismiss and the issue of corporate successor liability.

On December 7, 2007, counsel for Eagle filed a Protective Order from Gilliam's requests for admission. At approximately the same time, counsel for Gilliam began making preparations to take depositions of the principals of Eagle in Dubuque, Iowa for use in the underlying case and also for discovery of the corporate structure and elements necessary to apprise the Court of Eagle's status as a potential successor corporation and the issues raised in Eagle's Motion to Dismiss. In a letter dated December 11, 2007, Eagle's counsel made it clear that Eagle's principal would not answer questions regarding the bankruptcy or Eagle's corporate structure.

On January 21, 2008 Gilliam filed a Motion to Compel Eagle's responses to Gilliam's interrogatories and requests for production, as well as the requests to admit. Additionally, Gilliam requested that the Court consider Eagle's objection to the scope of Gilliam's depositions regarding Eagle's bankruptcy and corporate status. Gilliam submitted a Brief in support of the motion to reconsider, motion to compel and in opposition to Eagle's motion for protective order. Gilliam's motion was heard on March 26th, 2008, and denied by the Honorable Judge J. Derham Cole on January 21st, 2009. On January 29th, 2009, Gilliam timely filed a Notice of Appeal relating to the order granting dismissal of Eagle and the order denying Gilliam's motion to reconsider.

On March 15, 2011, The South Carolina Supreme Court heard oral arguments concerning Gilliam's appeal of the Trial Court's Order Granting Eagle's Motion to Dismiss. The South Carolina Supreme Court, in an Order filed on August 22, 2011, reversed the trial court's ruling. *Nationwide Mut. Ins. Co., Inc. v. Eagle Windows & Doors, Inc.*, 394 S.C. 54, 714 S.E.2d 322 (2011). The South Carolina Supreme Court held: (1) that contribution action was not barred by bankruptcy asset sale order's "free and clear" provisions; and (2) that bankruptcy court did not retain jurisdiction over contribution claim brought by a contractor and its insurer against debtor window manufacturer's successor. *Id.* The South Carolina Supreme Court further stated that the case should proceed in state court based upon the successor liability rules set forth in *Simmons v. Mark Lift Indust., Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005) and *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924).

This Case is now back before the Circuit Court for determination of successor liability.

FACTS

The South Carolina Supreme Court held that subject matter jurisdiction exists in this case based upon the South Carolina Supreme Court's prior rulings that a plaintiff may maintain a state law-based product liability claim under successor liability theory against a successor corporation which purchased the predecessor's assets in a voluntary sale approved by the Federal Bankruptcy Court. *Simmons v. Marklift Industries, Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005); *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924). The Supreme Court in *Simmons* held that a determination of successor liability required that the predecessor and successor corporations each had the same officers, directors, or shareholders. *Id.* at 215.

According to its internet history, Eagle has been operating in some form or another in Dubuque, Iowa since 1866. (See Exhibit "1" Internet History.) It appears that Eagle changed its name from Caradaco to Eagle Manufacturing in the 1970s and was sold to a Michigan company, Masco Corporation, in 1987, although it remained in Dubuque. After Masco's purchase, Eagle became a national brand name in the industry. In 1996, Eagle Window & Door was sold to fenestration products consolidator American Architectural Products Corporation along with many smaller window, door, & glass manufacturers. In 2000, Eagle Window & Door moved to a new 390,000 square foot manufacturing facility.

In 2001, American Architectural Products Corporation declared Chapter 11 bankruptcy and was forced to sell its assets, including Eagle. In 2002, a private equity investment company, Linsalata Capital Partners, based out of Cleveland, Ohio, purchased Eagle & Taylor Company, d/b/a Eagle Window & Door, Inc. from American Architectural Products Corporation pursuant to an asset sale agreement signed by the bankruptcy judge. To do so, a Delaware shell corporation was created, EWD Acquisition Co. (presumably Eagle Window & Door Acquisition Co.), which assumed the assets of Eagle & Taylor Company, d/b/a Eagle Window & Door, Inc. Immediately thereafter, EWD Acquisition Co. promptly changed its name back to Eagle Window & Door, Inc. Linsalata, as an investment company, provided capital, but otherwise took a "hands-off" approach and allowed Eagle "autonomy" in developing, marketing, and selling its line of products.

