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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143

Palmetto Construction Group, LLC — Respondent

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward — Petitioners

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
(Volume 1 of 4)

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Palmetto Construction Group, LLC, Respondent,

v.

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, Appellants.

Appellate Case No. 2016-002308

Appeal From Charleston County
Mikell R. Scarborough, Master in Equity

Opinion No. 5661
Heard April 2, 2019 – Filed June 26, 2019

APPEAL DISMISSED

A. Bright Ariail, of Law Office of A. Bright Ariail, LLC, of Charleston, for Appellants.

Andrew K. Epting, Jr. and Jaan Gunnar Rannik, both of Andrew K. Epting, Jr., LLC, of Charleston, and Michelle Nicole Endemann, of Clarkson, Walsh & Coulter, P.A., of Mt. Pleasant, for Respondent.

LOCKEMY, C.J.: Restoration Specialists, LLC (Restoration) and its owners, Ruben Mark Ward and Lynnette Pennington Ward (collectively Appellants), appeal a master-in-equity's order denying their motion for relief from an entry of default and motion to stay and compel arbitration. We dismiss the appeal as interlocutory.

FACTS

In 2011, Restoration, a Georgia company, and Palmetto Construction Group LLC, (PCG), a South Carolina LLC, entered into an agreement to work together on multiple construction projects. In 2012, the Veteran's Administration (the VA) awarded Restoration a contract to serve as the general contractor on the completion of a parking garage at the VA facility in Augusta, Georgia (the VA Project) for $1.8 million. On September 10, 2014, Restoration and PCG entered into a subcontract agreement under which Restoration would act as the general contractor and would be responsible for hiring the other subcontractors. The subcontract provided that PCG would perform the concrete work and act in a supervisory capacity. The subcontract stated Restoration would pay PCG for the subcontract work. The subcontract also contained a provision requiring mandatory mediation or in the alternative, binding arbitration, of claims arising out of the subcontract.

PCG claims in addition to the subcontract, Mark Ward asked PCG for help in obtaining a bond from PCG's surety to cover the VA Project. Restoration and PCG entered into a surety bond agreement with Hanover Insurance Company to provide a surety bond for the VA Project. Hanover required PCG, Restoration, and their respective principals and their spouses to sign an indemnity agreement requiring them to indemnify Hanover for any claims made on the bond. As the VA Project neared completion, several subcontractors filed claims under the bond asserting they did not receive payment. PCG claims Hanover paid $1,425,144.00 to subcontractors in accordance with the bond.

On February 12, 2016, PCG filed a summons and complaint against Appellants. PCG alleged breach of contract against Restoration for failure to pay amounts owed under the subcontract. In addition, PCG alleged actual and constructive fraud and negligent misrepresentation against the Appellants. On the same day, PCG filed a motion to stay and compel arbitration as provided in the subcontract agreement.

PCG personally served the summons and complaint as well as the motion to compel on Appellants on March 14, 2016. After Appellants did not answer, PCG filed an affidavit of default on April 18, 2016, and withdrew its motion to stay and compel arbitration. The circuit court granted PCG's motion for entry of default and referred the case to the master-in-equity for final judgment against Appellants on April 20, 2016.

On June 5, 2016, the day before the damages hearing, Appellants filed a motion for a continuance and a motion to be relieved from default. At the damages hearing

before the master, Appellants submitted an affidavit from Mark Ward to support their motion to be relieved from the entry of default. The master granted Appellants' motion for a continuance and held the motion for relief from default in abeyance. On July 11, 2016, Appellants filed a motion to stay and compel arbitration. At a hearing on July 14, 2016, the master found Appellants in default and declined to address Appellants' motion to stay and compel arbitration because of their default status. The master issued an order on the same day denying Appellants' request for relief from default, ordering a damages hearing on October 4, 2016, and denying Appellants' motion to stay and compel arbitration "as [Appellants are] in [d]efault." Appellants filed a Rule 59(e), SCRCP, motion to alter or amend on July 27, 2016. Appellants asked the master to schedule a hearing on this motion prior to the damages hearing. However, the master decided to keep the damages hearing on October 4, 2016, and scheduled a hearing on the Rule 59(e) motion for October 11, 2016.

On September 30, 2016, Appellants served a notice of appeal on PCG and notified the master of their appeal of the master's July 14, 2016 order, but did not file the notice with this court until November 18, 2016. In the meantime, the master held a third hearing on October 4, 2016. The master allowed PCG to proffer evidence on damages and Appellants to argue their Rule 59(e) motion. On October 28, 2016, the master issued an order denying Appellants' Rule 59(e) motion. In his order, the master states: "After a review of the file and memoranda submitted by counsel, the court finds as follows: 1) [Appellants'] Motion to Amend is respectfully DENIED, insomuch as [Appellants] have not shown good cause to lift the default; and 2) the affirmative defense of arbitration has been waived and [Appellants'] Motion to Stay and Compel filed July 11, 216 was not properly made."

Appellants appeal both the master's July 14, 2016 order and the October 28, 2016 order denying their Rule 59(e) motion.

LAW/ANALYSIS

A. Appealablity

The denial of a motion to set aside a default judgment is immediately appealable as it is a final judgment on the merits. *See Ateyeh v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 437, 361 S.E.2d 340, 340 (Ct. App. 1987). However, the denial of a motion to set aside an entry of default is not appealable until after final judgment. *Thynes v. Lloyd*, 294 S.C. 152, 154, 363 S.E.2d 122, 123 (Ct. App. 1987). Appellants appeal from a motion to set aside an entry of default. Furthermore, the parties have not participated in a damages hearing and the master has not entered a

default judgment against Appellants. Accordingly, both the master's July 14, 2016 order and October 28, 2016 order are interlocutory and not immediately appealable.

Appellants argue that because the master's order also denied their motion to stay and compel arbitration, the entire order is appealable. In his July 14, 2016 order, the master concluded Appellants' "motion to stay and compel arbitration is denied as [Restoration] is in [d]efault." Section 15-48-200 of the South Carolina Code (2005) provides an appeal may be taken from "[a]n order denying an application to compel arbitration." Appellants cite *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001), for the proposition that "an order that is not directly appealable will be considered if there is an appealable issue before the court." Accordingly, Appellants assert that although the master's order denying them relief from an entry of default is not appealable, it became appealable when coupled with the denial of their motion to compel arbitration. However, given the procedural posture of this case, we do not find an appealable issue before this court.

Appellants failed to answer PCG's complaint in time. Accordingly, Appellants' default status is not in question. "By defaulting, a defendant forfeits his right to answer or otherwise plead to the complaint. In essence, the defaulting defendant has conceded liability." *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978) (citations omitted) (internal quotations omitted). Other than damages, the issues the parties would have decided through arbitration are settled leaving little to arbitrate. Granting a motion to compel arbitration after an entry of default would allow the party seeking arbitration to revisit liability after it has been determined. As Appellants emphasize in their brief, "'The policy of the United States and this State is to favor arbitration of disputes.'" *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000) (quoting *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135,136 (1995)). However, if we allow the reexamination of liability after default, we are defeating the purpose of arbitration: "to achieve streamlined proceedings and expeditious results." *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (citations omitted) (internal quotations omitted).

Our supreme court analyzed the legal status of defaulting parties in *Roche v. Young Bros., of Florence*, 332 S.C. 75, 504 S.E.2d 311 (1998). In that case, the supreme court determined a defaulting party's consent was not required to refer the case to a special referee. The supreme court explained:

> Young Brothers clearly defaulted by failing to answer Roche's complaint within the prescribed time. Young Brothers' status as a defaulting party was not vitiated simply because it later chose to challenge the default judgment rendered against it.

Id. at 82-83, 504 S.E.2d at 315. Similarly, Appellants' default should not be excused because they chose to file a claim for arbitration when they found themselves in default. If we were to allow such, then any defaulting party would simply file a motion to compel arbitration to remove their default status. Therefore, the master correctly found Appellants' motion to stay and compel arbitration was not proper due to Appellants' default status. Appellants cannot bootstrap the master's denial of their motion for relief from default to the master's refusal to consider Appellants' request for arbitration in order to create an appealable issue.

B. Waiver

In addition, we find Appellants waived their right to arbitration. "It is generally held that the right to enforce an arbitration clause may be waived." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Id.* at 665, 521 S.E.2d at 753 (citations omitted) (internal quotations omitted).

While not specifically addressing the issue at hand, in *Wham v. Shearson Lehman Brothers, Inc.*, 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989), the defendants sought to set aside an entry of default or in the alternative, to stay the proceedings and compel arbitration. *Id.* We determined the master did not use the "good cause" standard, but rather applied an "excusable neglect" standard to determine whether he should grant relief and thus, we remanded the case on the issue of the entry of default. *Id.* at 465, 381 S.E.2d at 501. Concerning the motion to stay and compel arbitration, we stated:

> Because we vacate the order denying the motion by Shearson Lehman for relief from the entry of default and remand the issue raised by the motion, we need not address the master's denial of its alternative motion to stay the proceedings and compel arbitration. *See,*

> *however, Miller v. British America Assurance Co.*, 238 S.C. 94, 119 S.E.2d 527 (1961) (referring to an arbitration agreement set up in the answer as a "special defense"); 5 Am.Jur.2d *Arbitration and Award* § 51 at 556–57 (1962) (one's right to arbitrate given by contract may be waived by failing to raise the right in an answer).

Id. at 466, 381 S.E.2d at 502.

Other jurisdictions have found arbitration waived when a defaulting party seeks to compel it. In *Tri-State Delta Chemicals, Inc. v. Crow*, 61 S.W.3d 172, 173 (Ark. 2001), the Supreme Court of Arkansas considered whether a defendant's default on a suit filed in circuit court effectively waives any right to compel arbitration. Similar to our case, the trial court did not consider the defendant's motion to compel arbitration because it determined the defendant was in default. *Id.* at 173. The Supreme Court of Arkansas initially determined because the issue of damages had not been decided, the default judgment was not a final decision and accordingly, was not appealable. *Id.* at 174. Further, the court stated, "While we agree that, generally, a denial of a motion to compel arbitration is an immediately appealable order, we do not believe that an interlocutory appeal will lie under the circumstances of this case." *Id.* Instead, the court determined the defendant "waived any right it may have had to compel arbitration when it failed to timely assert arbitration as a defense to the suit." *Id.* The court cited to a New York trial court decision finding:

> Though arbitration clauses are generally enforceable, they cannot be used to bypass the statutory provisions requiring that pleadings be answered or to thwart a proper motion for a default judgment. The Defendant effectively waived its right to enforce the arbitration clause when it failed to answer or appear in response to the summons and complaint under circumstances where there was no reasonable excuse for such default.

Id. (quoting *Charming Shoppes, Inc. v. Overland Constr., Inc.*, 717 N.Y.S.2d 860 (N.Y. Sup. Ct. 2000)). Determining the plaintiffs properly served the defendant and the defendant failed to timely assert its right to arbitrate, the Supreme Court of Arkansas opined the defendant waived this right. *Id.* "The right to seek arbitration is a defense to civil litigation. Like any other defense, it may be waived by failing to timely assert it under the rules of civil procedure." *Id.* at 175.

Other jurisdictions have made similar determinations. *See Interconex, Inc. v. Ugarov*, 224 S.W.3d 523, 535–36 (Tex. Ct. App. 2007) (finding Interconex waived any right to arbitration that it may have had when it failed to file a timely answer); *LaFrance Architect v. Point Five Dev. S. Burlington, LLC*, 91 A.3d 364, 372 (Vt. 2013) ("The presumption in favor of arbitration, however, must be viewed within the context of its underlying purpose: to provide speedy, cost-effective resolution of disputes. To allow a party to 'cry arbitration' in order to undo the consequences of its own errors would turn the rationale of arbitration on its head."); *Woodruff v. Spence*, 883 P.2d 936, 938 (Wash. Ct. App. 1994), *as amended* (Jan. 30, 1995) ("Whether Mr. Spence knowingly waived his right to arbitration depends on whether he had notice of the action against him prior to entry of the default judgment."); *State ex rel. Barden & Robeson Corp. v. Hill*, 539 S.E.2d 106, 112 (W. Va. 2000) ("In this case, unless it is able to show good cause for its default, Robeson has waived its right to assert arbitration as an affirmative defense against continued litigation in the circuit court.").

PCG properly served Appellants with notice of its claims. Appellants failed to timely answer or respond to those claims. Thus, Appellants effectively waived their right to assert enforcement of the arbitration provision.

CONCLUSION

We find the master's July 14, 2016 and October 28, 2016 orders are not appealable. Moreover, because Appellants were in default, they waived their right to assert arbitration as a defense. Accordingly, Appellants' appeal is

DISMISSED.

SHORT and MCDONALD, JJ., concur.

The South Carolina Court of Appeals

Palmetto Construction Group, LLC, Respondent,

v.

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, Appellants.

Appellate Case No. 2016-002308

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C. J.

J.

J.

Columbia, South Carolina

cc:
Andrew K. Epting, Jr., Esquire
Michelle Nicole Endemann, Esquire
A. Bright Ariail, Esquire
Jaan Gunnar Rannik, Esquire

FILED
November 15, 2019

The South Carolina Court of Appeals

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November 15, 2019

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Re: Palmetto Construction Group, LLC v. Restoration Specialists, LLC(2)
Appellate Case No. 2016-002308

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Andrew K. Epting, Jr., Esquire
Michelle Nicole Endemann, Esquire
Jaan Gunnar Rannik, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143
[Appellate Case No. 2016-002308]

RECEIVED
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SC Court of Appeals

Palmetto Construction Group, LLC Respondent,

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward Appellants.

APPELLANTS' REPLY TO RESPONDENT'S RETURN TO APPELLANTS' PETITION FOR REHEARING *EN BANC*

NOW COME the Appellants, Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, by and through their undersigned counsel, who hereby reply to to Respondent's Return to Appellants' Petition for Rehearing *En Banc* pursuant to Rules 219, 221 and 240 of the South Carolina Appellate Court Rules.

In support of this reply, the Appellants, Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward submit the following:

INTRODUCTION

The Appellants have appealed the Orders of the Honorable Mikell R. Scarborough (the "Master"), dated July 14, 2016 and October 28, 2016.

The Master's July 14, 2016 Order orders as follows:

(1) Defendants' motion to be relieved from default is DENIED;

(2) A damages hearing is set for October 4, 2016 at 2:00 pm; and

(3) Defendants' motion to stay and compel arbitration is denied as Defendant is in Default.

The Master's October 28, 2016 Order orders as follows:

(1) Defendants' Motion to Amend is respectfully DENIED, insomuch as Defendants have not shown good cause to lift the default; and

(2) The affirmative defense of arbitration has been waived and Defendant's Motion to Stay and Compel filed July 11, 2016 was not properly made.

On June 26, 2019, the Panel issued an opinion dismissing the appeal as interlocutory and finding, that because Appellants were in default, they waived their right to assert arbitration as a defense.

The Appellants filed a Petition for Rehearing *En Banc* on July 10, 2019. The Respondent filed a Return to Appellants' Petition for Rehearing *En Banc* ("Return") on August 2, 2019. The Appellants file this Reply to Respondent's Return herein.

LAW/ANALYSIS

I. APPEALABILITY

A. The Appellants Respectfully Submit It Appears The Panel Overlooked The "Substantial Ground" For Immediate Appeal of the Master's Orders Refusing to Compel Arbitration.

On appeal, the Appellants' assert the following four grounds in support of their argument that the Master's rulings denying the Appellants the right to arbitration were immediately appealable:

(1): Under federal law, an order that refuses to compel arbitration is immediately

appealable, even if interlocutory in nature. *See* 9 U.S.C. §16(a)(1); *Stedor Enter., Armtex, Inc.*, 947 F.2d 727 (4th Cir. 1991);

(2): Under South Carolina law an order denying an application to compel arbitration is immediately appealable. S.C. Code Ann. §15-48-200(a)(1); *Cape Romain Contractors, Inc. v. Wando E, LLC*, 405 S.C. 115, 747 S.E. 2d 461 (2013); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E. 2d 839 (Ct. App. 1999).

(3): Under South Carolina law, an order finding that a party waived its right to compel arbitration is immediately appealable. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E. 2d 749 (Ct. Appl 1999);

(4): Under South Carolina law, an order affecting a substantial right of a party, including a party's mode of trial to which he is entitled is immediately appealable. S.C. Code Ann. §14-3-330 (2); *Lester v. Dawson*, 327 S.C. 263, 491 S.E. 2d 240 (1997); *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 620 S.E. 2d 333 (Ct. App. 2005). In fact, such orders **must** be appealed immediately and cannot be challenged in an appeal from final judgment. (emphasis added). *Id.*

While the Panel did address grounds (1) through (3) above in various parts of its Opinion, dated June 26, 2019 ("Opinion"), the Appellants' respectfully submit that it appears the Panel overlooked ground (4), the "substantial right" ground for immediate appeal of the Master's Order refusing to compel arbitration.

For the foregoing reasons, and for those set forth in the Appellants' Petition, the Appellants respectfully petition this Court pursuant to Rule 221, SCACR for a rehearing on the issue of appealability.

B. The Appellants Respectfully Submit It Appears The Panel Misapprehended The Interplay Of Appellants' Arguments Regarding Appealability and Waiver Of Arbitration In This Matter.

In its Opinion, the Panel dismissed the appeal as interlocutory. This included the appeal from the Master's rulings refusing to compel arbitration. Although dismissing the appeal from the Master's refusal to compel arbitration as interlocutory, the Panel issued a substantive ruling finding that Appellants had waived their right to arbitration due to the

entry of default.

The Appellants submit that in light of the Panel's rejection of Appellants' grounds for immediate appeal of the Master's rulings refusing to compel arbitration there should have been no substantive ruling on the issue of waiver. Stated differently, if the Master's rulings denying arbitration were interlocutory, and not immediately appealable, then a ruling on the merits of the waiver question would seem inviolate of the Panel's ruling on appealability.

The Appellants arguments are premised on the previously stated legal precedent that orders finding a waiver of arbitration and/or refusing to compel arbitration are immediately appealable. The appellants further submit that under such precedent an appellate court must either: (a) find that such an order is interlocutory, and not immediately appealable, and refrain from any substantive ruling on the issue of waiver or (b) find that such an order is immediately appealable and then issue a substantive ruling on the issue of waiver. However, it does not seem that the appellate court can find that the order is interlocutory, and not immediately appealable and, thereafter, issue a ruling on the merits of the waiver issue.

For the foregoing reasons, and for those set forth in the Appellants' Petition, the Appellants respectfully petition this Court pursuant to Rule 221, SCACR for a rehearing on the issue of appealability.

C. The Panel, In Dismissing the Appeal As Interlocutory Did Not Issue A Substantive Ruling On The Master's Denial Of Appellants" Motion To Set Aside The Entry Of Default.