In 2000, prior to American's bankruptcy, David Beecken was appointed as President and Chief Executive Officer of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. Apparently, Mr. Beecken has worked at Eagle since it was named Caradaco in the 1970s. Mr.

Beecken remained President and Chief Executive Officer of Eagle Window & Door, Inc., EWD Acquisition Co., and Eagle & Taylor Company d/b/a Eagle Window & Door throughout the sale of Eagle from American Architectural to Linsalata. According to Eagle's counsel, Eagle has been sold once again to Andersen Windows. David Beeken remains President and CEO of Eagle. According to Eagle's website:

Throughout the years, EAGLE has gone through several ownership changes, in addition to bankruptcy filing by its parent company. In 2002, the company sold off EAGLE, one of its few profitable operations, to a private-equity company. Throughout this tumult, one of EAGLE's consistent aspects has been Beeken's leadership and commitment. His guidance has kept employees motivated and eager to make EAGLE soar.

Eagle appears to be designing, manufacturing, marketing, and selling the same products, under the same name, from the same plant, made by the same employees, and directed by the same President as it has for years.

STANDARD OF REVIEW

"Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Thomas Sand Co. v. Colonial Pipeline Co.*, 563 S.E.2d 109, 112 (S.C. Ct. App. 2002). Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRCP. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefore must be viewed in the light most favorable to the non-moving party. *Strother v.*

Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App.1997). If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). "In cases applying the preponderance of the evidence burden of proof, **the non-moving party is only required to submit a mere scintilla of evidence** in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009).

LAW & ANALYSIS

Due to the current status of corporate successor liability as defined by the South Carolina Supreme Court, the South Carolina Circuit Court has subject matter jurisdiction over Eagle Window & Door, Inc. in this product liability case despite the Order of the Ohio Bankruptcy Court. In South Carolina, a plaintiff may maintain a state-based product liability claim under successor liability theory against a successor corporation which purchased a predecessor's assets in a voluntary sale approved by the Federal Bankruptcy Court. *Simmons v. Marklift Industries, Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005); *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924). The South Carolina Supreme Court in *Brown* stated:

In the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless (1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrants a finding of a consolidation or merger of the two corporations, (3) ***the successor company was a mere continuation of the predecessor***, or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims.

Id. at 123 S.E.2d 97 (emphasis added). A successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same

officers, directors, or shareholders. *Simmons v. Marklift Industries, Inc.*, 366 S.C. 308, 313, 622 S.E.2d 213, 216 (2005).

Based upon the holdings set forth in *Simmons*, Eagle Window & Door, Inc. is a mere continuation of Eagle & Taylor Company, d/b/a Eagle Window & Door, Inc., as it appears that the two corporations have substantially the same officers and/or directors (as the President is the same).

In *Simmons v. Marklift Industries, Inc.*, the Court was asked to address certified questions from the United States District Court of South Carolina:

- I. May a plaintiff maintain a product liability claim in South Carolina under a successor liability theory against a Defendant which purchased only assets of a voluntarily bankrupt selling company in an arms-length and court-approved bankruptcy sale, and the purchasing company did not approve of, participate in, cause or contribute to the selling company's bankruptcy?
- II. In the product liability context in South Carolina, what test is employed to determine whether there is successor liability of a company which purchased the assets of an unrelated company?

Id. at 622 S.E.2d 213-214.

In that case, the Plaintiff, Simmons, brought a product liability action in South Carolina state court, which was later removed to federal court, against Marklift Industries, Inc., among others, alleging that he was injured on an elevated scissor lift manufactured by the predecessor of Marklift Industries, Inc. That predecessor corporation had filed for bankruptcy in the Federal Bankruptcy Court and sold its assets to Marklift pursuant to a Federal Bankruptcy Court Order.

In responding to the certified questions, the South Carolina Supreme Court relied on its previous decision in *Brown* and held that the Court in *Simmons* could ignore the Order of the Federal Bankruptcy Court in ruling that a state-based products liability cause of action could proceed against Marklift if Simmons could show that Marklift had substantially the same officers, directors, or shareholders as its predecessor. *Id.*

Ultimately, the South Carolina Supreme Court has approved the instigation and continuation of a state based products liability action despite a Federal Bankruptcy Court Order prohibiting the action. *Id.* Regardless of the reasoning the Court used to deal with the issues of Full Faith and Credit, preemption and retention of jurisdiction, it is clear that the South Carolina Supreme Court will not honor or enforce a Federal Bankruptcy Court Order limiting South Carolina citizen's rights to sue a successor corporation in a state based liability case if that citizen can show that the successor is a mere continuation of the predecessor.

This decision is in line with the majority of other jurisdictions and comports with the doctrines of fairness and justice. Justice Burnett strenuously opined that the stroke of a corporate pen or blind adherence to unfair rules out of touch with modern realities did not promote justice or allow intelligent adjudication of issues which touched upon the Bankruptcy Court's perceived jurisdiction. Justice Burnett stated:

[t]he corporate fiction and the rules surrounding it have been of inestimable service in the affairs of business, but they must be applied in such a manner as to promote justice, not to hinder or defeat it.

Id. at 323 (citing *Long v Carolina Baking Co.*, 190 S.C. 367, 377, 3 S.E.2d 46, 50 (1939)).

In the case at bar, Plaintiffs submit that a review of Eagle's own website establishes that Eagle is a mere continuation of its predecessor corporation. The President and CEO of Eagle, David Beekan, held the same position with the company prior to and after the bankruptcy. It is clear from that marketing material that Eagle considers itself a separate and autonomous entity which has designed and manufactured windows in the same city for a century and a half, despite its numerous parent companies. Eagle's parent company, Linsalata, is merely an investment firm which takes a "hands off" approach when dealing with Eagle. Based on the website alone, it is evident to Plaintiffs that Eagle's present incarnation is a mere continuation of its former self.

As set forth above, a successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, or shareholders. *Simmons v. Marklift Industries, Inc.*, 366 S.C. 308, 313, 622 S.E.2d 213, 216 (2005). Based on the language used by the Court in *Simmons*, to prove that a "mere continuation" exists, a party need only show that the successor corporation have substantially the same officers, directors or shareholders; thus, proving that a successor corporation has substantially the same officers is sufficient to prove a mere continuation. *Id.* There is no requirement for the Court to examine the officers, directors and shareholders (Plaintiff only needs to establish one).

Eagle's President, David Beekan, was the President of Eagle prior to and after the bankruptcy (see: Affidavit of Stephen B. Perry submitted by the Defendant). Further, prior to the bankruptcy, the following individuals were officers of Eagle & Taylor Company d/b/a Eagle Window and Door, Inc.: Charles A. Daoud, David Beekan, Steven R. Stoppelmoor,

Ronald Vander Weerd and Andrew Wickham (see: Affidavit of Stephen B. Perry submitted by the Defendant). According to the Affidavit of Stephen B. Perry: "The closing of the assets purchase was scheduled to be held on May 6, 2002 and, on that date, after consummation of the purchase by payment of the agreed sales price, he issued a resolution on behalf of Eagle Window & Door, Inc. removing all existing officers (only himself) and appointing the following Officers:

Stephen B. Perry: Chairman
David Beeken: President
Charles A. Daoud: Executive Vice President
Steven R. Stoppelman: Vice President of Finance
Ronald Vander Weerd: Vice President of Engineering
Gregory L. Taber: Treasurer and Assistant Secretary
Ronald H. Neil: Secretary
Andrew Wickham: Controller

Thus, post-bankruptcy, of the eight new officers appointed to represent Eagle, five of the eight were officers of pre-bankruptcy Eagle. Specifically, individuals that were officers of Eagle prior to the bankruptcy sale held the following positions at Eagle post-bankruptcy: President, Vice President, Vice President of Finance, Vice President of Engineering and Controller. This information alone establishes that Eagle is a mere continuation of its predecessor as the successor is made up of substantially the same officers. Based upon the fact that Eagle is made up of substantially the same officers, under the standards set forth in *Brown and Simmons*, Eagle's successor corporation should be liable for its predecessor's product defects.