The Respondent, in addressing the issue of appealability, asserts that "this Court concluded that Appellants were properly in default.." *Return at 4.* The Respondent further asserts that "...without first considering the merits (whether the Master abused his discretion in declining to lift the default), this Court could not have determined whether it had jurisdiction over the appeal." *Id. at 4.* Finally, the Respondent asserts that the Panel found that the "[b]ecause [the Appellants] were unable to demonstrate good cause to lift the default, the motion to compel arbitration was a nullity and was properly denied as such..." *Id at 1.*

It would appear from the Respondent's assertions above, that the Respondent claims the Panel's Opinion included a substantive non-interlocutory finding that the Master did not

abuse his discretion in finding a lack of "good cause" to lift the entry of default and denying the Appellants' motion for such relief.

However, the opinion of the Panel does not contain any of the Respondent's assertions. Contrary to these assertions, the Panel made no rulings or findings in its Opinion as to the propriety of the Master's denial of Appellants' motion to set aside the entry of default or the Appellants' appeal therefrom. The Panel did not discuss the Rule 55 (a), SCRCP "good cause" standard for lifting an entry of default. Likewise, the Panel did not discuss the "abuse of discretion" standard of review for orders denying a motion to lift entry of default. Finally, the Panel made no finding as whether the Master did or did not abuse his discretion in denying Appellants' motion to set aside the entry of default. Indeed, if the Panel had affirmatively ruled on this issue and found there was no abuse of discretion, it would not have dismissed the appeal as interlocutory.

Instead, the Panel, cites *Ateyeh v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 437, 361 S.E.2d 340, 340 (Ct. App. 1987) and states that "the denial of a motion to set aside an entry of default is not appealable until after final judgment." *Opinion at 3.* Thereafter, the Panel states and finds as follows:

"Appellants appeal from a motion to set aside an entry of default. Furthermore, the parties have not participated in a damages hearing and the master has not entered a default judgment against Appellants. Accordingly, both the master's July 14, 2016 order and October 28, 2016 order are interlocutory and not immediately appealable."

Id. at 3-4.

For the foregoing reasons, the Respondent's apparent claim that the Panel issued a substantive ruling on the Master's Denial of Appellants' Motion to Set Aside the Entry of Default and the Appellants' Appeal therefrom lacks merit.

II. WAIVER

A. The Appellants Respectfully Submit It Appears the Panel Misapprehended The Application Of The Proper Legal Standard And Authorities To The Full Facts And Circumstances Of The Case In Ruling That The Appellants Waived Their Right To Arbitration.

The Respondent asserts that the Court properly held that the arbitration right of the

Appellants had been waived. *Return at 5.* Respondent argues the following in support of this assertion:

(1): Appellants' admission by default of the allegation in the Complaint that jurisdiction was vested in the trial court and venue was proper there constitutes an "emphatic repudiation" of the right to compel arbitration. *Return at 5.*

(2): Arbitration is an affirmative defense that is waived if not pled. *Return at 5.*

(3): A party in default has waived its right to plead and therefore waived the right to raise the affirmative defense of arbitration. *Return at 6.*

The Respondent's first argument fails to recognize that under both federal and South Carolina law, the court is divested of jurisdiction only when the case is submitted to arbitration. *U.S. ex rel. Coastal Roofing Co., Inc. v. P. Browne & Associates, Inc.*, 585 F. Supp. 2d 708 (D.S.C.); *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.C. 172 (Ct. App. 2009); *Main Corp. v. Black*, 357 S.C. 179, 592 S.E. 2d 300 (2004). Even then, while the court action is required to be stayed, the court's jurisdiction is only temporarily divested. The Court regains jurisdiction over the matter at such time as the arbitration proceeding is completed for purposes of confirmation/approval of the arbitration and/or for appeals to be taken therefrom. Indeed, the Respondent acknowledged as much in the filing of its own Motion to Compel and Stay contemporaneous with its Complaint.

Therefore, the Appellants' admission by default of the jurisdictional and venue allegations do not constitute a repudiation of their right to compel arbitration.

In response to the Respondent's second and third arguments, the Appellants submit that the question before this Court is whether the Appellants have waived or defaulted upon their rights to arbitration **based on the application of the proper legal standard and authorities to all of the facts and circumstances of this case.**

The proper legal standard and authorities are set forth and briefed in detail in the Brief of Appellants, Section II. (E)(2) – (4). Also, with the exception of *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978) and *Limehouse v.* Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013), the cases cited by the Respondent in support of its second and third arguments have been fully briefed and distinguished in the Brief of Appellants and Reply Brief of Appellants. The *Howard* case and *Limehouse* case do not involve arbitration

agreements or the question of whether a party has waived its right to arbitration.

However, the application of the proper legal standard and authorities to the full facts and circumstances of this case establishes that the Appellants have not defaulted upon nor waived their right to mandatory mediation/arbitration in this matter. *See* Brief of Appellants, Section II. (E)(2)-(4).

For the foregoing reasons, and for those set forth in the Appellants' Petition, the Appellants' respectfully petition this Court pursuant to Rule 221, SCACR for a rehearing on the issue of waiver.

B. <u>The Legal Authorities Cited In Support Of The Panel's Ruling That The Appellants Waived Their Right To Arbitration Are Inapposite To The Arbitration Issues Before This Court and Appellants Respectfully Submit The Panel Misapprehended The Precedential Value And Applicability Of These Legal Authorities To The Arbitration Issues Herein.</u>

The Respondent makes the general statement that the "cases cited by the Court stand for the propositions that the right to arbitrate can be waived in South Carolina, and that courts have previously found that a defaulting party has waived the right to arbitrate." *Return at 7.* This is a general statement that does not consider the material distinctions in the precedential value and the legal standards and particular facts set forth in those cases supporting a finding of waiver as compared to those in the present case. The Appellants specifically address these distinctions in their Petition for Rehearing *En Banc*. *Petition at 5-11.*

The Panel cites one South Carolina case and several additional cases from other jurisdictions in support of its ruling that the Appellants waived their right to arbitration. However, the Appellants respectfully submit that these cases are factually inapposite to the arbitration issues of first impression in South Carolina before this Court. Furthermore, Appellants respectfully submit that the application of the legal standards applied in these cases and the legal conclusions drawn therefrom were misapprehended by the Court with respect to the arbitration issues involved in the present case. *See Petition at 5-11.*

For the foregoing reasons, and for those set forth in the Appellants' Petition, the

Appellants' respectfully petition this Court pursuant to Rule 221, SCACR for a rehearing on the issue of waiver.

C. It Appears The Panel Overlooked The Well-Reasoned Opinion Of Cedar Surgery Center v. Bonelli, 96 P.3d 911, 2004 UT 58 (Utah 2004), In Which The Supreme Court Of Utah Employed Arbitration Waiver Standards Similar To The South Carolina State Law Standard And The District Of South Carolina/Fourth Circuit Federal Law Standard In A Default Situation.

The Appellants cited the case of *Cedar Surgery Center v. Bonelli*, 96 P.3d 911, 2004 UT 58 (Utah 2004) in support of its argument that the Entry of Default in the present case does not constitute a default or waiver of Appellants' right to mandatory mediation/arbitration.

A review of the *Cedar* case and Appellants' arguments in support of its applicability to the present case are set forth in Appellants' Petition for Rehearing *En Banc*. *See Petition at 12-14*.

Respondent asserts that Appellants argument that the Panel overlooked the *Cedar* case precedent is not supportable, "given the Court's thorough review of case law from other jurisdictions." *Return at 6*. Respondent's assertion ignores the fact that the referenced case law from other jurisdictions did not include the *Cedar* case.

Respondent further asserts that the *Cedar* case is distinguishable for several reasons from the present case.

First, Respondent asserts that the basis for finding non-waiver in *Cedar* was that the defaulting party's first action in the case included raising its arbitration right. Respondent then attempts to distinguish the present case by stating: (a) arbitration was not mentioned in either Appellants' motion to lift entry of default or Appellants' supporting affidavit and (b) Appellants' motion to compel arbitration was filed over a month after Appellants' motion to lift entry of default and after the Master indicated Appellants' motion was unlikely to succeed.

However, as the Record on Appeal reflects, Appellants' first action in the present case was to file a Motion for Continuance of the damages hearing and a Motion to Set Aside

Entry of Default on June 3, 2016 (the day after Appellants first learned of the entry of default and the pending damages hearing set for June 6, 2016) citing the mandatory mediation/arbitration provisions and Respondent's Motion to Stay and Compel mediation/arbitration as one of Appellants' grounds for relief. (R.pp. 77-81; R.pp. 82-87). The Appellants understood that Respondent's Motion to Stay and Compel mediation/arbitration remained pending for decision by the court at this time. (R.p. 79, line 18 – p. 80, line 2).

The Appellants, through their undersigned legal counsel, next raised and again put the lower court on notice of the application contractual mandatory mediation/arbitration provisions at the June 6, 2016 court hearing. (R.p. 465, Tr.p. 8, lines 4-8). The Master expressly acknowledged Appellants' counsel's comments and the existence of the mandatory mediation/arbitration provision. (R.p. 466, Tr.p. 12, lines 10-17). In fact, Respondent's counsel even acknowledged the mediation requirement and requested the Court's assistance during that hearing, "if we need to go to mediation." (R.p. 465, Tr.p. 7, lines 4-9).

Thereafter, the Appellants again asserted their right to arbitration and expressly joined in and consented to Respondent's Motion to Stay and Compel by virtue of Appellants' Motion to Stay and Compel mediation/arbitration filed July 11, 2016. (R.pp. 88-93).

The parties reconvened before the Master on July 14, 2016. Appellants also filed a memorandum in support of Appellants' Motion to Lift Entry of Default on July 14, 2016. (R.pp. 94-124). Appellants' supporting memorandum included their continuing invocation of the right to arbitration, coupled with their demand to stay this action and submission of the matter to mandatory mediation/arbitration. (R.p. 97, lines 15-20; R.pp. 94-124).

Finally, the Appellants timely filed a Motion to Alter and Amend the Master's orders pursuant to SCRCP 59(e) again demanding that this action be stayed and compelled to mandatory mediation/arbitration. (R.pp. 125-129)

The Appellants' actions above show the Appellants' vigorous efforts to assert their right to mandatory mediation/arbitration from the date they first appeared in the action and, thereafter, often and continuously throughout the proceedings in the lower court below.

The Respondent next attempts to distinguish the *Cedar* opinion by alleging that the *Cedar Surgery* court and this Court each reviewed their respective lower court's decision on

whether the default should be lifted under the "abuse of discretion" standard and found no abuse of discretion.

However, as set forth in Section I. C. of this Reply, the Panel did not issue a substantive ruling on whether the default should be lifted under the "abuse of discretion" standard. The Panel did not rule on the propriety of the Master's decision not to lift the entry of default for "good cause" under Rule 55(a), SCRCP nor did it rule on the merits of the Appellants' appeal therefrom.

For the foregoing reasons, and for those set forth in the Appellants' Petition, the Appellants respectfully petition this Court pursuant to Rule 221, SCACR for a rehearing on the issue of waiver.

D. It Appears The Panel Did Not Consider The Issue Of Whether PCG's Motion To Stay and Compel Arbitration, Which Motion The Appellants Joined In And Consented To, Was Properly Adjudicated And Whether The Relief Requested Therein Should Have Been Granted.

PCG filed and served a Motion to Stay and Compel mandatory mediation/arbitration contemporaneously with the commencement of this action. The Appellants joined in and consented to this motion as part of their Motion to Stay and Compel filed on July 11, 2016, thus rendering PCG's motion a joint motion for all parties to the case.

The Respondent acknowledges in its assertions regarding the Respondent's Motion to Stay and Compel mandatory mediation/arbitration that the Panel did not find waiver or make any other findings with regard to the impact of Appellants' joinder in Respondent's Motion to Stay and Compel Arbitration, or the lower court's disposition of that motion.

The Respondent's acknowledgment is consistent with the Appellants assertion that the Panel appears not to have considered the issue of whether the Respondent's Motion to Stay and Compel Arbitration, which motion the Appellants joined in and consented to, was properly adjudicated and whether Appellants were entitled to mediation/arbitration thereunder.

The Appellants' full argument on this issue is set forth in Appellants' Brief and Section I.2.C. of Appellants' Petition for Rehearing *En Banc*.

For the foregoing reasons, and for those set forth in the Appellants' Petition, the

Appellants' respectfully petition this Court pursuant to Rule 221, SCACR for a rehearing on the issue of waiver.

III. REHEARING *EN BANC*

Appellants' Request For Rehearing *En Banc* Is Proper.

Respondent argues that Appellants' request for rehearing *en banc* conflates the standard for rehearing with the *en banc* rehearing standard. Respondent's argument lacks merit.

The grounds for rehearing pursuant to Rule 221, SCACR are properly made and set forth in Appellants' Petition for Rehearing and this Reply to Respondent's Return to Appellants' Petition for Rehearing.

The Appellants' request for a rehearing *en banc* on these grounds addresses the mechanics and proper constitution of the Court (i.e., rehearing by the full court instead of the three-judge panel) for purposes of rehearing the matter. The Appellants' request for an *en banc* rehearing is properly made pursuant to Rule 219, SCACR for the following reasons:

(1): This Court should grant the rehearing *en banc* as consideration by the full court is necessary herein to secure or maintain uniformity of its decisions regarding the appealability of orders affecting a party's substantial right to arbitration. The supporting arguments for this request for a rehearing *en banc* are set forth in Section I. of Appellants' Petition for Rehearing *En Banc*.

(2): This Court should grant the rehearing *en banc* to answer a question of exceptional importance to the arbitration jurisprudence affecting the citizens and commerce of South Carolina: Whether a party waives its right to arbitration solely by virtue of an entry of default against that party. The supporting arguments for this request for a rehearing *en banc* are set forth in Section II. of Appellants' Petition for Rehearing *En Banc*.

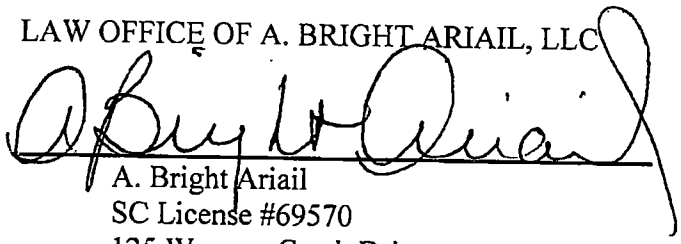
CONCLUSION

For the foregoing reasons as well as the reasons set forth in Appellants' Petition for Rehearing *En Banc*, the Appellants Restoration Specialists, LLC, Reuben Mark Ward and

Lynnette Pennington Ward hereby respectfully request that this Court grant the petition for rehearing *en banc* in this matter.

Respectfully submitted this the 9th day of August, 2019.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC



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ATTORNEY FOR APPELLANTS

August 9, 2019
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

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SC Court of Appeals

Case No. 2016-CP-10-1143
[Appellate Case No. 2016-002308]

Palmetto Construction Group, LLC — Respondent

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward — Appellants

PROOF OF SERVICE

I certify that I have served the Appellants' Reply to Respondent's Return to Appellants' Petition for Rehearing *En Banc* on Palmetto Construction Group, LLC by depositing a copy of it in the United States Mail, postage prepaid, on August 9, 2019, addressed to Palmetto Construction Group, LLC's attorneys of record, Andrew K. Epting, Jr and Jann Rannik, Andrew K. Epting, LLC, 46A State Street, Charleston, South Carolina, 29401. and Michelle N. Endemann, Clarkson, Walsh & Coulter, PA, P O Box 2219, M. Pleasant, SC 29465.

August 9, 2019

A. Bright Ariail
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Attorney for Appellants

Law Office of A. Bright Ariail, LLC

August 9, 2019

RECEIVED
AUG 12 2019
SC Court of Appeals

VIA EXPRESS MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*
Appellate Case No. 2016-002308

Dear Ms. Kitchings;

Enclosed, please find the original and six copies of Appellants' Reply to Respondent's Return to Appellants' Petition for Rehearing *En Banc* and Proof of Service for filing. In addition, for my records, I've included an additional copy of all for you to file stamp and return to me in the self-addressed stamped envelope included.

By copy of this letter, I am serving the Appellants' Reply to Respondent's Return to Appellants' Petition for Rehearing *En Banc* and Proof of Service on counsel for Respondent.

With kindest regards, I am

Sincerely yours,

A. Bright Ariail

Enclosures

cc: Andrew Epting, Esquire
Jann Gunnar Rannik, Esquire
Michelle Endemann, Esquire

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master in Equity

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SC Court of Appeals

2016-CP-10-1143
Appellate Case No.: 2016-002308

Palmetto Construction Group, LLC Respondent,

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward, Appellants.

RESPONDENT'S RETURN TO APPELLANTS' PETITION FOR REHEARING

Respectfully Submitted By:

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ATTORNEYS FOR RESPONDENT

The actions available to a party in default are limited to moving to be relieved from default and, failing that, cross examining witnesses at a damages hearing. Appellants were in default when they filed a motion to compel arbitration. Because they were unable to demonstrate good cause to lift the default, the motion to compel arbitration was a nullity and was properly denied as such, as found by both the Master in Equity and this Court. For this reason, and because Appellants have failed to demonstrate that this Court misapprehended or overlooked Appellants' arguments, Appellants' Petition for Rehearing ("Petition") should be denied.

FACTUAL BACKGROUND[1]

Respondent Palmetto Construction Group, LLC ("PCG") filed suit against Appellants on February 12, 2016, alleging misappropriation of funds from a construction project for the Department of Veterans Affairs, failure to pay subcontractors and suppliers, and defaults on agreements with PCG and the surety, leaving PCG responsible to pay Appellants' debts (of over $1.4 million) to the surety and the subcontractors.

Respondents were personally served with the summons and complaint on March 14, 2016. Respondents did not answer within 30 days, and Appellants moved for default on April 18, 2016 and a default order was entered on April 21, 2016. The matter was referred to the Master in Equity for a damages hearing.

On June 3, 2016, Appellants filed a motion to be relieved from default and attached an affidavit that sought to explain why the default occurred, stating:

> "when I received the Summons and Complaint for the instant action, I thought that it was related to my

[1] The complete underlying factual and procedural background is set forth in Respondent's Brief on file with the Court. An abbreviated version is presented here.

> arrangements with [the surety]. I am not an attorney and did not understand that the above captioned action was separate and apart from the bond claims that I have been working directly with [the surety] to address."[2]

Affidavit of Reuben Mark Ward at ¶¶ 9–10 (ROA 75). Neither the affidavit nor the motion cited arbitration as a reason for failing to answer. On July 11, 2016, Appellants filed a motion to compel arbitration. The Master in Equity ultimately denied the motion to lift the default and the motion to compel arbitration, and this appeal followed.

ARGUMENT AND CITATION OF AUTHORITY

I. Appellants' Petition Fails to Satisfy Rule 221(a), SCACR

The purpose of rehearing is not to allow a party to try a case in the appellate court for a second time, but rather to ensure the Court gives proper consideration to the matter before it. *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (internal citation omitted). To be entitled to rehearing, the petitioner must demonstrate that this Court overlooked or misapprehended petitioner's argument. *Id.*; Rule 221(a), SCACR.

Appellants' Petition fails to demonstrate either of these elements; rather, it makes bald assertions of the misapprehension or overlooking of arguments,[3] rehashes prior contentions that this Court has rejected, and quibbles with details of the cases cited by this Court. Appellants have failed to meet the burden of Rule 221(a) and the Petition should be denied.

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[2] There was no suit filed by the surety.

[3] *See infra.*

A. This Court Did Not Overlook Appellants' Argument

Page 4 of the Petition states that "the Panel did not address the Appellants' argument allowing for the immediate appeal of the Master's Orders regarding the Appellants' substantial right to arbitration." *Petition at 4.* This is demonstrably inaccurate. This Court's order devotes nearly two pages to this very argument before concluding that a party in default has *no* right to arbitration, because a party in default has conceded liability and "forfeit[ed] the right to answer or otherwise plead to the complaint." *Order at 4* (quoting *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978)). The Court further noted, "if we allow the reexamination of liability after default, we are defeating the purpose of arbitration: 'to achieve streamlined proceedings and expeditious results.'" *Order at 4* (quoting *Preston v. Ferrer*, 552 U.S. 346, 357 (2008)).

B. The Court Did Not Misapprehend Appellants' Argument

This Court's June 26 opinion sets forth two holdings — (i) the denial of Appellants' motion to compel arbitration was not appealable as it was filed by a party in default; and (ii) by going into default, a party waives its right to arbitration. Both holdings result in the same outcome: that the appeal must fail.

The Petition argues that the Court must have misapprehended Appellants' argument because the Court's holdings of non-appealability and waiver are in conflict with one another. *Petition at 4.* The holdings are not in conflict; rather, they are alternative bases for why Appellants' appeal did not succeed. The Court held in the first instance that a motion to compel arbitration by a defaulting party is a nullity and its denial is therefore not

appealable, and *also* that a party who is in default has waived its right to arbitrate. These are not inconsistent holdings, and the Court's order is not subject to rehearing on this basis.

1. The Court's Holding Is Not in Conflict With Other Decisions of This Court

Nor does the holding of non-appealability threaten the uniformity of this Court's decisions regarding appealability of orders denying arbitration, as Appellants urge. *Petition at 2.* The holding is narrow — a party in default cannot move to compel arbitration. There is no conflicting authority from this state.

II. This Court's Holdings Are Not Subject to Rehearing

A. Non-Appealability

As an initial matter, Appellants were not denied an appeal. As noted on pages 3–4 of Appellants' Petition, PCG's 2017 motion to dismiss the appeal was denied (without prejudice to issues of appealability being argued in the appeal of the merits). The Parties then briefed the merits of the appeal.. After considering the parties' substantive briefs and conducting oral argument, this Court concluded that Appellants were properly in default, that Appellants were not permitted to move to compel arbitration while in default, and therefore that no appealable issue was before it.

Indeed, without first considering the merits (whether the Master abused his discretion in declining to lift the default), this Court could not have determined whether it had jurisdiction over the appeal.

B. Waiver

Appellants argue that rehearing *en banc* should be granted because the question of whether a defaulting party waives the right to arbitrate is of "exceptional importance to the

arbitration jurisprudence . . . ." *Petition at 4*. This conflates the standard for rehearing (misapprehension or overlooking of arguments) with the standard for when a matter should be heard or reheard *en banc* rather than by a three-judge panel (exceptional importance, maintaining uniformity of decisions). The Petition is not subject to rehearing on this basis.

Moreover, as discussed below, the Court properly held that the arbitration right had been waived.

1. Admission of Allegations

A defaulting party is deemed to have admitted the truth of the allegations against it, thus conceding liability. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 424, 246 S.E.2d 880, 882 (1978). One of the allegations in the complaint was that jurisdiction was vested in the trial court and that venue was proper there. *Complaint* at ¶ 6 (ROA 13). Admission of that allegation constitutes an "emphatic repudiation" of the right to compel arbitration. *See Bland v. Green Acres Grp.*, 12 So.3d 822, 824 (Fla. App. 2009) ("Assuming proper service and actual knowledge of the case, it is difficult to imagine a more emphatic repudiation of the right to arbitrate than an admission that a court is a proper forum to determine the claim."). This Court properly held that Appellants waived their arbitration right.

2. Affirmative Defense

Additionally, arbitration is an affirmative defense that is waived if not pled. *E.g.*, *Partain v. Upstate Auto Grp.*, 386 S.C. 488, 490, 689 S.E.2d 602, 603 (2010) ("Upstate Auto asserted three affirmative defenses in its Answer, including an arbitration agreement with Partain."); *Howard v. S.C. Dept. of Highways*, 343 S.C. 149, 155, 538 S.E.2d 291, 294 (Ct. App. 2000) ("Affirmative defenses are waived if not pled."); *Gen. Star Nat'l Ins.*

Co. v. Administratia Asigurarilor de Stat, 289 F.3d 434, 438 (6th Cir. 2002) ("a defendant's failure to raise arbitration as an affirmative defense shows his intent to litigate rather than arbitrate").

A party in default has waived its right to plead and therefore waived the right to raise the affirmative defense of arbitration.[4] To regain the right, it must present good cause for the default to be lifted. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).[5] It should not be permitted to circumvent this requirement by seeking to compel that which it waived.

3. Appellants' Remaining Arguments

a. Cedar Surgery Case

Appellants argue that this Court overlooked precedent out of Utah,[6] entitling Appellants to rehearing. *Petition at 12–13.* This argument is not supportable, given the Court's thorough review of case law from other jurisdictions. *See Order at 5-7.*

In any event, the Utah case is materially distinguishable from this case The basis for finding non-waiver in *Cedar Surgery* was that the defaulting party's first action in the case included raising its arbitration right. *Cedar Surgery Center v. Bonelli*, 96 P.3d 911, 912, 2004 UT 58 (2004) ("On July 12, 2002, the Bonellis made their first appearance in the case by filing a rule 60(b) motion for relief from default *and a motion to compel*

---

[4] *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880,882 (1978).

[5] Indeed, a party in default can do little beyond move to be relieved from default and, should that motion be denied, move for reconsideration. If reconsideration is denied, it can participate in a damages hearing; but even then, it is only allowed to cross examine the plaintiff's witnesses. *See Limehouse v. Hulsey*, 404 S.C. 93, 113–16, 744 S.E.2d 566, 577–79 (2013).

[6] *Cedar Surgery Center v. Bonelli*, 96 P.3d 911, 2004 UT 58 (2004).

arbitration . . . ." (emphasis added)). Here, in contrast, arbitration was not mentioned either in Appellants' motion to be relieved from default or the affidavit setting forth Appellants' purported justification for their default. Rather, Appellants' motion to compel arbitration was not filed until over a month *after* Appellants moved to be relieved from default, and after the Master had indicated the motion to lift the default was unlikely to succeed. *See Hearing Tr. (June 6, 2016) 11:22–24 (ROA 466)* ("There's not much I saw in that affidavit that would give me indication that I would grant that motion. I can tell you that right now.")

Additionally, the Court in *Cedar Surgery* was reviewing an order lifting a default; that ruling—like the Master's ruling in this case denying relief from default—would be reversible only if the trial court abused its discretion. *Id.* at 913; *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) ("The trial court's decision [of whether to set aside an entry of default] will not be disturbed on appeal absent a clear showing of abuse of that discretion."). The *Cedar Surgery* court and this Court found no abuse of discretion.

The absence of discussion by this Court of a distinguishable case from another jurisdiction is not a basis for rehearing.

b. Legal Authorities Cited by This Court

Appellants assert that this Court's citations to legal authorities are inapposite or are mere dicta. *Petition at 5-12.* The cases cited by the Court stand for the propositions that the right to arbitrate can be waived in South Carolina, and that courts have previously found that a defaulting party has waived the right to arbitrate. *Order at 5-7.* The Court's

citations are not inapposite, and the distinctions raised by Appellants have no impact on the validity of the propositions for which the cases were cited.

This Court's order is not subject to rehearing on this basis.

c. PCG's Motion to Compel Arbitration

Appellants argue that, because PCG's motion to compel arbitration was withdrawn[7] and not formally ruled upon, it is not a valid basis for a finding of waiver of *Appellants*' arbitration rights. *Petition at 14–15*. However, this Court did not find waiver on that basis; it found waiver as a result of Appellants' default status. Accordingly, this is not a basis for rehearing either.

CONCLUSION

This Court's holdings of non-appealability and waiver are deliberate, well-reasoned, and should not be subject to reconsideration. Because Appellants have failed to demonstrate any argument that this Court misapprehended or overlooked, PCG respectfully submits that Appellants' petition for rehearing should be denied.

[signature on following page]

[7] The Petition rehashes the argument that PCG's motion to compel arbitration remained pending and that Respondents joined in that motion. *Petition at 14*. This is inaccurate and has been rejected by the trial court and this Court. *See Order at* 2 ("After Appellants did not answer, PCG filed an affidavit of default on April 18, 2016 and withdrew its motion to stay and compel arbitration.").

Respectfully Submitted:

ANDREW K. EPTING, JR., LLC

This 30th day of July, 2019
Charleston, South Carolina

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ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

Mikell R. Scarborough, Master-In-Equity

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CASE NO. 2016-CP-10-1143
Appellate Case No.: 2016-002308

Palmetto Construction Group, (Respondent)

v.

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward. (Appellants).

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Appellants' Petition for Rehearing on opposing counsel of record by depositing a copy in the United States Mail, Postage prepaid, on July 31, 2019, addressed as follows:

A. Bright Ariail, Esquire
Law Office of A. Bright Ariail, LLC
125 E Wappoo Creek Drive, Suite 202
Charleston, SC 29412

ANDREW K. EPTING, JR., LLC

By _____
Angela Gross, Legal Assistant to
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July 31, 2019

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SC Court of Appeals

V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: *Palmetto Construction Group v. Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward*
Case No.: 2016-CP-10-1143
Appellate Case No.: 2016-002308

Dear Allen:

Please find enclosed an original and seven (7) copies of Respondent's Return to Appellants' Petition for Rehearing and the original and one (1) copy of the Proof of Service of same in the above-referenced appeal. I would greatly appreciate your filing the originals and returning a file-stamped copy to me in the self-addressed, stamped envelope provided. Thank you in advance. Should you have any question or concerns, please do not hesitate to contact our office.

With kind regards,

ANDREW K. EPTING, JR., LLC

Angela Gross
Legal Assistant to Andrew K. Epting, Jr.
/agg

Enclosures – as stated
cc: A. Bright Ariail, Esquire (w/enc.)

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

Mikell R. Scarborough, Master-In-Equity

CASE NO. 2016-CP-10-1143
Appellate Case No.: 2016-002308

RECEIVED
AUG 02 2019
SC Court of Appeals

Palmetto Construction Group, (Respondent)

v.

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward. (Appellants).

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Appellants' Petition for Rehearing on opposing counsel of record by depositing a copy in the United States Mail, Postage prepaid, on July 31, 2019, addressed as follows:

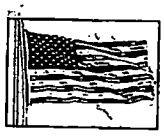
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143
[Appellate Case No. 2016-002308]

RECEIVED
JUL 10 2019
SC Court of Appeals

Palmetto Construction Group, LLC Respondent,

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward Appellants.

APPELLANTS' PETITION FOR REHEARING *EN BANC*

NOW COME the Appellants, Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, by and through their undersigned counsel, who respectfully petition this Court pursuant to Rules 219 and 221 of the South Carolina Appellate Court Rules to rehear this case *en banc* and reconsider its opinion issued on June 26, 2019 due to this Court's failure to address and misapprehension of the legal authorities and points discussed below as they relate to this case.

In support of this petition, the Appellants, Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward submit the following:

INTRODUCTION

The Appellants have appealed the Orders of the Honorable Mikell R. Scarborough (the "Master"), dated July 14, 2016 and October 28, 2016.[1]

The Master's July 14, 2016 Order orders as follows:

(1) Defendants' motion to be relieved from default is DENIED;

(2) A damages hearing is set for October 4, 2016 at 2:00 pm; and

(3) Defendants' motion to stay and compel arbitration is denied as Defendant is in Default.[2]

The Master's October 28, 2016 Order orders as follows:

(1) Defendants' Motion to Amend is respectfully DENIED, insomuch as Defendants have not shown good cause to lift the default; and

(2) The affirmative defense of arbitration has been waived and Defendant's Motion to Stay and Compel filed July 11, 2016 was not properly made.

LAW/ANALYSIS

I. APPEALABILITY

This Court should grant rehearing *en banc* as consideration by the full court is necessary herein to secure or maintain uniformity of its decisions regarding the appealability of orders affecting a party's substantial right to arbitration.

On appeal, the Appellants assert that both of the Master's Orders, dated July 14, 2016

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[1] This Court's opinion issued June 26, 2019 states in the recitation of Facts that the Appellants did not file their September 30, 2016 Notice of Appeal with the Court of Appeals until November 18, 2016. However, the Record on Appeal establishes that the Appellants originally filed their September 30, 2016 Notice of Appeal with the Clerk of the Court of Appeals ("Clerk") on October 5, 2016and then refiled said Notice with the Clerk on October 6, 2016. (R. pp. 512-532).

[2] When issuing the July 14, 2016 Order, the Master struck through the portion of proposed language stating "*No ruling is made on*" Defendant's motion to stay and to compel arbitration and held by inserting a handwritten notation that Appellant's motion to stay and compel arbitration "*is denied as Defendant is in Default*".

Judge Williams was not a sitting member of the three-judge panel that issued the Court of Appeals opinion, dated June 26, 2019.

In this Court's opinion rendered on June 26, 2019, the panel dismissed the appeal as interlocutory. Furthermore, although dismissing the appeal as interlocutory, the panel issued a substantive ruling finding that Appellants had waived their right to arbitration due to the entry of default.

Appellants respectfully submit that the above rulings of this Court are inconsistent and conflicting with one another as they relate to the dismissal of the appeal of the Master's Orders denying Appellants' right to arbitration as interlocutory.

Furthermore, it appears the Panel did not address the Appellants' argument allowing for the immediate appeal of the Master's Orders regarding the Appellants' substantial right to arbitration. Accordingly, the Appellants respectfully petition this Court for rehearing *en banc* on these issues and respectfully submit that reconsideration by the full court is necessary herein to secure or maintain uniformity of its decisions regarding the appealability of orders affecting a party's substantial right to arbitration.

II. WAIVER

This Court should grant rehearing *en banc* to answer a question of exceptional importance to the arbitration jurisprudence affecting the citizens and commerce of South Carolina: Whether a party waives its right to arbitration solely by virtue of an entry of default against that party.

This Court held in the instant case that because Appellants were in default, they waived their right to arbitration. It would appear the question of whether a party waives its right to arbitration solely by virtue of the entry of default against that party is a matter of first impression in South Carolina.

The right to arbitration is a substantial right. The arbitration jurisprudence of South Carolina and the federal arbitration jurisprudence under the Federal Arbitration Act

profoundly impacts myriad and wide ranging contracts, projects and transactions across the State of South Carolina. These contracts, projects and transactions which involve the arbitration clauses and arbitration rights thereunder are engaged in by individuals, small businesses, large commercial corporations and ventures and government institutions throughout the state. These contracts, projects and transactions impact local, regional and intrastate commerce as well as interstate commerce involving South Carolina under the Federal Arbitration Act. As such, the proceeding before this Court involves a matter of first impression concerning a question of exceptional importance to the arbitration jurisprudence affecting the citizens and commerce of South Carolina.

A. The Legal Authorities Cited In Support Of The Panel's Ruling That The Appellants Waived Their Right To Arbitration Are Inapposite To The Arbitration Issues Before This Court.

This Court cites one South Carolina case and several additional cases from other jurisdictions in support of its ruling that the Appellants waived their right to arbitration. However, the Appellants respectfully submit that these cases are factually inapposite to the arbitration issues before this Court. Furthermore, Appellants respectfully submit that the application of the legal standards applied in these cases and the legal conclusions drawn therefrom were misapprehended by the Court with respect to the arbitration issues involved in the present case.

South Carolina Legal Authorities

The South Carolina case cited by this Court is *Wham v. Shearson Lehman Brothers, Inc.*, 298 S.C. 462, 381 S.E. 2d 499 (Ct. App. 1989). In *Wham*, the defendants sought to set aside an entry of default or in the alternative, to stay the proceedings and compel arbitration. *Id.* The *Wham* Court specifically stated that its opinion addressed only the questions relating to the standard for granting relief from an entry of default under Rule 55(c) of the South Carolina Rules of Civil Procedure. *Id.* at 463, 381 S.E. 2d at 500. Concerning the motion to stay and compel arbitration, the *Wham* Court stated:

> "Because we vacate the order denying the motion by Shearson Lehman for relief from entry of default and remand the issue raised by the motion, we need not address the

> master's denial of its alternative motion to stay the proceedings and compel arbitration. *See, however, Miller v. British America Assurance Co.*, 238 S.C. 94, 119 S.E. 2d 527 (1961) (referring to an arbitration agreement set up in the answer as a "special defense"); 5 Am.Jur.2d *Arbitration and Award* § 51 at 556-57 (1962) (one's right to arbitrate given by contract may be waived by failing to raise the right in an answer)."

Id. at 466, 381 S.E.2d at 502.

The language in *Wham* was mere *dicta*. The *Wham* Court expressly stated that it "need not address the master's denial of its alternative motion to stay the proceedings and compel arbitration." *Id.* Furthermore, the *Wham* opinion is completely silent as to the basis of the master's denial of the motion to stay and compel arbitration and/or the standard invoked by the master in denying the motion. In short, the *Wham* opinion does reach the issue of a waiver of a party's right to arbitration in South Carolina.

In addition to lacking precedential value, the *dicta* portion of the *Wham* decision is not instructive in the instant case. The *dicta* portion of the *Wham* case includes the court's express acknowledgement that it did not address the motion to compel arbitration followed by citations to: (a) *Miller v. British America Assurance* Co., 238 S.C. 94, 119 S.E.2d 527 (1961) and (b) 5 Am.Jur.2d *Arbitration and Award* § 51 at 556-57 (1962). These two cited authorities are inapposite and factually distinguishable from the instant case.

The *Miller* case and any procedural issues therein were governed by the code pleading statutes contained in the Code of Laws of South Carolina (1952). These code pleading statutes were repealed and superseded by the adoption of the South Carolina Rules of Civil Procedure in 1985. Accordingly, the *Miller* case does not provide any precedent or guidance regarding the effect of pleading rules under South Carolina Rules of Civil Procedure (or the Federal Rules of Civil Procedure upon which they are based), upon the right to arbitration. This includes a lack of precedent or guidance regarding pleading arbitration as an affirmative defense under Rule 8(c), SCRCP.