Eagle, by the stroke of a pen, attempted to end its liability globally, totally, and permanently by merely changing owners. Eagle was not forced into bankruptcy by economics, but rather was dragged through it by its parent company's bankruptcy. As such, the ordinary

purpose of bankruptcy was not present for Eagle. Ordinarily bankruptcy's purpose is to provide the debtor with a fresh start, freeing it from the obligations and responsibilities consequent upon financial misfortune so that it may continue to survive. CJS Bankruptcy §2. In this case, Eagle was American's only profitable company. Eagle did not require the intervention of the Bankruptcy Court or the protection afforded by it. Therefore, it should not be allowed to use its parent company's fortuitous bankruptcy as a sword with which to sever its entire pre-bankruptcy obligations. This would not serve justice, but would rather hinder or defeat it. Justice Burnett, citing another case with similar facts cited the strong language used by that Court:

The [successor's] position does not appeal to us; it is an attempt to dodge the damages that [the plaintiff] has sustained by a quirk and technical question of law, and smacks too much of a skin game, and hand stacked and dealt to dealer from the bottom of the deck...By its action [the successor] has allowed the [predecessor] to go out of existence and now proposes to let the [plaintiff] whistle for his money, and by its technicality, which would besmirch the character of any honest man, smacks its lips and licks its chops and congratulates itself on its shrewdness in avoiding its payment of a just claim.

Id. at 318 (citing *Brabham v. Southern Express Co.*, 124 S.C. 157, 117 S.E. at 368 (1922)).

Eagle, in its Motion to the Court, focuses on its parent company Linsalata. Eagle focuses on Linsalata in an attempt to persuade the Court that it should focus on the officers, shareholders or directors of Linsalata. Linsalata is not a party to this action. Plaintiffs sued Eagle, not Linsalata. Eagle is the proper entity that should be analyzed by the Court to determine if post-bankruptcy Eagle is a mere continuation of pre-bankruptcy Eagle (which it is).

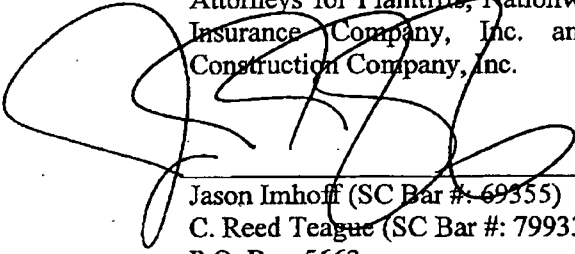
Plaintiffs submit that they have established the requirements set forth in *Brown* and *Simmons*; thus, sufficient evidence exists to establish that Eagle is a mere continuation of pre-bankruptcy Eagle.

CONCLUSION

The authority set forth in *Brown* and *Simmons*, along with the South Carolina Supreme Court's previous ruling in this case supports this Court denying Eagle's Motion for Summary Judgment.

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October 15, 2012

Exhibit 1

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History

Past, Present and Future

Lumbering and woodworking have long been one of the principal industries in Dubuque, Iowa's history. The industry, which started in the early 1800's, saw millions of feet of timber from the upper Midwest float in log rafts down to Dubuque mills where it was processed into a variety of component parts for the building trade industry. Utilizing its ideal location on the Mississippi River, Dubuque became a hub of lumbering and millwork activity which flourished in the mid-1860's and on into the 20th century. Wood millwork (specifically sash and doors) soon became the new symbol of Dubuque's prosperity, overshadowing all other businesses.