Furthermore, the *Miller* case involved the question of whether the defendant insurance company's demand for appraisal/arbitration as a condition precedent to the right of the insured to maintain a legal action on the insurance policy had been made on a timely basis (i.e., within sixty (60) days after receipt of proof of loss and disagreement as to the

amount of loss) under the terms of the subject insurance policy.

The pleading of a condition precedent to the commencement of litigation is not an affirmative defense under the South Carolina Rules of Civil Procedure. Instead, it constitutes the pleading of a special matter under Rule 9, SCRCP. None of the parties to this appeal have raised the condition precedent defense in this action.

Finally, the defendant was not in default in the *Miller* case and the case does not involve the question of whether a defendant had waived its right to arbitration solely by the rendering of an entry of default against it.

Likewise, the citation to 5 Am.Jur.2d *Arbitration and Award* § 51 in the *Wham* case is neither binding nor authoritative precedent under the facts of this case. First, the cited second edition of *American Jurisprudence* is an encyclopedia of the United States law and the particular referenced section does not cite to any South Carolina legal authorities.

Second, the defense of "arbitration and award" is expressly enumerated in Rule 8(c) of both the South Carolina and Federal Rules of Civil Procedure. It is the only arbitration defense *specifically defined* in Rule 8(c). The defense of "arbitration and award" is an affirmative defense asserting that the subject matter of the action has already been settled in arbitration. *Black's Law Dictionary* 120 (9th ed. 2009). Thus, the specified "arbitration and award" defense is limited to the situation where a dispute already has been arbitrated and an award has been obtained. *Id.*; *Lee v. Grandcor Medical Systems, Inc.*, 702 F. Supp. 252 (D. Colo. 1988). Neither of these events have occurred in this case.

Third, the explanatory parenthetical contained in the *Wham* citation to 5 Am.Jur.2d. *Arbitration and Award* § 51 does not speak in terms of a mandatory and automatic waiver of a right to arbitration. Instead, it merely states that "one's right to arbitrate given by contract **may** be waived by failing to raise the right in an answer." (emphasis added). *Id.*

The remaining cases cited from jurisdictions other than South Carolina are equally distinguishable and inapposite to the arbitration issues before this Court. First, as a general matter, none of these cases involve interstate commerce and arbitration rights governed by the Federal Arbitration Act ("FAA"). As such, with the exception of *State ex rel. Barden & Robeson Corp. v. Hill*, 539 S.E.2d 106 (W. Va. 2000) (which applies a mix of West Virginia

law and several federal court opinions) these cases do not consider, evaluate or apply the federal law standard of waiver.

Second, none of these cases involve a situation where, as in the present case, the defendant had joined in and consented to a motion filed by plaintiff to stay and compel arbitration.

Legal Authorities From Jurisdictions Outside of South Carolina

The cases cited from jurisdictions outside of South Carolina are as follows:

(1): *Tri-State Delta Chemicals, Inc. v. Crow*, 61 S.W.3d 172 (Ark. 2001) – This is an Arkansas case which holds as a matter of first impression in Arkansas that a defaulting defendant waived its right to compel arbitration when it failed to timely assert arbitration as a defense to the suit. The timing of the defendant's delay in making its initial appearance and asserting its arbitration rights in the *Tri-State* case was considered by the court and was twice that of the Appellants in in the present case. The *Tri-State* Court did not define the waiver of arbitration standard traditionally applied in Arkansas, but instead looked to other jurisdictions for guidance on the issue before the Court.

Specifically, the Court looked to and found the holdings in *Charming Shoppes, Inc. v. Overland Constr., Inc.*, 717 N.Y.S2d 860 (N.Y. Sup. Ct. 2000) and *Woodruff v. Spence*, 76 Wash. App. 207, 883 P.2d 936 (1994) as persuasive authority on the issue presented in the case.

The *Charming Shoppes* Court, however, found both the defendant's default and its use of the judicial proceedings as the basis of waiver. Also, the *Charming Shoppes* case is further distinguished below from the present case before this Court.

The *Woodruff* Court did not make a ruling on the issue of whether the defendant waived his right to arbitration. Furthermore, the *Woodruff* case is distinguished in Sub-paragraph 3 below from the present case before this Court.

(2): *Charming Shoppes, Inc. v. Overland Constr., Inc.*, 717 N.Y.S. 2d 860 (N.Y. Sup. Ct. 2000) – This is a New York case applying a broad New York waiver of arbitration standard stated as follows: "[a] defendant may waive any right to submit issues to arbitration by his actions." *Id.* at 296. This New York standard is certainly broader than the either of

the longstanding waiver standards under South Carolina law or federal law under the Federal Arbitration Act ("FAA)"). *See Brief of Appellants, Section II. E. 2.* In particular, the New York standard fails to require a showing of substantial delay in asserting the right to arbitration, substantial participation in the lawsuit and/or use of the litigation machinery and prejudice.

The *Charming Shoppes* Court found a procedural waiver under the New York standard by virtue of the entry of default against the defendant. However, the Court did not stand on this finding alone. Instead, the Court felt compelled to also consider and analyze whether defendant's use of the judicial proceedings constituted a waiver of the right to arbitration. The Court concluded the defendant's active participation regarding the lawsuit in the judicial forum constituted a waiver.

Therefore, based upon the finding of **both** a procedural waiver by default and waiver by use of the judicial proceedings, the Court found defendant had waived **any** right to arbitration and denied its motion to compel arbitration.

(3): *Woodruff v. Spence*, 76 Wash. App. 207, 883 P.2d936 (1994) – This is a case from the State of Washington, in which the Court did not actually reach a determination as to whether the defendant waived his right to arbitration. Instead, the Court remanded the case for an evidentiary hearing and framed the issue as "[w]hether [the defendant] knowingly waived his right to arbitration depends on whether he had notice of the action against him prior to the entry of default judgment [in which Plaintiff was awarded his full requested damages and court costs]." *Id.* at 211.

The *Woodruff* case is distinguishable from the present case before this Court for the following reasons: (1) The *Woodruff* Court articulates the Washington waiver of arbitration standard as follows: "Parties to an arbitration contract may waive that provision, however, and a party does so by failing to invoke the clause when an action is commenced and arbitration has been ignored." This standard is significantly different than the South Carolina standard or federal standard under the FAA. Specifically, the Washington standard as articulated by the *Woodruff* Court does not require findings of substantial delay in seeking arbitration, substantial participation in litigation or prejudice; and (2) The *Woodruff* plaintiff

had obtained a default judgment for his full requested damages as compared with PCG's entry of default obtained when the present litigation was in its infancy.

(4): *Interconex, Inc. v. Ugarov*, 224 S.W. 3d 523 (Tex. Ct. App. 2007) – This is a Texas case which applies the Texas waiver of arbitration standard, a standard similar to both the South Carolina and federal standards of waiver. Recognizing that "public policy favors arbitration", the *Interconex* Court stated that "there is a strong presumption against finding a waiver of the right to arbitration, and any doubts regarding waiver are resolved in favor of arbitration." *Id.* at 533. Thus, the Court stated that waiver would be found "**only** when (1) the party seeking arbitration has substantially invoked the judicial process and (2) the party opposing arbitration suffers actual prejudice as a result." (emphasis added) *Id.*

In regard to whether Appellant Interconex waived its right to arbitration, the Court first looked to the issue of Interconex's substantial invocation of the judicial process. The Court found: (1) Interconex was served with the lawsuit on January 7, 2004 and failed to answer; (2) the trial court entered a partial default judgment "as to liability" against Interconex on March 3, 2004; (3) Interconex did not file its motion to set aside default judgment until June 2, 2004; (4) Interconex did not set a hearing or file its amended motion to set aside default judgment, which included more extensive allegations, until October 15, 2004; (5) the trial court reset the damages from October 25, 2004 to December 13, 2004 hearing pursuant to Interconex's request for a jury trial on damages; (6) Interconex waited until December 1, 2004, ten days prior to the damages trial which Interconex had specifically requested, to file its motion to compel arbitration, asserting for the first time that the case should be sent to arbitration. Based on these facts, the Court found that Interconex had substantially invoked the judicial process before it moved to compel arbitration.

The *Interconex* Court next looked at the issue of prejudice and concluded that the Appellee demonstrated that Interconex's invocation of the judicial process caused him to suffer actual prejudice.

Based on the above findings, the Court held that Interconex waived any right to arbitration it may have had. Therefore, while the entry of default was a factor in the Court's decision, it was not the sole dispositive factor. Instead, the Court looked at all the facts

before it as is the requirement under SC and 4th Circuit Federal law and determined that the two prong test of waiver had been met before concluding Interconex had waived any right to arbitration.

(5): *LaFrance Architect v. Point Five Dev. S. Burlington, LLC*, 91 A.3d 364 (Vt. 2013) – This is a Vermont case in which the defendant failed to answer and plaintiff obtained a default judgment in the amount of $69,024.90, against defendant, in addition to interest and costs. The *LaFrance* Court found that the defendant waited more than nine months after being properly served before participating in the case. In fact, defendant did not respond at all until after plaintiff commenced an action to domesticate the default judgment in New York.

The *LaFrance* Court set forth the Vermont waiver of arbitration standard as follows:

> "In determining whether there was waiver, several factors should be considered, including: the timing of the request, the extent that the party seeking arbitration has participated in litigation, and 'whether the party opposing arbitration has suffered prejudice through the incursion of litigation time, costs, and expenses.' *Lamell[Lumber Corp. v. Newstress Int'l, Inc.]*, 2007 VT 83, ¶ 11, 182 Vt. 282, 938 A.2d 1215. This inquiry must take into account the 'entire course of conduct' of the moving party. *Menorah [Ins. Co. v. INX Reins. Corp.]*, 72 F.3d[218] at 221."

Id. at 372.

The Vermont standard of waiver is similar to the South Carolina and federal standards. However, the application of this standard to the facts found by the *LaFrance* Court are much different than those in the present action.

Applying the Vermont waiver standard to the facts before it, the *LaFrance* Court found that there was both delay and prejudice. Based on the findings of delay and prejudice, the Court ruled that defendant had waived its right to arbitration.

Therefore, even the singular fact of the default judgment (as opposed to a mere entry of default) was not dispositive of the waiver question. Instead, the *LaFrance* Court looked at the "entire course of conduct" of the defendant and required a finding of both delay and prejudice to invoke a finding of waiver.

(6): *State ex rel. Barden & Robeson Corp. v. Hill*, 539 S.E.2d 106 (W. Va. 2000) – The Brief of Appellants and Reply Brief of Appellants specifically address the *Barden*

opinion and the legal authorities on which it relies, including *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88 (4th Cir. 1996), *McDonnell v. Dean Witter Reynolds, Inc.*, 620 F. Supp. 152 (D.Conn.1985) and Civil Procedure Rule 8(c). Appellants submit that the *Barden* case and supporting legal authorities are distinguishable for the reasons stated therein. *See Brief of Appellants, Section II. (E) (1) Pgs. 27-28, 31-35 and Section II. (E) (4) Pgs. 40-44; Reply Brief of Appellants, Section II. (B) (1) Pg. 16.*

In addition, the *Barden* case is further distinguishable in that the *Barden* Court's decision relied on both W.Va. R. Civ. P. 8(c) and 9(c). However, the pleading of the special matter of a condition precedent under Rule 9 of the South Carolina or Federal Rules of Civil Procedure is not at issue in the present case.

B. It Appears The Panel Did Not Consider The Well-Reasoned Opinion Of Cedar Surgery Center v. Bonelli, 96 P.3d 911, 2004 UT 58 (Utah 2004), In Which The Supreme Court Of Utah Employed Arbitration Waiver Standards Similar To The South Carolina State Law Standard And The District Of South Carolina/Fourth Circuit Federal Law Standard In A Default Situation.

The Appellants cited the case of *Cedar Surgery Center v. Bonelli*, 96 P.3d 911, 2004 UT 58 (Utah 2004) in support of its argument that the Entry of Default in the present case does not constitute a default or waiver of Appellants' right to mandatory mediation/arbitration.

The *Cedar* case applies the Utah standard of waiver of the right to arbitration. Utah shares the basic framework of South Carolina law and 4th Circuit federal law for deciding whether a party has waived a contractual right to arbitration. Specifically, the Supreme Court of Utah articulated the Utah waiver standard as follows:

> "This court has recognized the important policy behind enforcing arbitration agreements as an "'approved, practical, and inexpensive means of settling disputes and easing court congestion."' *Chandler v. Blue Cross Blue Shield*, 833 P.2d 356, 358 (Utah 1992) (quoting *Robinson & Wells, P.C. v. Warren*, 669 P.2d 844, 846 (Utah 1983). In light of this policy, we have also acknowledged that there is "a strong presumption against waiver of the right to arbitrate." *Cent. Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 24, 40 P.3d 599. Consistent with our general waiver jurisprudence, *see Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P.2d

> 935, 939-40 (Utah 1993) (defining waiver as "the intentional relinquishment of a known right' (quotation omitted)), we have held that a "waiver of the right to arbitrate must be intentional," and a court may infer waiver "only if the facts demonstrate that the party seeking to enforce arbitration intended to disregard its right to arbitrate." *Cent. Fla.*, 2002 UT 3 at ¶24, 40 P.3d 599. Hence, for a court to find that a party has waived its arbitration right, the party alleging waiver must demonstrate (1) that the party seeking arbitration substantially participated in the underlying litigation to a point inconsistent with the intent to arbitrate; and (2) that this participation resulted in prejudice to the opposing party. *Chandler*, 833 P.2d at 360; *Cent. Fla.*, 2002 UT 3 at ¶¶ 22, 24, 40 P.3d 599. "Whether a party has waived the right to arbitrate is a factually intensive determination," and we "infer the original intent of the party asking for arbitration on a case-by-case basis." *Cent. Fla.*, 2002 UT at ¶ 23, 40 P.3d 599."

Id. at 914.

The *Cedar* Court framed the issue before it as whether defendants waived their contractual right to arbitration when they declined to participate in the underlying litigation and filed a motion to compel arbitration only after default judgment had been entered against them.

In *Cedar* case, when the defendants failed to answer or file a responsive pleading to the complaint, the court entered a default judgment against them. When the defendants also failed to respond to the court's notice of a hearing to determine damages, the court entered a judgment for damages in the amount of $381,370 against the defendants.

Following the entry of judgment for damages, the defendants made their first appearance in the case by filing a Rule 60(b) motion for relief from default judgment and a motion to compel arbitration based on the arbitration clause in the parties' contract. In analyzing the defendants' motion, the *Cedar* court employed the above-stated Utah waiver standard, which standard is extremely similar to the South Carolina and 4th Circuit federal law waiver standards.

Applying this standard to the facts of the case, the *Cedar* Court stated that "[i]deally, the [defendants] would have raised the contractual arbitration clause in an answer to [plaintiff's] complaint and then brought a motion to compel arbitration, rather than simply ignoring the district court proceedings altogether. However, we do not find that such failure evidences an intent on the part of the [defendants] to waive their right to arbitration and

pursue redress through litigation." *Id.* at 915.

The *Cedar* Court expressly acknowledged "that adherence to [the Utah waiver] standard may reward litigants who fail to respond to a complaint or district court proceeding." *Id.* at 915. However, the Court stated that "[w]hile we regret this result, we nevertheless believe that such a standard is entirely appropriate in cases such as this." *Id.*

Accordingly, upon applying the Utah waiver standard to the facts before it, the *Cedar* Court found that the defendants' failure to participated in the underlying litigation and the entry of default judgment resulting therefrom **did not** constitute a waiver of their right to arbitration. (emphasis added) *Id.* The *Cedar* Court, therefore, held that the lower court did not abuse its discretion in setting aside the default judgment and compelling arbitration. *Id.*

C. It Appears The Panel Did Not Consider The Issue Of Whether PCG's Motion To Stay and Compel Arbitration, Which Motion The Appellants Joined In And Consented To, Was Properly Adjudicated And Whether The Relief Requested Therein Should Have Been Granted.

PCG filed and served a Motion to Stay and Compel mandatory mediation/arbitration contemporaneously with the commencement of this action. The Appellants joined in and consented to this motion as part of their Motion to Stay and Compel filed on July 11, 2016, thus rendering PCG's motion a joint motion for all parties to the case.

The Clerk of Court "closed out" this motion due to the referral of the case to the Master. (R. p. 467, Tr. p. 9, lines 5-8). The Clerk's closure of the motion occurred despite Appellants' formal joinder in the motion. The Master issued a bench ruling, finding that the Clerk's action constituted an adjudication of this motion. (R. p. 467, TR. p. 9, lines 5-9). The Master's ruling became final in his written order denying Appellants' Motion to Stay and Compel dated July 14, 2016. The summary closure of this joint motion as an administrative matter and the Master's "adjudication" of this motion on that basis does not constitute a proper adjudication of this motion nor a valid basis for waiver of Appellants' arbitration rights. *See General Equipment v. Keller Rigging*, 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001) (finding that the referral of a case to the Master-in-Equity does not constitute

a waiver of the right to arbitration).

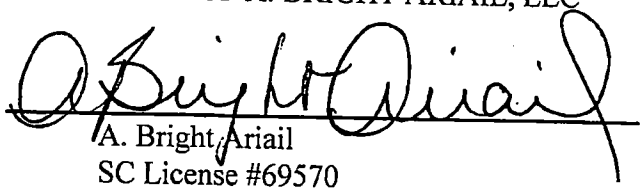
For this reason, and based on all controlling authorities cited in the Brief of Appellants and Reply Brief of Appellants, the Appellants respectfully submit that the joint motion should have been properly adjudicated and a judicial decision rendered by the Master granting the motion and submitting the matter to mandatory mediation/arbitration.

CONCLUSION

For all the foregoing reasons, the Appellants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward hereby respectfully request that this Court grant the petition for rehearing *en banc* in this matter.

Respectfully submitted this the 9th day of July, 2019.

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July 9, 2019
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

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Case No. 2016-CP-10-1143
[Appellate Case No. 2016-002308]

Palmetto Construction Group, LLC — Respondent

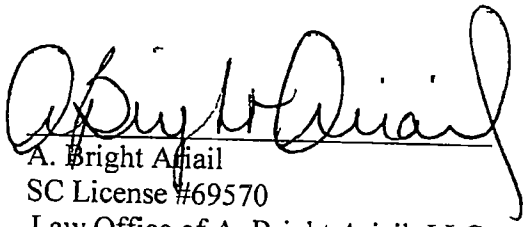
v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward — Appellants

PROOF OF SERVICE

I certify that I have served the Appellants' Petition for Rehearing *En Banc* on Palmetto Construction Group, LLC by depositing a copy of it in the United States Mail, postage prepaid, on July 9, 2019, addressed to Palmetto Construction Group, LLC's attorneys of record, Andrew K. Epting, Jr. and Jann Gunnar Rannik, Andrew K. Epting, LLC, 46A State Street, Charleston, South Carolina, 29401 and Michelle Endemann of Clarkson, Walsh & Coulter, P.A., PO Box 2219, Mt. Pleasant, SC, 29465.

July 9, 2019



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July 9, 2019

VIA FACSIMILE AND EXPRESS MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*
Appellate Case No. 2016-002308

Dear Ms. Kitchings;

Enclosed, please find the original and six copies of the Appellants' Petition for Rehearing *En Banc* and Proof of Service in the above referenced appellate case. In addition, for my records, I've included an additional copy of all for you to file stamp and return to me in the self-addressed stamped envelope. I've also included the filing fee of $25.00 for same.

By copy of this letter, I am serving the Appellants' Petition for Rehearing *En Banc* and Proof of Service on counsel for Respondents.

With kindest regards, I am

Sincerely yours,

A. Bright Ariail

Enclosures

cc: Andrew Epting, Esquire
Jann Gunnar Rannik, Esquire
Michelle Endemann, Esquire

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The Honorable Jenny Abbott Kitchings
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

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SC Court of Appeals

Case No. 2016-CP-10-1143
[Appellate Case No. 2016-002308]

Palmetto Construction Group, LLC — Respondent

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward — Appellants

REPLY BRIEF OF APPELLANTS

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143
[Appellate Case No. 2016-002308]

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v.

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Lynnette Pennington Ward — Appellants

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ARGUMENTS

I. BECAUSE GOOD CAUSE EXISTS FOR RELIEF FROM THE ENTRY OF DEFAULT, THE COURT ERRED WHEN IT DENIED APPELLANTS' MOTION TO SET ASIDE ENTRY OF DEFAULT.[1]

[1] Respondent continues to cite facts in its Pleadings and Motions without "references to the transcript, pleadings, orders, exhibits or other materials which may be properly included in the Record on Appeal". (SCRAP 208(B)(4). Accordingly, Appellants contend that facts presented without citation should not be considered in the Court of Appeal's analysis of this appeal.

(A): The Master's Orders Denying Appellants' Motions To Stay And To Compel Arbitration Are Immediately Appealable.

The Appellants have appealed the Master's Orders dated July 14, 2016 and October 28, 2016. The Master's July 14, 2016 Order ruled, in part, that "Defendants' motion to stay and to compel arbitration is denied as Defendant is in Default." The Master's October 28, 2016 Order ruled that "the affirmative defense of arbitration has been waived and Defendant's Motion to Stay and Compel filed July 11, 2016 was not properly made." As such, both orders refuse to stay this action and deny Appellants' application and rights to compel arbitration. The Master's orders refusing to stay this litigation and denying Appellants' application and rights to compel arbitration are immediately appealable under both federal and state law.

Under federal law, an order that favors litigation over arbitration—whether it refuses to stay the litigation in deference to arbitration or refuses to compel arbitration—is immediately appealable, even if interlocutory in nature. *See* 9 U.S.C. §16(a)(1); *Stedor Enter., Ltd. v. Armtex, Inc.*, 947 F. 2d 727 (4th Cir. 1991). Likewise, under state law an order denying an application to compel arbitration is immediately appealable. S.C. Code Ann. §15-48-200(a)(1); *Cape Romain Contractors, Inc. v. Wando E, LLC,* 405 S.C. 115, 747 S.E. 2d (2013); *Towles v. United Healthcare Corp.*, S.C. 29, 524 S.E. 2d 839 (Ct. App. 1999). Also, an order finding that a party waived its right to compel arbitration is immediately appealable. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E. 2d 749 (Ct. App. 1999).

The Court of Appeals expressly affirmed these principles allowing for immediate appeal of the Master's orders in its previous order denying Respondent's motion to dismiss. (R.p. 8). In addition, the Master's orders are immediately appealable in that they deny the Appellants the right to arbitration and, therefore, affect a substantial right of the Appellants. An order denying a party a mode of trial to which he is entitled is immediately appealable. S.C. Code Ann. §14-3-330 (2); *Lester v. Dawson*, 327 S.C. 263, 491 S.E. 2d 240 (1997); *Widdicombe v. Tucker-Cales*, 366 S.C. 75; 620 S.E. 2d 333 (Ct. App. 2005). Such orders must be appealed immediately

and cannot be challenged in an appeal from final judgment. *Id.*

(B): The Master's Orders Denying Appellants' Application To Compel Arbitration Are Immediately Appealable And, Therefore, The Master's Entire Orders Should Be Considered On Appeal.

Where there is a single order that is appealable in part, the entire order should be considered upon the appeal. *See Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 216 S.C. 500, 59 S.E. 2d 132 (1950); overruled on other grounds, *Mcall v. Batson*, 285 S.C. 243, 329 S.E. 2d 741 (1985).

Ordinarily, an order denying a motion to lift entry of default is interlocutory and not immediately appealable. *Thynes v. Lloyd*, 294 S.C. 152, 363 S.E. 2d (Ct. App. 1987). An order that is not immediately appealable, however, will be considered if there is another appealable issue before the court. *Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 556 S.E. 2d 397 (Ct. App. 2001). In the present case, the appealable issues of the Master's refusal to stay this action and the denial of Appellants' applications and rights to compel arbitration is squarely before this court. Therefore, the entire orders of the Master, including the Master's denial of Appellants' Motion to Lift Entry of Default, should be considered upon appeal. *Id.* Furthermore, a decision by the Court of Appeals on the Master's entire orders will best serve the interests of judicial economy and eliminate the inevitable additional appeals which would arise from a piecemeal appellate review of the Master's orders. *See Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E. 2d 154 (2009); *Southern Bell Tel. and Tel. Co. v. Hamm*, 306 S.C. 70, 409 S.E. 2d 775 (11991); *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 620 S.E. 2d 333 (Ct. App. 2005); *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E. 2d 250 (Ct. App. 1998).

(C): The Master Had Jurisdiction To Enter An Order On Appellants' Rule 59(e) Motion.

The Respondent asserts that the Master had no jurisdiction to enter an order on Appellants' Rule 59(e) motion and that Appellants' appeal constitutes a "misuse of process." Brief of Respondent, Section V.A.1. The record refutes Respondent's statement.

The Appellants requested and the Master initially agreed to hear Appellants' Rule 59(e), SCRCP motion prior to the damages hearing. Brief of Appellants, Statement of the Case (p. 8, line 15 – p. 9, line 7). The Master reversed his decision to hear Appellants' Rule 59(e) motion first ***only*** after Respondent notified the Master of its preference to proceed with the damages hearing prior to any hearing on the Rule 59(e) motion. *Id.* The Master's decision to proceed with the damages hearing before hearing the Rule 59(e) motion effectively denied this motion as proceeding with the damages hearing would severely prejudice, and potentially force a waiver of Appellants' rights to arbitration and foreclose any appeal therefrom. Therefore, subject to, without waiving and fully reserving their rights to arbitration, the Appellants served and filed a notice of appeal from the Master's "effective" denial of Appellants' Rule 59(e) motion on September 30, 2016. (R.pp. 496-500; R.p. 7).

Thereafter, in ruling on the Respondent's motion to dismiss the appeal, the Court of Appeals held that "because the master discussed the Rule 59(e) motion during the [October 4, 2016] hearing, accepted memoranda regarding the motion, and allowed the parties to proffer information relating to the motion, it appears the master intends to issue a final, written order on the Rule 59(e) motion." (R.p. 7, lines 2-6). Accordingly, the Court of Appeals expressly acknowledged the Master's jurisdiction over Appellants' Rule 59(e) motion and dismissed the initial appeal **without prejudice**. In its Order, the Court of Appeals further affirmed Appellants' right to appeal within ten days after the Master's order disposing of the Rule 59(e) motion. (R. p. 7, lines 7-12). Indeed, the Master did issue his written order denying Appellants' Rule 59(e) motion and Appellants timely appealed consistent with the Order of the Court of Appeals and the South Carolina Appellate Court Rules. The Appellants good faith compliance with the appellate court's order and rules and non-wavering assertion of their right to arbitration do not constitute a misuse of process.

(D): The Appellants Are Entitled to Mandatory Mediation/Arbitration Of This Matter and Have Meritorious Defenses To The Plaintiff's Lawsuit.

The Appellants are entitled to the substantial right to mediation/arbitration of the claims in Respondent's lawsuit for the reasons set forth in the Brief of Appellants, Arguments Section II. In addition, the Appellants have asserted the further substantive defenses to Respondent's claims discussed below:

(1): **Overpayment to PCG**: Respondent admits by footnote 1 in Section V.C.2.b. of its Brief that Appellants' claim of overpayment is a meritorious defense when they indicate it is a set-off that is a proper subject of a damages hearing.

Respondent has relied on documents it prepared for use at the damages hearing to support its claim that it is owed $184,858.69. (Brief of Respondent, Section V.C.2.b.). Appellants maintain that these documents are not properly in the record on the grounds set forth in Appellants' Motion to Exclude and Strike. (R.pp. 377-394; R.pp. 395-457). Reviewing the document prepared by Respondent that makes this calculation, Respondent has apparently relied on all project costs it incurred that are listed in its "Job Cost and Billing Detail" report which is attached thereto. (Brief of Respondent, Section V.C.2.b.). Accordingly, Respondent is treating the Subcontract as a "cost plus" subcontract rather than a firm fixed price subcontract. However, by the express terms of §10.1 of the Subcontract, this is a firm fixed price contract; specifically, "The Contractor shall pay the Subcontractor in current funds for performance of the Subcontract the Subcontract Sum of One million eighty two thousand three hundred forty two dollars and 10/100, ($1,082.342.10)..." (R.p. 27, lines 18-19). There were no modifications to the Subcontract. Appellants agree that payments in the amount of $1,096,569.19 have been made; accordingly, Respondent has been overpaid by $14,227.09.

(2): **No Profit Sharing:** Regardless of what Respondent indicates may have been contemplated by the Teaming Agreement, per its express language, which both Appellants and Respondent quote in their initial briefs, the Teaming Agreement did not allow profit sharing.

Concerning the allegation that the Subcontract contains a profit sharing agreement, the original

Complaint in this case did not include the attachment that Respondent is now relying upon. Further, no other documents in the record at the time of submission of the Motion to Lift Entry of Default or at the time of submission of the Motion to Stay and Compel Arbitration which are the subject matter of this appeal included the document that Respondent is relying upon concerning profit sharing. The Appellants' position opposing the admission of documents in the possession of Respondent during the October 4, 2016 hearing (including the attachment to the Subcontract that mentions profit-sharing) into the record on appeal remains unchanged from that stated in Appellant's Motion to Exclude and Strike.

Assuming, *arguendo*, that the alleged attachment to the subcontract is in the record and that profits are to be shared, that document expressly indicates that profits are "projected" and "to be determined". Appellants have indicated that the project remains active with major rework and warranty work continuing, some directly attributable to Respondent. (R.p. 475, Tr. p. 30, line 21 – p. 31 line 6); accordingly, a set-off is due for those expenses, and profits, if any, cannot yet be determined. Respondent has also breached various terms of the subcontract related to overhead and supervision which has resulted in additional expense to Appellant Restoration Specialists for which they seek a set-off.

Finally, Respondent admits by footnote 2 in Section V.C.2.c. of its Brief that Appellants' position related to profit sharing is a meritorious defense when they indicate it is a set-off that is a proper subject of a damages hearing.

(3): **Merit of Subcontractors' Claims:** Appellants have and still contend that the surety, Hanover, has overpaid many bond claimants, failed to notify Appellant Restoration Specialists of the majority of the claims, failed to provide Affidavits of Claims for all but one claim, and failed to allow Appellants to participate in claim review prior to payments being made. (R.p. 475, Tr. p. 30, lines 10-21). In fact, Appellants contend that more than half of the payments made by Hanover exceeded what is due those claimants.

Respondent alleges that "this is not a defense to [Respondent's] claim' and that "Appellants had no defenses to the subcontractors' claims". Both of these statements are patently untrue. Per the express language of Respondent's Complaint under its cause of action for "Breach of Agreements", it alleges that, "[a]s a consequence of [Appellant Restoration Specialists'] default under its agreements with [Respondent] Palmetto and other subcontractors [for failure to pay], [Respondent] Palmetto has been damaged..." Respondent is attempting to sue Appellant Restoration Specialists for nonpayment under subcontracts with others. Clearly, overpayment of those subcontractors by Hanover is a defense to that allegation. Concerning the statement that "Appellants had no defenses to the subcontractors' claims", Respondent has cited an email chain related to a **single** claimant to support that premise, and has ignored Appellant Restoration Specialists' continued position that more than half of the claimants have been overpaid.

(4): **VA Final Payment:** Respondent continues to treat this project as complete and tries to singularly rationalize why each defense is not valid without consideration of that defense in concert with others. Here, Respondent computes numbers it believes shows that monies received under the contract "should have been more than enough to pay all the subcontractors in full and produce a profit of $226,092.67." [By footnote 4, they allege to have computed the project profit to total $443,460.91. (Brief of Respondent, Footnote 4.)] Here, Respondent has failed to consider, *inter alia*, that: (1) substantial rework and warranty work is ongoing, including rework attributable to Respondent's defective work, (2) Appellant Restoration Specialists has claimed set-offs for Respondent's breach of contract, (3) profitability cannot be considered until the project work is complete, and (4) that pursuant to the express terms of paragraph 20 of the indemnity agreement, the indemnitors waived and subordinated all rights of indemnity, subrogation, and contribution each against the other until all obligations to the Surety have been first satisfied in full. (Items 1, 2 and 3 were all discussed in the paragraphs above.)

(5): **Waiver of Consequential Loss:** Respondent has alleged breach of contract against Appellant Restoration Specialists for alleged breach of its subcontract with Respondent as well as subcontracts with other subcontractors. Insomuch as Respondent has no privity related to subcontracts between Appellant Restoration Specialists and its other subcontractors, Respondent cannot claim that these are purely contract damages. Respondent has now, in its initial brief, alleged breach of the indemnity agreement for the **first time**, something that was not alleged in its original complaint.

Respondent also ignores paragraph 20 of the Indemnity Agreement which indicates that the indemnitors waive and subordinate all rights of indemnity, subrogation, and contribution against each other until all obligations to the Surety have been first satisfied in full. Article 9 of the Teaming Agreement cited in Section V.C.2.f. of Respondent's Brief indeed applies to any damages claimed by Respondent other than those alleged that are related to its subcontract with Appellant Restoration Specialists.

The existence of any one of the above-enumerated defenses satisfies the meritorious defense element of Rule 55(c), SCRCP.

II. BECAUSE THE CONTRACT CONTAINS MANDATORY MEDIATION/ARBITRATION PROVISIONS AND THE APPELLANTS HAVE NOT DEFAULTED UPON NOR WAIVED THEIR RIGHTS TO MEDIATION/ARBITRATION, THE COURT ERRED WHEN IT FAILED TO STAY THIS ACTION AND COMPEL MEDIATION/ARBITRATION.

(A): The Respondent's Claims Against the Ward Appellants Relate To and Are Intertwined With The Subcontract And, Therefore, Are Subject To Arbitration.

The Respondent asserts that its claims against the Ward Appellants are not intertwined or interwoven with the Subcontract between Appellant Restoration Specialists and Respondent and are not subject to arbitration. The Respondent's assertion is expressly refuted by the language of the alternative dispute resolution provisions in the Subcontract Agreement. Section 6.1.1 and 6.2 of the Subcontract read as follows:

"**[a]ny claim arising out of or related to this Subcontract, except those waived in this**

Subcontract, shall be subject to mediation as a condition precedent to binding dispute resolution (emphasis added)." Section 6.1.1.

"**any claim subject to but not resolved by mediation shall be resolved by binding arbitration (emphasis added)**" pursuant to Section 6.3 of the agreement. Section 6.2.

These are not narrow arbitration clauses requiring only the arbitration of claims arising under the Subcontract. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed. 2d 1270 (1967); *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F. 3d 88 (4th Cir. 1996). In contrast, these are broad arbitration provisions not limiting arbitration to the literal interpretation or performance of the contract, but embrace disputes having a relationship to the contract regardless of the label attached to the dispute. *See Id.* Respondent's own statements and allegations clearly assert actions by the Ward Appellants which relate to and are intertwined with the Subcontract and which Respondent alleges give rise to liability on the part of the Ward Appellants. While Appellants would dispute many of these allegations, the summary below is a sampling of Respondent's own statements and allegations contradicting Respondent's assertion that the claims against the Ward Appellants are not intertwined and, thus not arbitrable:

(1): Mr. Ward of Restoration Specialists approached PCG about working on the VA project as a concrete subcontractor, as well as in a supervisory capacity. Further, Mr. Ward indicated that Restoration Specialists was unable to secure the sizable bond the VA Project required, and asked that PCG obtain the bond from its surety, Hanover. PCG agreed and a subcontract was entered into between Restoration Specialists and PCG dated September 10, 2014. (Subcontract) (Initial Brief of Respondent, p. 3, lines 15-20);

(2): Per the subcontract agreement between Restoration Specialists and PCG, PCG agreed to aid Restoration Specialists in obtaining the bond. (Initial Brief of Respondent, p. 3, lines 20-22 & p. 4, lines 1-2).

(3): PCG's surety, Hanover, did issue the payment and performance bond for the project, Bond No. 9000-0045. (Bond). However, Hanover required that both PCG and Restoration Specialists, as well as their respective principals and their spouses sign an indemnity agreement, requiring them to indemnify Hanover for any sums it expends in paying claims made on the bond. (Indemnity Agreement). (Initial Brief of Respondent, p. 4, lines 5-9).

(4): Claims have been made by other subcontractors upon the Payment Bond and as a consequence subcontractors are making claims against Palmetto and its surety. Palmetto, Restoration, and individually, Mr. Ward and Mrs. Ward, all signed an indemnity agreement

with a surety in relation to a Payment Bond for this project (Exhibit C). Accordingly, Restoration, Mr. Ward and Mrs. Ward must indemnify the surety and Plaintiffs to the extent that they are required to pay. (R.p. 13, lines 12-17).

(5): Mr. Ward represented that he would manage this project and that all monies from the project would be used to pay for material and work supplied to or performed on the project. Mr. Ward has a pecuniary interest in the project. The representations of Mr. Ward were material and were relied upon by Palmetto. Mr. Ward intended and induced Palmetto to rely upon his representations. Mr. Ward is personally liable for his own tortious conduct. Palmetto's justifiable reliance upon Mr. Ward has damaged Palmetto. (R.p. 14, lines 6-12).

(6): All Defendants are contractually bound to pay funds if there are claims on the surety bond. There are claims on the surety bond. (R.p. 15, lines 4-5).

(7): Hanover made a demand under its indemnity agreement and upon the VA for the contract balance but by this time Mr. Ward had collected all but $90,000 of the $8.1 Million contract. (Initial Brief of Respondent, p. 4, lines 17-19).

(8): PCG sued all Appellants for actual and constructive fraud and negligent misrepresentation regarding the Appellants' misappropriation of funds paid to them by the VA, which resulted in over $1.4 Million in claims by subcontractors on the payment bond. (Initial Brief of Respondent, p. 5, lines 2-5).