Shortly before the Civil War in 1862 a young man named William W. Carr headed west from Chicago to Dubuque, Iowa hoping to start a business of his own in America's heartland. Carr soon met an experienced woodworker named Woodbury H. Austin and together they founded, Carr, Austin & Company in 1866. With a starting work force of only two men, the Carr, Austin & Company began producing millwork products in its new manufacturing facility. It was destroyed by fire in both 1871 and 1879, but in spite of their difficulties, a third building was constructed and their employee base grew to 35 men over the next eight years. In 1887, it was renamed Carr, Ryder and Wheeler Company. The business continued to grow and soon its stock capitalization was increased. In 1890, the name changed to Carr, Ryder and Engler Company. Over the next seven years the original plant increased in size many times showing a healthy growth in employment and sales. By 1897, the name was changed again to Carr, Ryder & Adams Company, under which the business grew in astronomical proportions and added several buildings. This name remained until 1938 when the firm became Carr, Adams and Collier Company, manufacturers of Bilt-Well woodwork products. Progressing through this vast series of name changes, the company eventually became Caradco in 1958. It remained one of the largest window and door manufacturers in the country during this period of time.



Carr, Austin and Company



Carr, Ryder and Engler Company

became the largest Caradco distributor (in a single location) in the country.

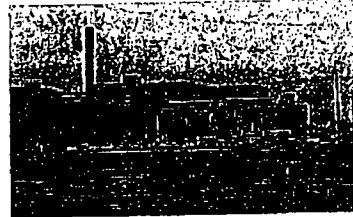
In 1967, as Caradco was still a major player in Dubuque, a window distribution center was established in Cedar Falls, Iowa by a group of investors called Caradco of Cedar Falls. Its initial intent was to set up and distribute Caradco windows to lumber yards in Cedar Falls and its surrounding areas. Throughout the late 1960's and early 1970's, this business expanded to include residential doors, trim, and hardware items. Despite its heavy competition, Caradco of Cedar Falls soon

In 1976 citing constraints in growth and productivity in their facility, Caradco moved its office and manufacturing facilities from Dubuque to Rantoul, Illinois. At this time, the window distribution from Cedar Falls was moved to Dubuque and into some of the vacant building space provided by Caradco's departure. Soon afterwards, quality and delivery problems began to plague Caradco. The quality of their products had

diminished and lead times were greatly extended. Much of this was due to the relocation and restructuring of their plant, the lack of trained personnel, and literally no back-up plan whatsoever. The Dubuque plant had totally shut down.

Soon the investors of Caradco of Cedar Falls decided to terminate their relationship with Caradco and design, manufacture and market a window line of their own. Only one problem existed. This was an era when energy efficiency was an essential commodity. America knew it as the "energy crisis" of the 70's. So, designing a high-quality product with built-in energy efficient features became the goal. With a vacant production facility and a group of eager, experienced personnel, both left behind by Caradco, Eagle Manufacturing launched a new era.

In 1977, EAGLE produced its first aluminum clad wood casement window furthering the rich heritage of millwork production in Dubuque. During the next twelve months, EAGLE continued developing better techniques, enhancing their designs, training their personnel, and making quality a priority. By 1980, the clad Sliding Patio door was introduced. Over the next six years, five more product lines were developed including; clad double-hung, skylights, circle-tops, geometric windows and French doors.



Eagle Manufacturing, 1980's

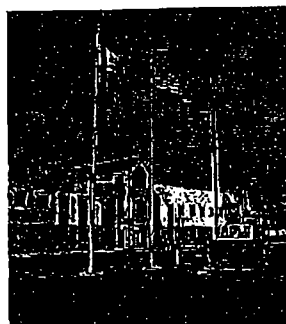
Even with the introduction of these new products, the early 1980's managed to be some of the worst business times in history. However, the extreme dedication and efforts put forth by EAGLE and its employees helped them survive and even grow in a time of uncertainty. Nearing the end of the decade, it became apparent that EAGLE's current ownership could not generate the resources necessary to take advantage of the base that had been built for them, so the company was sold to Masco Corporation of Taylor, Michigan in September of 1987.