As a whole, these disputed allegations clearly establish that the parties' dealings, the subcontract, the indemnity agreement and Respondent's claims against the Ward Appellants arising therefrom are all related to and intertwined with the subcontract as part and parcel of the VA Project.

In addition to asserting these allegations, the Respondent filed a Motion to Stay and Compel mediation/arbitration at the commencement of suit. The Respondent did not carve out the claims against the Ward Appellants as being independent of the Subcontract and not subject to arbitration. To the absolute contrary, the Respondent demanded that **all claims in this action, including Respondent's claims against the Ward Appellants, be stayed and compelled to mediation, and if necessary, to arbitration.**

Based on the above, as well as the additional authorities cited in Section II. (C) of the Brief of Appellants, all of the Appellants, including the Ward Appellants, have standing to enforce the mandatory mediation/arbitration provisions. Accordingly, all of the Appellants, including the Ward Appellants, are entitled to an order compelling mediation/arbitration of the Respondent's

claims in this action.

(B): The Defendants Have Not Defaulted Upon Nor Waived Their Right To Mediation/Arbitration Under The Mandatory Alternative Dispute Resolution Provisions Of The Contract And Applicable Law.

(1): The Master's Ruling That The Right To Arbitration Is An Affirmative Defense Which Has Been Waived By Appellants Constitutes An Error Of Law And Should Be Reversed.

Respondent asserts that arbitration is an affirmative defense that is waived if not pled. Respondent first cites Rule 8(c) SCRCP in support of this proposition. As briefed in the Brief of Appellants, the specific defense of "arbitration and award" contained in Rule 8(c) does not apply in this case. Brief of Appellants, Section II.(E)(1).

Likewise, the umbrella provision requiring the affirmative pleading of any other matter constituting an avoidance does not apply. In order to constitute an avoidance, the matter pled must assert facts and arguments that, if true, will defeat the plaintiff's claim, even if all the allegations in the complaint are true. *Black's Law Dictionary* 482 (9th ed. 2009). The right to arbitration as a mode of trial is certainly a substantial right of a party to litigation. Consequently, the denial of the right to arbitration is immediately appealable and must be immediately appealed by the aggrieved party. However, pleading a right to arbitration under an arbitration agreement does not constitute the assertion of facts and arguments that, if true, will defeat the plaintiff's claim, even if the allegations in the complaint are true. Therefore, the right to arbitration under an arbitration agreement does not constitute an affirmative defense under the umbrella provision of Rule 8(c).

The Respondent next asserts that South Carolina and federal courts have consistently held that arbitration is an affirmative defense that is waived if not pled. The Brief of Appellants addresses the majority of the cases cited by Respondent in arguing this proposition. A review of the remaining cases cited by Respondent establishes that these cases are distinguishable and inapposite to the arbitration issues before this court:

(1): *General Star Nat'l Ins. Cp. v. Administratia Asigurarilor de Stat*, 289 F. 3d 434 (6th Cir. 2002) – This is an opinion issued by the United States Court of Appeals, Sixth Circuit on appeal from the United States District for the Southern District of Ohio. The court applied Sixth Circuit federal law in finding that the Defendant waived its right to arbitration due to its extreme delay in asserting the right to arbitrate and the prejudice incurred by the Plaintiff. *Id.* Specifically, the Defendant did not assert its right to arbitration until 17 months after receiving notice of the lawsuit and 1 year after the entry of default judgment. The Plaintiff incurred the costs of the action for 17 months **before** the Defendant filed its application for arbitration. *Id.* The extreme delay and actual prejudice demonstrated during the period before Defendant applied for arbitration in *General Star Nat'l Ins. Cp.* are in stark contrast to the short delay and lack of prejudice in the present case.[2] See Initial Brief of Appellants, Sections I.(E) and (G) and II.(E)(3).

(2): *Johnson Associates Corp. v. HL Operating Corp.*, 680 F. 3d 713 (6th Cir. 2012) – This is another distinguishable Sixth Circuit case in which the court states the Sixth Circuit standard for waiver of an agreement to arbitrate as follows: "A party may waive an agreement to arbitrate by engaging in two courses of conduct: (1) taking actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) delaying its assertion to such an extent that the opposing party incurs actual prejudice." *Id*, at 717 (6th Cir. 2012).

As an initial matter, the *Johnson* Court expressly rejected the "substantial invocation of the litigation process" analysis relied on by Defendant in light of the "completely inconsistent" actions test employed in the Sixth Circuit. *Id*, at 718 (6th Cir. 2012). The "substantial invocation of the litigation process" standard rejected by the *Johnson* Court is similar to the waiver

[2] Appellants addressed Respondent's original claims of prejudice in their Brief of Appellants, Section I.(G). Respondent's Final Brief alleges three new prejudices, specifically, 1) it is nearing bankruptcy, 2) it now has incurred legal fees related to this appeal, and 3) the first appeal of Appellants related to this case was dismissed. All of these allegations are unsworn assertions by Respondent's counsel, lack legal citation and fail to satisfy the standards for legal prejudice in South Carolina.

standard applied in the state and federal courts in South Carolina. Thus, the first element of the Sixth Circuit waiver standard is distinguishable from the South Carolina standard. Secondly, in analyzing the prejudice element of the Sixth Circuit standard of waiver, the *Johnson* Court found the Plaintiff had suffered actual prejudice based on the totality of the following facts:

(a): Defendant delayed 8 months from the date suit commenced before asserting the right to arbitration; (b): Defendant filed an answer and counterclaim; (c): the parties engaged in court case management and judicial settlement conferences, held settlement discussions, and exchanged multiple settlement offers with the assistance of a magistrate judge before the filing of Defendant's motion for arbitration; (d): the defendant, both unilaterally and jointly with plaintiffs, filed multiple motions to continue trial, extend discovery and modify the case management order prior to filing its motion for arbitration; (e) the defendant served plaintiff with interrogatories, requests to produce and requests for admission and noticed 8 depositions prior to filing its motion for arbitration; (f) the plaintiffs served defendant with discovery requests prior to the filing of defendant's motion for arbitration; (g): the plaintiffs served defendant with discovery responses (including 1151 pages of responsive documents and a 4.11 gigabyte hard-drive containing responsive information) prior to the filing of defendant's motion for arbitration; (h) defendant served discovery responses on plaintiffs and continued to seek discovery from plaintiffs while defendant's motion to compel arbitration remained pending. Clearly, the *Johnson* defendant's delay and involvement in the litigation process prior to asserting a right to arbitration are totally distinguishable from the actions of the Appellants herein. *See* Brief of Appellants, Sections I.(E) and (G) and II.(E)(3).

Thirdly, the *Johnson* Court's reliance on the defense of arbitration in a defendant's answer as providing notice to a plaintiff of the defendant's desire to arbitrate is irrelevant to the present case. The *Johnson* plaintiff did not move for arbitration and their first notice of any arbitration issue was by way of the defendant's motion to compel arbitration filed 8 months after commencement of suit. In the present case, the Respondent was already on notice of the arbitration agreement at the time it commenced suit as it filed its very own Motion to Stay and Compel mediation/arbitration at the time it commenced suit. Accordingly, it certainly had notice of the arbitration agreement and cannot be prejudiced by Appellants application for arbitration.

(3): *Doubleday & Company, Inc. v. Curtis*, 763 F. 2d 495 (2nd Cir. 1985) – This is a federal opinion issued by the United States Court of Appeals, Second Circuit on appeal from the United States District Court for the Southern District of New York. The *Doubleday* case arises out of

a book publishing dispute, applies federal procedural law and New York substantive law, and involves the affirmative defense of waiver. This case does not in any way involve issues of arbitration.

(4): *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F. 3d (4th Cir. 1996) – This is a federal opinion issued by the United States Court of Appeals, Fourth Circuit on appeal from the United States District Court for the Eastern District of Virginia. The *American Recovery* Court held that the Plaintiff's claims against the defendant were arbitrable inasmuch as:

(a): Plaintiff's claims related to the parties' agreement containing the arbitration provision and
(b): Plaintiff failed to carry its burden of proving that defendant's actions constituted a default of its right to arbitrate under the Federal Arbitration Act.

The *American Recovery* opinion establishes that a party's failure to raise arbitration as an affirmative defense alone is insufficient to waive the right of arbitration in the Fourth Circuit. *Id.* Instead, it requires sufficient delay and significant utilization of the litigation machinery by the party asserting the right to arbitration and legally sufficient prejudice to the opposing party to constitute waiver/default of a right to arbitration. *Id.*

(2): Applying The Proper Legal Standard To The Facts Of This Case Establishes Appellants Have Not Waived Nor Defaulted Upon Their Right To Mandatory Mediation/Arbitration.

The proper legal standards are set forth in the Brief of Appellants, Section II.(E)(2). Respondent attempts to argue against these standards by alleging that Appellants waived any rights to arbitration by participating in litigation in the lower court. Brief of Respondent, Section V.D.4. The record belies the merits of this assertion, however, as Appellants' limited activities in the lower court do not rise to the level necessary to constitute a waiver of the right to arbitration. Brief of Appellants, Section II.(E)(3).

Respondent also argues that Appellants have waived any rights to arbitration by committing acts inconsistent with their arbitration rights. As legal precedent for this argument, Respondent

cites *Brown v. Dillard's, Inc.*, 430 F.3d 1004 (9th Cir. 2005) and *DeLage Linden Fin. Services, Inc. v. Raynes, McCarty, Binder, Ross and* Mundy, 51 Pa. D. & C. 4th 57 (Pa. Com. Pl. 2001). The Respondent cites *Brown* for the proposition that a party who is in material breach of an arbitration agreement (e.g., by refusing to arbitrate) is in default of that right and cannot compel arbitration. The *Brown* case, however, is distinguishable both on a legal and factual basis. In *Brown*, the plaintiff was an employee of Dillard's department store until she was fired from her job. The plaintiff filed a pre-litigation notice of intent to arbitrate a wrongful termination claim under Dillard's Fairness in Action Program. Dillard's refused to participate in the pre-suit arbitration proceedings. After Dillard's refused to arbitrate her claim, the plaintiff filed suit in state court for wrongful termination. At that point, Dillard's decided it wanted to arbitrate plaintiff's claim. Therefore, Dillard's removed plaintiff's suit to federal court and moved to compel arbitration. Based on these facts, the Ninth Circuit held that:

> "when an employer enters into an arbitration agreement with its employees, it must itself participate in properly initiated arbitration proceedings or forego its right to compel arbitration. That is, we hold that Dillard's cannot compel Brown to honor an arbitration agreement of which it is itself in material breach." *Id* at 1006.

The facts and legal holdings in the *Brown* case are clearly distinguishable and inapposite to the present case.

Likewise, the *DeLage* case is equally distinguishable and non-dispositive of the arbitration issues on appeal before this court. The *DeLage* order is not an appellate decision. The opinion is a trial court order issued by the Court of Common Pleas of Pennsylvania, Philadelphia County. First, the *DeLage* case is a Pennsylvania case distinguishable on the same grounds as the previous Pennsylvania cases reviewed in Section II.B. of Appellants' Initial Reply Brief herein. Secondly, in *DeLage*, neither the plaintiff nor third party defendant asserted the right to arbitration. The third-party defendant, Sharp, also never raised an arbitration defense by way of preliminary objections or in answer and new matter. *Id* at 3. Instead, Sharp engaged in the judicial process and served discovery upon third party plaintiff, IKON, which IKON responded

to. *Id.* It was only when IKON served discovery on Sharp that Sharp first objected to the trial court's jurisdiction some two and a half months later.

The Respondent makes the following factual assertions for its argument that Appellants waived their rights to arbitration by acting inconsistently therewith:

(a): No motion or request was made by Appellants to invoke the arbitration provision in Appellants motion for continuance or motion to be relieved from default filed before the June 6, 2016 court hearing. Initial Brief of Respondent, p. 5, lines 15-18.

(b): The Appellants did not raise the issue of arbitration at the June 6, 2016 court hearing. Initial Brief of Respondent, p. 5, lines 20-21.

(c): It was only after the Court indicated that the motion to be relieved from default may not be granted that Appellants moved to compel arbitration. Initial Brief of Respondent, p. 23, lines 12-14.

(d): Appellants only sought to compel arbitration after they were unsuccessful before the Master. Initial Brief of Respondent, p. 29, lines 2-3.

(e): Appellants ignored Respondent's pleadings and failed to respond and consent to Respondent's motion to stay and compel arbitration, thereby refusing to arbitrate. Initial Brief of Respondent, p. 24, lines 13-15.

The Respondent's assertions are manifestly incorrect, grossly distort the record, and cannot serve as the basis for a finding of waiver.

The Respondent's Summons and Complaint contains no allegations whatsoever concerning the application of mandatory mediation/arbitration provisions to the Respondent's claims. Therefore, the Appellants' failure to timely respond to these pleadings due to an unintentional and good faith misunderstanding does not constitute a refusal to arbitrate.

The Respondent's Motion to Stay and Compel did contain such allegations and expressly demanded a stay of the lawsuit and submission of Respondent's claims to mandatory mediation/arbitration. Appellants were justified in relying on Respondent's assertion that it was moving the court for an order staying the matter and compelling mandatory mediation/arbitration.

Furthermore, the South Carolina Rules of Civil Procedure did not require a responsive pleading

to Respondent's Motion to Stay and Compel. As such, the Appellants were fully within their rights: (a): simply not to contest the Respondent's Motion to Stay and Compel and await the court's order compelling arbitration or (b): to appear and state their position on mediation/arbitration at the hearing on Respondent's motion. The Appellants, however, never received the opportunity for hearing to which they were entitled due to the administrative "closure" of Respondent's motion and the Master's adjudication of the motion on that basis. Accordingly, the Appellants' failure to respond to Respondent's Motion to Stay and Compel does not constitute a refusal to arbitrate.

As the record reflects, the Appellants were unaware of the default status of the case and the scheduling of the damages hearing until they received the damages hearing notice on June 2, 2016. (R.pp. 72-73). Appellants immediately retained legal counsel on June 3, 2016. (*Id).* Appellants' counsel immediately filed a Motion for Continuance of the damages hearing and a Motion to Set Aside Entry of Default on June 3, 2016 citing the mandatory mediation/arbitration provisions and Respondent's Motion to Stay and Compel mediation/arbitration as one of Appellants' grounds for relief. (R.pp. 77-81; R.pp. 82-87). The Appellants understood that Respondent's Motion to Stay and Compel mediation/arbitration remained pending for decision by the court at this time. (R.p. 79, line 18 – p. 80, line 2).

The Appellants' counsel next raised and again put the court on notice of the application of the contractual mandatory mediation/arbitration provisions at the June 6, 2016 court hearing. (R. p. 465, Tr. p. 8, lines 4-8). The Master expressly acknowledged Appellants' counsel's comments and the existence of the mandatory mediation/arbitration provision. (R.p. 466, Tr. p. 12, lines 10-17). In fact, Respondent acknowledged mediation was required and requested the Court's assistance during that hearing, "if we need to go to mediation. (R.p. 465, Tr. p. 7, lines 4 – 9.)

Thereafter, the Appellants again asserted their right to arbitration and joined in Respondent's

Motion to Stay and Compel by virtue of Appellants' Motion to Stay and to Compel mediation/arbitration filed July 11, 2106. (R.pp. 88-93).

The parties reconvened before the Master on July 14, 2016. Appellants also filed a memorandum in support of Appellants' Motion to Lift Entry of Default that date. (R.pp. 94-124). Appellants' supporting memorandum included their continuing invocation of the right to arbitration, coupled with their demand for stay of this action and submission of the matter to mandatory mediation/arbitration. (R.p. 97, lines 15-20; R.pp. 94-124).

Finally, the Appellants timely filed a Motion to and to Alter and Amend the Master's orders pursuant to SCRCP 59(e) again demanding that this action be stayed and compelled to mandatory mediation/arbitration. (R.pp. 125-129).

The Appellants actions described above show the Appellants' vigorous efforts to assert their right to mandatory mediation/arbitration early, often and continuously in the lower court. Appellants' actions were absolutely consistent with their right to arbitration and do not constitute a refusal or waiver of the right to arbitrate.

(3): The Entry Of Default Does Not Constitute A Default Or Waiver Of Appellants' Right To Mandatory Mediation/Arbitration.

The Respondent asserts that the Appellants have waived their right to compel arbitration by virtue of the entry of default in this case. The Brief of Appellants addresses the majority of the cases cited by Respondent in arguing this proposition. A review below of the remaining cases cited in Respondent's Brief establishes that these cases are distinguishable and inapposite to the arbitration issues before this court:

(1): *Bland v. Green Acres Group, L.L.C.*, 12 So. 3d 822 (Fla. App. 2009) – This is a Florida case applying Florida waiver of arbitration standards, not the state or federal law standards applied in South Carolina. The legal standards and factual circumstances involved in the *Bland* case are significantly different than those in the present case. Even so, the *Bland* Court looked to the totality of the circumstances, not just the entry of default to determine the issue of waiver.

In the *Bland* case, the plaintiff sued the defendant for breach of contract in March 2005, but then dismissed its case without prejudice in August 2007. The plaintiff refiled its case in August 2007 and the court entered default in October 2007. In December 2007, the plaintiff moved for default final judgment. Unlike in the present case, the *Bland* plaintiff did not at any time during these two lawsuits file a motion to compel arbitration. On July 29, 2008, defendant served a Motion to Stay and to Compel Arbitration asking, for the first time, that the dispute be resolved in arbitration. On August 8, 2008, the trial court denied the motion to compel arbitration, finding that defendant had waived the contract's arbitration clause. The *Bland* Court ruled that a finding of waiver may be predicated on both pre- and post-suit actions in tandem. *Id* at 825. Applying this standard to the facts of the case, the *Bland* Court then reviewed the pre and post-suit filing actions of the defendant to determine if his actions were sufficient to waive arbitration. The *Bland* Court found that:

> "the trial court heard evidence that [defendant] knew of the 2005 suit no later than March of 2006; actively avoided service; never sought to trigger the mediation pre-condition to arbitration; never made a demand to arbitrate under Fla. Stat. § 684.22(1); waited eleven months after learning suit had been refiled and over seven months after appearing to seek to compel arbitration; and engaged in settlement negotiations for years without raising the arbitration clause." *Id* at 825.

The *Bland* Court determined that the above actions were sufficient to waive arbitration. *Id.* In doing so, the *Bland* Court looked beyond the singular fact of the entry of default and found that the totality of defendant's actions constituted waiver of the right to arbitration. Clearly, the legal standards and facts dispositive of the *Bland* case are distinguishable from the present case. *See* Brief of Appellants.

(2): *Bojadzijev v. Roanoke Technology Corp.*, 997 So. 2d 1251 (Fla. App. 2009) - Like the *Bland* case, this is a Florida case applying Florida waiver of arbitration standards, not the state or federal law standards applied in South Carolina. Again, the legal standards and factual circumstances involved in the *Bojadzijev* case are distinguishable from the present case. And again, even so, the *Bojadzijev* Court looked to the totality of the circumstances to find waiver.