Masco Corporation (a Fortune 500 company) was known for its long history in consumer products for the home and family. These included home furnishings such as Henredon and Drexel Heritage; faucets and plumbing products like Delta and Peerless; Cabinetry including Fieldstone and Merillat; and many other hardware and appliance companies. During its Masco tenure, EAGLE made substantial growths while increasing market share due to broadening its distribution throughout North America and Japan. It also tripled its product breadth by introducing French Sliding doors, entry doors, bi-parting doors, radius casements, elliptical units, and a full line of all-wood windows and doors. As you can well imagine, the investment and commitment on Masco's behalf was massive, but for EAGLE to grow and be recognized as a quality, national brand name in the industry, it was essential.

The early 1990's proved to be interesting years for EAGLE. With the economy on a downward trend, housing starts were flat which in turn lowered EAGLE's sales. This was a time for EAGLE to fine tune their product line and search for distribution in new markets with the hopes of eliminating some of the seasonality in their business. Gaining market share in the southern part of the country would help level out sales and place it on a consistent path over the year. Fortunately, turn around began in 1992 and sales progressively increased over the next few years.

In 1996, Masco surprised all with an announcement that they would be selling off their furnishings and building products divisions respectively. The divestitures would allow them to focus and concentrate on their core line of consumer and transportation products for which the companies had become recognized. The sale of EAGLE Window and Door received a great deal of interest among the industry and due diligence continued for many months. However, in August of 1996, a transaction between MascoTech and American Commercial Holdings, Inc. transferred the ownership of EAGLE Window & Door to the newly formed and publicly traded American Architectural Products Corporation. The new company, headquartered in Boardman, Ohio, was determined to grow its existing base of businesses and acquire new businesses with high-quality products and services that would complement the growing family of building industry companies. The goal was to become a major consolidator within the fenestration industry. To support this goal, many smaller window, door and glass manufacturers were acquired during the next two years.

With extreme growth between 1996 and 2000, EAGLE had outgrown its old facility. Efficiencies in processes and production were hindered. It became evident that for EAGLE to continue its growth pattern, changes were necessary.



EAGLE Window & Door, 2001

Talk of a new facility was elevated and soon plans were under way. By moving production to a single-floor facility, increased productivity and capacity for expansion in the coming years would be attainable.

The year 2000 became an exciting time for EAGLE Window & Door. In October of 2000, EAGLE officially began its move into a brand new 390,000 sq. ft. manufacturing facility. The move was orchestrated by EAGLE's employees. Due to a detailed plan and a lot of hard work, interruption to service was totally avoided. State-of-the-art equipment, enhanced design, and production flow were put into place with the move and will now allow EAGLE to efficiently manufacture its line of high-end, low-maintenance, aluminum-clad wood windows and doors.

In 2001, EAGLE continued its impressive growth. However, American Architectural Products Corporation, its then parent company, was forced to file for bankruptcy. With EAGLE as its only profitable company, AAPC placed EAGLE on the selling block in order to help pay off their debt. In April of 2002, Linsalata Capital Partners, a Cleveland-based private equity firm purchased EAGLE. With the new ownership EAGLE was finally able to focus on what they do best — building quality windows and providing unparalleled service and support.

EAGLE experienced phenomenal growth in 2003! In that time, EAGLE introduced 5 significant innovations. At the International Builder's Show in Las Vegas, EAGLE introduced its new Talon™ Double-Hung window with a concealed locking and tilting mechanism. It also introduced 2 between-glass blind systems, a new generation of casement hardware and its 50 standard exterior colors: innovations that lead the industry. Later in October, EAGLE introduced the new Talon RetroFit double-hung specifically for the replacement market. With the addition of many new and satisfied dealers and distributors, 2003 will remain an unforgettable year.

Today, in 2004, EAGLE continues to grow in extreme proportions. A protective film applied to the interior and exterior of the glass during the construction process, was introduced as a standard product in January and is a hit in the marketplace. And a new line of alternative hardware finishes for casements, awnings and double-hungs brought added flexibility to our hardware options.

At EAGLE, we continue to remain innovative and are committed to the future and continued rich heritage of window crafting in the Dubuque area.

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News & Announcements



06/27/03 EAGLE President and CEO David Beeken Recognized as Manufacturing Entrepreneur of the Year

For Immediate Release

EAGLE President and CEO David Beeken Recognized as Manufacturing Entrepreneur of the Year

OMAHA, NEBRASKA, June 27 – The Ernst & Young Entrepreneur Of The Year award honors entrepreneurs whose ingenuity, hard work and perseverance have created and sustained successful, growing business ventures. Founded in 1986, the awards are presented in 38 U.S. regional competitions and 35 worldwide competitions. The Iowa/Nebraska program, now in its fifteenth year has recognized over 130 outstanding business leaders. Individuals awarded in the Iowa/Nebraska program will become eligible for the national awards, given in November in Palm Springs, California.

This year six categories were awarded including: Emerging Entrepreneur, Master Entrepreneur, Technology Entrepreneur, Manufacturing Entrepreneur, Family-Owned Entrepreneur and Financial Services Entrepreneur. David Beeken, President and CEO of EAGLE Window & Door, Inc., Dubuque, Iowa was nominated and later awarded the Manufacturing Entrepreneur of the Year at a ceremony in Omaha, Nebraska on June 26, 2003.

Throughout his rise as a high school graduate on the production floor of EAGLE Window & door, Inc., to the CEO's desk, David Beeken has closely followed this advice: "Worry less about what you will make, and more about what can be learned." Using his voracious appetite for learning all aspects of the business, from production to sales to distribution, Beeken has double sales and found new markets for EAGLE's products.

Fresh out of high school, Beeken took a job on the production floor of what was then Caradco, a window distributor that has been in business since 1866. Beeken's path to success found him working in a variety of positions, continually rising in the company until he was named president and CEO three years ago.

Beeken sets EAGLE apart by offering modified door and window products to its customer instead of completely customized products. This allows the company to charge premium rates for windows and doors but not disrupt the production process as much as customizing would. Beeken has achieved rapid growth in sales at EAGLE by focusing on two growing markets – high-end homes and the institutional segment, such as health care facilities, schools, and churches – and by expanding its sales in the South and West, where year-round construction activity opens more doors for EAGLE.

Having worked his way up the corporate ladder, Beeken understands the value employees at all levels of the company bring. He holds dear the philosophy that "bricks and mortar make a company but people make a business," and he listens to input and ideas on how to improve operations at frequent employee meetings.

Throughout the years, EAGLE has gone through several ownership changes, in addition to a bankruptcy filing by its parent company. In 2002, the company sold off EAGLE, one of its few profitable operations, to a private-equity company. Throughout this tumult, one of EAGLE's consistent aspects has been Beeken's leadership and commitment. His guidance has kept employees motivated and eager to make EAGLE soar.

Source: Ernst & Young LLP
Driving Force - The Element of Success



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News & Announcements



07/10/02 EAGLE Buyer Plans for Growth

Linsalata Capital Partners has a proven record of building mid-size companies, a corporate official said, and the investment firm plans more of the same for one of its newest acquisitions - Eagle Window & Door Inc. of Dubuque.

Cleveland-based Linsalata in April won a bankruptcy bidding war, earning the right to purchase Eagle Window & Door from the manufacturer's financially strapped parent American Architectural Products Corp., also headquartered in Ohio. According to the Securities and Exchange Commission, Linsalata paid nearly \$65 million for American Architectural Products' most successful subsidiary.

"Eagle Window & Door, we think, is an outstanding company, positioned well in its market," said Stephen Perry, a senior vice president for Linsalata.

The private equity investment company, currently with about \$500 million under management, has built its name by building mid-size companies like Eagle, he said.