In *Bojadzijev*, the plaintiff filed a breach of contract action against the defendant and did not at any time during the lawsuit file a motion to compel arbitration. After obtaining an entry of default against defendant, the plaintiff filed a motion for default final judgment in excess of six million dollars. A hearing was held on plaintiff's motion and the trial court entered a default final judgment for the full amount of damages sought. Months later, the defendant filed a motion to be relieved from default judgment which the trial court denied. The *Bojadzijev* Court upheld the trial court and affirmed the default judgment. The distinguishing elements of the *Bojadzijev* case are numerous and significant; namely:

(1): The *Bojadzijev* plaintiff never filed a motion to compel arbitration – In the present case, the Respondent did file such a motion with the trial court, was on full notice of the arbitration agreement and expressly requested arbitration. Furthermore, Appellants relied upon and joined in Respondent's motion but were deprived of the opportunity to be heard on that motion due to the Clerk's administrative "closure" of this motion and the Master's "adjudication" of this motion on that basis; (2): In *Bojadzijev*, a default judgment had been entered and the court applied the Florida equivalent of the higher Rule 60, SCRCP "excusable neglect" standard – In the present case, there is no default judgment – instead, there is an entry of default subject to the lower "good cause" standard (3): The *Bojadzijev* defendant did not file a motion to compel arbitration until "months" after a default judgment had been entered.The *Bojadzijev* Court found that, by doing so, the defendant acted inconsistently with any arbitration right and failed to raise the arbitration issue in a timely motion to compel arbitration – In the present case, the Appellants filed timely motions to lift the entry of default and applications for arbitration pursuant to state and federal law applicable in South Carolina. *See* Brief of Appellants, Sections I.(E) and (G) and II.(E)(3).

(3): *Samuel J. Marrance General Contracting Co., Inc. v. Amerimar Cherry Hill Associates Ltd. Partnership*, 416 Pa. Super. 45, 610 A. 2d 499 (Pa. Super., 1992) *citing Foster v. Philadelphia Manufacturers*, 140 Pa. Cmwith 186, 592 A. 2d 131 (1991) – These are Pennsylvania cases applying Pennsylvania waiver of arbitration standards, not the state or federal law standards applied in South Carolina. These cases do not involve defendants held in default. The legal standards and factual circumstances involved in these cases are significantly different than those on appeal before this Court. Also, the defendants in these cases had not been held in default by the lower court.

In the *Foster* case the trial court had not entered default against the defendant. Furthermore,

the *Foster* Court actually upheld the defendant's right to arbitration, dismissed the Plaintiff's complaint and referred the matter to arbitration.

In the *Samuel J. Marrance* case the lower court had not entered default against the defendant. The *Samuel J. Marrance* Court articulated the Pennsylvania waiver standard as follows:

"[w]aiver may be established [in Pennsylvania] by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary. See 17A Am.Jur.2d, Contracts §656." *Id* at 501.

Applying this waiver standard the *Samuel J. Marrance* Court looked to the totality of the circumstances, not just the defendant's failure to plead arbitration as an affirmative defense to determine waiver. Based on the following facts, the *Samuel J. Marrance* Court held that defendant's conduct constituted waiver:

(a): defendant chose not to file a petition to compel arbitration; (b): defendant elected not to assert arbitration as an affirmative defense either in preliminary objections or in new matter as required by Pennsylvania Rule of Civil Procedures 1030 and 1032; (c): defendant filed pretrial motions for improper venue and forum non-conveniens; (d): defendant's venue motions unequivocally established a willingness on defendant's part to litigate the case without arbitration in another jurisdiction; (d): defendant waited until it had received an adverse lower court ruling on its venue motions before invoking and seeking to enforce the arbitration provision of the contract; and (e): defendant initiated other proceedings in different jurisdictions regarding matters related to the contract..

The *Samuel J. Marrance* Court held that the above facts constituted waiver of defendant's right to arbitration. The court's holding established that the singular fact of the failure to plead arbitration as an affirmative defense was not dispositive. Instead, it was the totality of the defendant's actions that "amounted" to waiver in the eyes of the *Samuel J. Marrance* Court. *Id* at 501. Clearly, the legal standards and facts dispositive of the *Samuel J. Marrance* case are distinguishable from the present case. *See* Brief of Appellants.

(4): *Sigma Motors, Inc. v. Klien*, CA-CV 07-0831, 2008 WL 4853611 (Ariz. App. 1st Div. Nov. 6, 2008) – This is an Arizona case containing the Court of Appeals of Arizona specific legal precedent disclaimer notice. The notice states: "THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY

APPLICABLE RULES." *Id* at 1. In addition to lacking precedential value on the issue of waiver in Arizona, much less South Carolina, the *Sigma Motors* opinion is distinguishable from the present case for the following reasons:

(a): The quotation the Respondent attributes to the Court of Appeals of Arizona is, in fact, the statement of the Arizona trial court from which the appeal was taken; (b): The case involved a default judgment governed by Rule 60 "excusable neglect" standards not simply Rule 55(c) "good cause" standards; (c): The *Sigma Motors* Court specifically stated in its opinion that it did not address "whether the [defendants] waived their right to arbitration." *Id* at 5.

(5): *Olde Discount Corp v. RCK Corp.*, Inc., 110 F.3d 69, 1997 WL 133239 (9th Cir. 1997). – This is a United States Court of Appeals, Ninth Circuit decision containing the Court of Appeals specific legal precedent disclaimer notice. The notice states that this opinion is not suitable for publication, is not precedential and may not be cited to or by the courts of the Ninth Circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. *Id* at 1. In addition to lacking precedential value on the issue of waiver in the Ninth Circuit, much less South Carolina or the Fourth Circuit, the *Olde Discount Corp.* opinion is distinguishable from the present case for the following reasons:

(a): The *Olde Discount Corp.* case is a securities fraud action – such actions are not subject to arbitration under federal securities laws; (b): The legal authority for the quotation relied upon by Respondent (i.e., *Conover v. Dean Witter Reynolds, Inc.*, 837 F.2d 867, 868 (9th Cir. 1988) is a comparative citation (Cf.) case in which the Dean Witter defendant waited almost 2 years from the date suit was filed to move for arbitration; (c): the court found that the default was due to defendant's own culpable conduct in refusing to accept personal service of the summons and complaint; (d): the plaintiff did not file a motion to compel arbitration; (e): the brief decision indicates that defendant first raised the issue of arbitration on appeal.

(6): *Cho Yang Shipping Co., Ltd. V. American Freight Lines, Ltd.*, No 94 Civ. 0347, 1994 WL 577006 (S.D.N.Y. Oct. 19, 1994) – This is a United States District, S.D. New York decision. The *Cho Yang Shipping* opinion does not apply the state or federal waiver standards applied in South Carolina. In addition, the *Cho Yang Shipping* decision is distinguishable from the present case for the following reasons:

(a): the plaintiff did not file a motion to compel arbitration; (b): the defendant did not file a motion to compel arbitration; (c): the defendant first raised the issue of arbitration as a challenge to the court's jurisdiction on appeal; (d): the *Cho Yang Shipping* case involved a default

judgment governed by Rule 60 standards not simply Rule 55(c) "good cause" standards. *Id.* Based on the above authorities, the entry of default against Appellants herein does not constitute a waive or default of Appellants' right to mandatory mediation/arbitration of the parties' disputes. In light of the applicable and well established standards discussed throughout the Brief of Appellants, the Court should reverse the Master's ruling, stay this action and compel the parties to mediate, and if necessary, arbitrate their disputes pursuant to their contractual agreement.

CONCLUSION

For the reasons stated above, this Court should reverse the rulings of the circuit court, lift the entry of default, stay this action and compel mandatory mediation/arbitration pursuant to the contractual agreement of the parties.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143
[Appellate Case No. 2016-002308]

Palmetto Construction Group, LLC — Respondent

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward — Appellants

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master in Equity

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Restoration Specialists, LLC,
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Lynnette Pennington Ward, Appellants.

FINAL BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES ON APPEAL

1. Whether an order denying a motion to be relieved from default is appealable before final judgment is entered?

2. Whether the Master in Equity correctly held that Appellants' motion to compel arbitration was not properly before him as Appellants were in default?

3. Whether this appeal as to Appellants Mark and Lynnette Ward should be dismissed as an order denying a motion to be relieved from default is not appealable until after final judgment and the Wards concede they have no arbitration provision?

4. Whether the Master in Equity acted within his discretion in denying Appellants motion to be relieved from default?

II. STATEMENT OF THE CASE

This matter arises out of Respondent Palmetto Construction Group, LLC's ("PCG's") complaint against Appellants alleging, *inter alia*, that Appellants misappropriated funds from a construction project for the Department of Veterans' Affairs ("VA"), failed to pay its subcontractors and suppliers, and defaulted on its agreements with PCG and the surety, Hanover Insurance Company ("Hanover"), leaving PCG responsible to its subcontractors and the surety for in excess of $1.4 Million. Appellants were personally served with the summons and complaint, but failed to respond. Appellants were held in default and the matter was referred to the Master in Equity.

The day before the damages hearing, counsel appeared on behalf of the Appellants, seeking a continuance of the damages hearing and relief from the default judgment. Appellants later filed a motion to compel arbitration. After two hearings on the motions, the Master in Equity issued an order denying Appellants' motion to lift the default and finding that the arbitration motion was not properly before him as the Appellants were in default. (ROA 4). The Master succinctly stated his ruling at the hearing: "Well, Ms. Ariail,

I think the first thing you have to do is get out of default before you can bring affirmative relief." (ROA 467, at 9:2-4). Appellants filed a motion to reconsider, which was denied after a third hearing. Appeals followed; Appellants first appeal was denied by this Court. (ROA 7).

No final judgment has been entered as this appeal was filed before the damages hearing was held.

III. STATEMENT OF THE FACTS

A. The Project

Appellant Restoration Specialists, LLC ("Restoration Specialists") was awarded a contract with the VA for completion of a parking garage for the VA facility in Augusta, Georgia (the "VA Project"). The contract between Restoration Specialists and the VA is dated March 29, 2012 (ROA 577), though the project was delayed for several years before commencement. The total contract price was ultimately in excess of $8.1 Million. (ROA 574–76). Restoration Specialists was the general contractor on the VA Project, responsible for hiring subcontractors and obtaining a payment and performance bond. Appellant R. Mark Ward is the owner of Restoration Specialists. Appellant Lynnette Pennington Ward is his wife. Restoration Specialists is a Georgia company.

In November of 2011, Restoration Specialists entered into a Teaming Agreement with Appellant PCG. (ROA 1697). PCG is a South Carolina company with a specialty in concrete work. The Teaming Agreement contemplated that Restoration Specialists and PCG would work together on multiple construction projects; Restoration Specialists and PCG did successfully complete some projects without incident prior to the VA Project. Mr. Ward of Restoration Specialists approached PCG about working on the VA project as

a concrete subcontractor, as well as in a supervisory capacity. Further, Mr. Ward indicated that Restoration Specialists was unable to secure the sizable bond the VA Project required, and asked that PCG obtain the bond from its surety, Hanover. PCG agreed and a subcontract was entered into between Restoration Specialists and PCG dated September 10, 2014. (ROA 1703). Pursuant to the subcontract agreement between Restoration Specialists and PCG, Restoration Specialists would remain the general contractor on the VA Project and would hire all subcontractors, and PCG would perform concrete work and work in a supervisory capacity as well as aid Restoration Specialists in obtaining the bond. Pursuant to the subcontract, PCG was to be paid as a concrete subcontractor for its work and was also to share the profits equally with Restoration Specialists. (ROA 1718).

PCG's surety, Hanover, did issue the payment and performance bond for the project, Bond No. 9000-0045. (ROA 1729). However, Hanover required that both PCG and Restoration Specialists, as well as their respective principals and their spouses sign an indemnity agreement, requiring them to indemnify Hanover for any sums it expends in paying claims made on the bond. (ROA 1719).

The concrete work was performed by PCG, and as the Project neared completion, PCG asked that the parties meet to discuss the profit split provided for in the subcontract. (*See* ROA 1733). However, at this time PCG was alerted that several of Restoration Specialists' subcontractors had not received payment. PCG too, was owed over $180,000.00 pursuant to its own subcontract with Restoration Specialists. *Id.* PCG approached Mr. Ward several times about these issues but received no answer. It soon became apparent that multiple subcontractors were owed money, which Hanover was required to pay, in the amount of $1,425,144.00. (ROA 1778). Hanover in turn made a

demand under its indemnity agreement and upon the VA for the contract balance but by this time Mr. Ward had collected all but $90,000 of the $8.1 Million contract. *See* ROA 574–76.

B. PCG's Complaint

PCG filed its summons and complaint against the Appellants on February 12, 2016. PCG's complaint alleges a breach of contract action against Appellant Restoration Specialists for its failure to pay PCG the funds due pursuant to the subcontract between Restoration Specialists and PCG. PCG sued all Appellants for actual and constructive fraud and negligent misrepresentation regarding the Appellants' misappropriation of funds paid to them by the VA, which resulted in over $1.4 Million in claims by subcontractors on the payment bond. PCG also filed a motion to stay and compel arbitration as the subcontract between PCG and Restoration Specialists contains an arbitration provision.

PCG personally served its summons and complaint together with a motion to compel arbitration on Appellants on March 14, 2016. (ROA 66, 68, 70). When the Appellants failed to answer or otherwise respond, an affidavit of default was filed on April 18, 2016. (ROA 64). Because of the default, PCG withdrew its motion to stay and compel arbitration and on April 21, 2016 referred the matter to the Master in Equity for determination of damages. (ROA 3).

C. The Master in Equity's July 14, 2016 Order

A damages hearing was scheduled by the Master for June 6, 2016. The day before the hearing, counsel appeared on behalf of Appellants and filed a motion for continuance and a motion to be relieved from default. (ROA 77, 82). No motion or request was made then by Appellants to invoke the arbitration provision. The parties appeared before the

Court on June 6, 2016, and Appellants submitted an affidavit of R. Mark Ward in support of the Appellants' motion to be relieved from default (ROA 74). The Appellants did not raise the issue of arbitration at this hearing or by affidavit. The Court granted Appellants' motion for a continuance of the damages hearing and held Appellants' motion to lift the default in abeyance to allow the parties time to exchange financials in advance of a damages hearing.

However, the Court did note:

> Your Motion for Relief from the Entry of Default - I'm not going to rule on yet. There's not much I saw in that affidavit that would give me indication that I would grant that motion. I can tell you that right now. Okay?

(ROA 466, at 11:20-24). Appellants provided answers to PCG's interrogatories and requests for production on July 7, 2016. (ROA 534). Appellants then made three separate document productions on July 6, 11, and 13, 2016 consisting largely of financial records related to the project.

On July 11, 2016, Appellants filed a motion to compel arbitration. On July 14, 2016, the Master issued his order. (ROA 4). A damages hearing was set for October 4, 2016 at 2:00pm. *Id.*

D. <u>The Initial Appeal</u>

On September 30, 2016, PCG was served with a notice of appeal, and immediately moved to dismiss the appeal. On October 5, 2016, PCG's counsel received a letter from the Court of Appeals returning its motion to dismiss on the grounds that the Court had no record of such an appeal being filed. (ROA 533). Also on October 5, PCG was served by facsimile with a copy of another notice of appeal, different than the one previously served, which attached the July 14, 2016 Order and portions of the transcript of the hearing. On

October 6, 2016, PCG's counsel was served by facsimile with yet another version of the notice of appeal. On October 17, 2016, PCG's counsel received a letter from the Court of Appeals stating that one of the notices of appeal was being returned to Ms. Ariail together with the transcript as the transcript was not an order and was not properly included with a notice of appeal. (ROA 1783). The Court had filed the first appeal which was served on Respondents on September 30, 2016. PCG promptly refiled its motion to dismiss the appeal which was granted by this Court on November 10, 2016. (ROA 7).

E. Appellants' Motion to Reconsider

Appellants' filed a motion to reconsider pursuant to Rule 59 SCRCP on July 27, 2016. (ROA 125). The motion to reconsider was scheduled to be heard by the Master on October 11, 2016. Appellants wrote the court on September 7, asking that the motions to reconsider be heard in advance of the damages hearing. This request was denied. The parties appeared before the Master for the damages hearing on October 4, 2016. The Master, believing an appeal had been filed by Appellants, elected not to proceed with the damages hearing but requested a damage proffer and heard argument on Appellants' motion to reconsider. The motion was denied on the grounds that: (1) Appellants failed to show good cause to lift the default; and (2) the Appellants' motion to stay and compel arbitration was not properly made as a party in default cannot seek affirmative relief. (ROA 5).

F. The Appeal *Sub Judice*

This appeal followed the Master's denial of Appellants' motion to reconsider.

IV. SUMMARY OF ARGUMENT

This is the second interlocutory appeal (though the fifth notice of appeal) filed by Appellants in this case. The first appeal was dismissed by this Court on November 10, 2016. (ROA 7). Appellants are in default and appealed before a damages hearing was held or a default judgment was entered. In order to prevent the damages hearing from moving forward, the Appellants appealed, though it is undisputed that two of the Appellants—Mark and Lynnette Ward—are not parties to any contract containing an arbitration provision and this is an interlocutory appeal from an order refusing to lift the entry of default. This Court should dismiss this interlocutory appeal and remand to the Master for a damages hearing and an entry of final judgment. Should this Court render a decision, the Master should be affirmed as:

1) The Master did not abuse his discretion in refusing to lift the default as Appellants failed to provide good cause, lack a meritorious defense, and Respondent PCG has been prejudiced by their conduct;

2) The Master correctly held that Appellants' motion to stay and compel arbitration was not properly before him as: (a) arbitration is an affirmative defense pursuant to both federal and SC law; (b) affirmative defenses are waived if not pled; (c) a party who goes into default waives the right to demand arbitration; and (d) Appellants in this case have taken actions inconsistent with arbitration, including participating in discovery, filing motions and affidavits, and appearing at hearings without raising the arbitration provision.

V. ARGUMENT

A. <u>The Appeal Must Be Dismissed in Its Entirety</u>

The Appeal must be dismissed as both orders appealed from are interlocutory.

Appellants appeal the Master's Order dated July 14, 2016, which denies Appellants' motion to lift the entry of default against them as well as the Master's Order dated October 28, 2016, denying Appellants' motion to reconsider. "An order denying a motion to lift entry of default is interlocutory and not immediately appealable." *See Thynes v. Lloyd*, 294 S.C. 152, 153, 363 S.E.2d 122, 122 (Ct. App. 1987) ("an order refusing to grant relief from the entry of default is not appealable until after final judgment"). Appellants contend that the orders are appealable because they also deny that the dispute is subject to arbitration. However, the Orders make no substantive ruling on the arbitration issue and thus are not immediately appealable. Rather, Judge Scarborough held that the arbitration motion was not properly before him as the Appellants were in default. *See* ROA 4. Judge Scarborough succinctly stated his ruling at the July 14, 2016 hearing: "Well, Ms. Ariail, I think the first thing you have to do is get out of default before you can bring affirmative relief." (ROA 467, at 9:2–4). At the hearing on Appellants' motion to reconsider, Judge Scarborough reasoned:

> The question as I see it is whether or not the question for the appeal is procedural, whether or not there's a final order from which you can appeal. I think that's number one. The second thing has to do with whether or not there's finality to that, and I don't think there's finality until a determination of damages has been held.