"Linsalata is in the business of investing in middle-market companies, growing them over time and delivering solid returns to the investment and ownership of those investments," Perry said. "We have an 18-year track record of delivering above-average returns to our investors."

That was apparently the formula for another window-and-door company Linsalata acquired.

"PGT (Industries, Inc.) is similar to Eagle in that it has a solid niche market led by a superior management team," Perry said of the Venice, Fla.-based window and door manufacturer Linsalata purchased in January 2001. "Its employment base has grown about 20 percent along with the business since we acquired it."

With reported annual revenues of about \$120 million and a work force of more than 1,100 employees, PGT is poised for continued growth, Perry said. And growth is the plan for Linsalata's Dubuque operation.

"We want to provide the capital necessary to add the equipment to the facility that would be needed to capture the growth of the businesses," Perry said.

Statements like that must surely come as a huge relief for Eagle, long constrained in its growth by financially faltering American Architectural Products. Although Eagle President and Chief Executive Officer David Beeken could not be reached for comment for this article, he has in the past made no secret of the stifling influence American Architectural Products has had on the Dubuque plant.

"Under this new ownership, we will not have those levels of constraints," Beeken has said. "It will free us up to do a lot of things we haven't been able to do."

John Schoenike, secretary and general counsel for American Architectural Products, admitted that the company did not welcome the loss of Eagle Window & Door.

"But at the same point in time, it was something that was necessary to be done for the benefit of Eagle and the remaining (American Architectural Products) companies," Schoenike said.

In December 2001, American Architectural Products filed for Chapter 11 bankruptcy, looking to crawl out from \$125 million in debt. The company has sold off the lion's share of its subsidiaries - 15 of 19 units - in its reorganization bid.

"Along with the sale of Eagle and the cash resulting from that, we anticipate emerging this year and putting the bankruptcy process behind us," Schoenike said, adding that the Eagle sale was a "significant cash infusion" for American Architectural Products.

Linsalata's investments cover a diverse range of companies, far beyond the scope of the window-and-door business. The investment firm is involved in the production of everything from agricultural equipment and truck beds to sportswear and feminine-hygiene products.

But Perry said autonomy of Linsalata's individual holdings is crucial to the companies' continued growth. To that end, Linsalata, to a great extent, takes a hands-off approach to running successful companies like Eagle Window & Door, Perry said.

"We work closely with management teams in developing and buying into the strategies, but from there forward it is up to management to utilize that strategy and manage that capital wisely to grow the business," he said. "Without the appropriate level of autonomy, it would be difficult for the team to accomplish that."

While officials say the sale of Eagle is essentially final, Schoenike said a few financial loose ends have to be tied up. Due to normal fluctuations in working capital, Schoenike said final calculations still must be made in the sale.

"We hope it is within the next 30 days, although the transaction in reality is final and closed," he said.

Source: Telegraph Herald
Dubuque, IA
By M.D. Kittle
July 10, 2002

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
Nationwide Mutual Insurance Company,
and Gilliam Construction Company,
Inc.

Plaintiffs,

vs.

Eagle Windows & Doors, Inc.,
American Architectural
Products Corporation, Window and Door
Concepts, Inc., Charles Goad, Hobbit
Plastering, Inc., Phillip L. Bender,
Upstate Waterproofing, Inc., M. Dale
Coleman, and Gary Churchill,

Defendants.

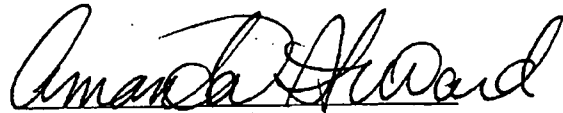
IN THE COURT OF COMMON PLEAS

C.A. No.: 2007-CP-42-296

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the **Plaintiffs, Nationwide Mutual Insurance Company and Gilliam Construction Company, Inc.'s Memorandum in Opposition to Defendant Eagle Windows & Doors' Motion for Summary Judgment** was served upon the attorney for the Defendant on October 15, 2012 by electronic mail, to the following addresses:

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