(ROA 475, at 32:15-21). The Master's conclusion is in keeping with well-established precedent that "[a]n order denying a motion to lift entry of default is interlocutory and not immediately appealable." *Thynes*, 294 S.C. at 153, 363 S.E.2d at 122.

A motion to reconsider an order denying relief from default is no more appealable than the original order denying relief from default. *Id.*

1. Appellants' motion to reconsider was not properly before the Master.

What follows is a nuance but one that should disturb this Court. While this appeal in its entirety should be dismissed, this Court cannot review the Master's order denying the Motion to Reconsider as the Master had no jurisdiction to enter that order as jurisdiction was vested in the Appellate Court by virtue of Appellants' notices of appeal.

"[S]ervice of notice of an intent to appeal divests the lower court of jurisdiction," *Jackson v. Speed*, 326 S.C. 289, 311, 486 S.E.2d 750, 761 (1997), though the lower court may typically consider a timely post-trial motion notwithstanding the filing of an appeal. *Shumpert v. Time Ins. Co.*, 329 S.C. 605, 616 n. 5, 496 S.E.2d 653, 658 (Ct. App. 1998). However, the circumstances of this case are not typical.

On the morning of the damages hearing, October 4, 2016, Appellants urged the Master that he could not proceed because of an appeal served on September 30, 2016. The Appellants intended and succeeded in delaying the damages hearing because of the service of a notice of appeal that divested the Master of jurisdiction. This is not a case of simultaneous or near simultaneous filing of a Motion to Reconsider and delay of the damages hearing; rather Appellants intended to vest jurisdiction in the Appellate Court. Like residency which is a state of mind, Appellants intended the appeal and subsequent appeal to divest the Master of jurisdiction so he could not rule on damages. The Master's subsequent order denying the Motion to Reconsider was without jurisdiction.

True, the result is the same; a remand as this appeal is interlocutory, but here is an unmasking of the use of process in a way never intended. Respondents have suffered from Appellants' misuse of process and actions ask this Court to say so.

B. The Appeal of Mark and Lynnette Ward must be Dismissed

1. Appellants Mark and Lynnette Ward concede they have no arbitration provision.

There are multiple Appellants/Defendants named in this action, and all are in default. Arbitration is not a defense available to Mark Ward or Lynette Ward for an additional reason as they concede they are not parties to the construction contract that contains the arbitration provision. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663, 62 U.C.C. Rep. Serv. 2d 217 (2007) (arbitration is available only when the parties involved contractually agreed to arbitrate). The subcontract containing the arbitration provision is between Restoration Specialists and PCG. Mark and Lynette Ward have no arbitration provision. The appeal, as to these parties, must be dismissed.

2. PCG's claims against Mark and Lynnete Ware are not "intertwined" or "interwoven" with the concrete work subcontract that contains the arbitration provision.

Appellants alleged that, though Mark and Lynnette Ward are not parties to any contract containing an arbitration provision, the claims PCG makes against them are "intertwined" with the agreement that contains the arbitration provision — the subcontract between PCG and Restoration Specialists. Appellants rely on a District Court decision styled *U.S. ex rel. Coastal Roofing Co., Inc. v. P. Browne & Associates, Inc.*, 585 F. Supp. 2d 708 (D.S.C. 2007). The District Court articulated the intertwined claims test as follows:

> Under the intertwined claims test, "the circuits have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed."

Id. at 714 (citation omitted). The District Court further explained:

> [T]he signatory need not necessarily assert a cause of action against the nonsignatory for breach of the contract containing the arbitration clause.

> Instead, estoppel is appropriate if "in substance [the signatory's underlying] complaint [is] based on the [nonsignatory's] alleged breach of the obligations and duties assigned to it in the agreement."

Id. at 715 (citation omitted). The test is similar to that articulated by the South Carolina Court of Appeals in *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 611 S.E.2d 305 (Ct. App. 2005), *aff'd*, 373 S.C. 168, 644 S.E.2d 718 (2007) to determine whether a tort claim is subject to arbitration:

> The test is based on a determination whether the particular tort claim is so interwoven with the contract that it could not stand alone. If the tort and contract claims are so interwoven, both are arbitrable. On the other hand, if the tort claim is completely independent of the contract and could be maintained without reference to the contract, the tort claim is not arbitrable.

Id. Under either test, the facts show that PCG's claims against Mark and Lynette Ward are not intertwined or interwoven with the subcontract between Restoration Specialists and PCG. PCG's complaint alleges a breach of contract action against Appellant Restoration Specialists for its failure to pay PCG the funds due pursuant to the subcontract between Restoration Specialists and PCG. This cause of action would be subject to arbitration, which is why PCG filed its motion to stay and compel arbitration with its complaint. *See* ROA 9–41, 42–60. However, PCG withdrew the motion upon Appellants' default (*see infra*) and, for the reasons articulated below, believes all arbitration rights have been waived.

PCG also sued for actual and constructive fraud and negligent misrepresentation regarding the Appellants' misappropriation of funds paid to them by the VA, which resulted in over $1.4 Million in claims by subcontractors on the payment bond and a demand for indemnity from Hanover pursuant to the indemnity agreement. (ROA 14). PCG sought equitable and injunctive relief and an accounting concerning the same. (ROA

15). The foregoing claims have absolutely nothing to do with the subcontract for concrete work that contains the arbitration provision; PCG's claim against Restoration Specialists for breach of this agreement is based on the fact that PCG has not been paid in full for their work. On the other hand, PCG's other claims against arises out of the bond and indemnity agreement with the surety, Hanover. Turning to the intertwined claims test, there is nothing in the claims for fraud, negligent misrepresentation, breach of the indemnity agreement, or the equitable relief sought by PCG that arises out of duties or obligations in the subcontract. There is no requirement that PCG provide a payment bond for the project in the subcontract. There is no requirement that PCG provide indemnity to the surety in the subcontract. There is no requirement in PCG's subcontract with Restoration Specialists that Restoration Specialists pay its other subcontractors. The subcontract between Restoration Specialists and PCG is a simple form contract for PCG's provision of concrete work. *See* ROA 1703. The other claims arise out of the indemnity agreement and the bond — neither of which contains an arbitration provision. *See* ROA 1729–31 (Bond), 1719 (Indemnity Agreement). These claims are completely independent of the subcontract and all of them survive without reference to it. The doctrine of intertwined or interwoven claims is not applicable. Accordingly, the appeal of Lynette and Mark Ward must be dismissed.

C. The Master Properly Denied Defendants' Motion to Be Relieved from Default

1. The Master did not abuse his discretion.

The South Carolina Rules of Civil Procedure provide: "For good cause shown the court may set aside an entry of default . . . ." Rule 55(c), SCRCP. "The decision of whether to grant relief from an entry of default is solely within the sound discretion of the trial

court." *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989). In the present case, the Court correctly concluded that the Defendants failed to show good cause for why the default should be lifted.

Appellants submitted an affidavit by Mr. Ward, acknowledging service of the complaint but stating that he failed to answer because he believed this litigation was part and parcel of that filed by Hanover, the surety. First, there is no litigation filed by Hanover. Second, even if Mr. Ward believed what he stated under oath, this does not explain why Appellants would ignore a summons and complaint. Further, the Master did not abuse his discretion in finding Appellants do not have a meritorious defense to Plaintiff's claims as Mr. Ward *acknowledges* that he has failed to pay his subcontractors and suppliers, despite being paid over $8 Million dollars by the Department of Veterans Affairs. *See* ROA 574–76 (final pay application signed by Ward), ROA 74 (affidavit of Mark Ward).

2. Appellants do not have a meritorious defense.

a. The Arbitration Provision as a meritorious defense

Appellants claim the arbitration provision is a meritorious defense. *See* Appellants' Brief at 18–19. However, the U.S. Supreme Court has held that an arbitration provision is not a substantive or contractual defense to an action's merits. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985) (agreeing to arbitrate a claim does not forgo or convey substantive rights but merely submits their resolution to an arbitral, not judicial, forum).

The remainder of Appellants' examples of their alleged meritorious defenses are belied by their own records.

b. Appellants' assertion that PCG was overpaid

Appellants claim as a defense that PCG has been over paid $14,000 under its subcontract.[1] There is no basis to support this allegation, and in fact, the records, including those provided by Restoration Specialists in discovery, show that PCG is owed $184,858.69. *See* ROA 1627–40 (Checks to PCG written by Restoration Specialists), ROA 1775–76 (Subcontract Pay Application Breakdown), ROA 1762–74 (Job Cost Billing Detail), ROA 1703–18 (PCG-Restoration Specialists Subcontract), ROA 1760–61 (AR history report).

c. Profit Sharing

Appellants next claimed that there is no profit-sharing provision in the Teaming Agreement.[2] Appellants cite the Teaming Agreement which states: "[n]othing herein shall be construed as providing for the sharing of profits or losses arising out of the efforts of either or both of the Parties; except as may be provided for in any resultant contractual arrangement agreed to between the Parties." Appellants' Brief at 19 (emphasis added). The teaming agreement specifically contemplates profit sharing being provided for in subsequent agreements, which is exactly what happened with the VA Project. Despite Appellants claim that there is "nothing in the Subcontract Agreement" that allows for profit sharing (Appellants Brief at 19), there is just such a provision. The profit-sharing provision is found in the parties' agreement, which delineates all sums that Restoration Specialists is to pay PCG, including the "RS/PCG Projected 50% Profit Share." *See* ROA 1718 (PCG Subcontract Breakdown, made part of the Subcontract by way of Subcontract Provision

[1] Appellants argue a set-off, which is properly the subject of the damages hearing.

[2] *See supra* n. 1.

16.1.4.2 titled "Other documents" (ROA 1717), which reads: "[l]ist here any additional documents that are intended to form part of the Subcontract Documents...#1. PCG Subcontract Breakdown"). Appellants' assertion that there is no profit-sharing agreement between PCG and Restoration Specialists is belied by the parties' written agreement.

d. The Merit of the Subcontractors' Claims

Appellants next claim as a meritorious defense that they dispute many of the claims made by the subcontractors that have made claims against the payment bond, essentially arguing that Hanover has overpaid the bond claimants.[3] First, this is not a defense to PCG's claim. However, in its most recent demand letter to all indemnitors, Hanover states:

> Hanover conducted its own investigation of the claims pursuant to the Miller Act, 40 U.S.C.S. § 270a et seq., and has sought your input in the payment of these claims including whether any viable defenses to the claims exist, and has made payment to the bond claimants and secured releases of the claims.

(ROA 1778) (emphasis added). As of the date of Hanover's demand, Appellants had no defenses to the subcontractors' claims, which is why they were paid by Hanover. For example, Mr. Ward's email exchanges with Hanover show that after several attempts by Hanover to obtain information from Mr. Ward regarding the bond claim made by a subcontractor of Restoration Specialists' called Tupperway, Hanover finally asked Mr. Ward, "So I should just pay them?" and Mr. Ward responded, "Certainly not what I want but I don't think we can win this argument." (ROA 1734).

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[3] *See supra* n. 1.

e. Appellants assertion that Restoration Specialists has not been paid by the VA

For purposes of this next claimed meritorious defense, Appellants concede that Restoration Specialists "has not paid all subcontractors and vendors in full" but alleges the lack of payment is due to the "VA having not yet made its final payment" to Restoration Specialists. Appellants' Brief at 20. Appellants' records and answers to interrogatories establish that the VA is holding approximately $90,887.08 in retainage, and this because the VA received notice of subcontractor claims. (ROA 543–44). However, Appellants can hardly claim that the lack of a $90,887.08 payment has resulted in sixteen of Restoration Specialists' subcontractors making $1,425,144.00 in claims on the payment bond. (ROA 1778–79). Further, the documents provided by Appellants in discovery also show that Restoration Specialists received over $8.1 Million from the VA. This sum, based solely on the contract with the VA and the subcontracted cost ($6,929,212.00 per Appellants) and in house cost ($1,038,724.04 per Appellants) provided by Appellants in discovery, should have been more than enough to pay all the subcontractors in full and produce a profit of $226,092.67.[4] *See* ROA 577 (Notice of Award), ROA 1754–56 (Restoration Specialists' contract log), ROA 1757–58 (Restoration Specialists' monthly expenses spreadsheet).

f. Waiver of Consequential Loss

The final defense alleged by Appellants in their brief concerns a waiver of indirect, special, or consequential losses, found in Article 9 of the Teaming Agreement. PCG is

[4] The profit of $226,092.67 is based solely on the figures provided by Appellants. When the inflated in house costs is adjusted per industry standards to $642,385.80, and the subcontract cost is adjusted up in favor of Appellants to $7,108,182.00 (based on an error in Restoration Specialists' subcontract log), the VA Project produced a profit of $443,460.91. *See* ROA 1753.

claiming damages arising out of Restoration Specialists' breach of its subcontract with PCG, including the $184,858.69 that PCG is still owed for its concrete work and $221,730.46 for the agreed upon 50/50 profit split. PCG is further claiming the $1,425,144.00 that has been demanded of PCG by Hanover as a result of Appellants' breach of the indemnity agreement and misappropriation of funds from the VA Project. These are contract damages and not consequential losses.

3. PCG has been Prejudiced.

Appellants never sought to advance their arbitration claim, rather they sought to lift the default and engaged in discovery, thus using the judicial machinery. Appellants only advanced the arbitration provision when faced with the denial of their motion to lift default. Appellants' efforts were calculated to delay by tying this matter up in appeals. The net result is PCG (and its owners as indemnitors) face bankruptcy. Further, PCG has taken actions, like the withdrawal of its own motion to compel arbitration and referral of the action to the Master in Equity, because of the Appellants' default. If Appellants had properly responded to PCG's summons and complaint and Restoration Specialists had consented to PCG's motion to arbitrate those claims arising out of the subcontract that are subject to arbitration, the arbitration of the subcontract claims could have already been completed and the litigation concerning the bond claims and demand by Hanover could be well under way. Instead, PCG has now incurred attorneys' fees in litigation with the Appellants for over a year, taking place in the circuit court, before the Master in Equity, and in the Court of Appeals, including one appeal that has already been dismissed by this Court. *See* ROA 7.

D. The Lower Court Correctly Held That the Motion to Compel Arbitration Was Not Properly Before Him as Parties in Default Cannot Seek Affirmative Relief

1. Arbitration Is an Affirmative Defense.

The policy of the United States and South Carolina is to favor arbitration of disputes. *Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc.*, 356 S.C. 202, 588 S.E.2d 136 (Ct. App. 2003). Nevertheless, a circuit court's factual findings will not be reversed on appeal if there is any evidence reasonably supporting the findings. *McMillan v. Gold Kist, Inc.*, 353 S.C. 353, 577 S.E.2d 482 (Ct. App. 2003).

Rule 8(c), SCRCP states in relevant part:

> Affirmative Defenses; Reply. In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality...and any other matter constituting an avoidance or affirmative defense.

South Carolina courts have consistently held that arbitration is an affirmative defense. *See, e.g., Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 452, 730 S.E.2d 312, 314 (2012) (where plaintiff "opposed the motion to compel arbitration on the ground Brentwood Homes waived the right to assert the affirmative defense due to its delay in responding"); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 490, 689 S.E.2d 602, 603 (2010) ("Upstate Auto asserted three affirmative defenses in its Answer, including an arbitration agreement with Partain.").

The law is the same if the FAA applies. Where the contract documents "evidence transactions in commerce," the FAA, enacted pursuant to the commerce clause, supersedes South Carolina law. *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d

647, 652 (1977). Ms. Ariail represented that Restoration Specialists is a Georgia corporation, and the project was in fact constructed in Augusta Georgia. Therefore, there is interstate commerce and the FAA applies. The analysis under the FAA is the same as under the South Carolina Rules of Civil Procedure as arbitration is an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure. *See, e.g.*, *McDonnell v. Dean Witter Reynolds, Inc.*, 620 F. Supp. 152, 155-56 (D. Conn. 1985) (holding that under Fed. R. Civ. P. 8(c), the affirmative defense of arbitration must appear in the answer); *see also Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002) (finding waiver where a movant waited until after the entry of default judgment to compel arbitration). Further, as the 6th Circuit held:

> Regardless of whether a defendant is required to raise arbitration as a defense under Rule 8(c), a defendant's failure to raise arbitration as an affirmative defense shows his intent to litigate rather than arbitrate. The filing of an answer is, after all, the main opportunity for a defendant to give notice of potentially dispositive issues to the plaintiff; and the intent to invoke an arbitration provision is just such an issue.

Johnson Associates Corp. v. HL Operating Corp., 680 F.3d 713, 718 (6th Cir. 2012).

2. An Affirmative Defense is Waived if Not Pled.

An affirmative defense is waived if not pled. *Delta Apparel, Inc. v. Farina*, 406 S.C. 257, 272, 750 S.E.2d 615, 623 (Ct. App. 2013) (internal citations omitted); *Howard v. S. C. Dep't of Highways*, 343 S.C. 149, 152, 538 S.E.2d 291, 294 (Ct. App. 2000); *see also RIM Assocs. v. Blackwell*, 359 S.C. 170, 182-83, 597 S.E.2d 152, 159 (Ct. App. 2004) (claims or defenses not presented in the pleadings are waived). Under Fed. R. Civ. P. 8(c), the affirmative defense of arbitration must appear in the answer, and "a party's failure to plead an affirmative defense bars its invocation at later stages of the litigation." *McDonnell v. Dean Witter Reynolds, Inc.*, 620 F. Supp. 152, 155-56 (D. Conn. 1985) (citing *Doubleday*

& Company, Inc. v. Curtis, 763 F.2d 495, 503 (2d Cir. 1985)); *see also Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002) (finding waiver where a movant waited until after the entry of default judgment to compel arbitration).

3. Waiver by way of Default

In the context of a party in default seeking to compel arbitration, courts in the 4th Circuit and across the country have held that unless the movant can show good cause for its default, the defaulting party has waived its right to assert arbitration as an affirmative defense against continued litigation in the circuit court. *See State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 168-69, 539 S.E.2d 106, 111–12 (2000) (citing *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 96 (4th Cir. 1996) (affirmative defense of arbitration must be pled in answer)); *McDonnell v. Dean Witter Reynolds*, Inc., 620 F. Supp. 152, 155-56 (D. Conn. 1985) ("the affirmative defense of arbitration must appear in the answer, and 'a party's failure to plead an affirmative defense bars its invocation at later stages of the litigation'"(internal citation omitted)). In *State ex rel. Barden,* 208 W. Va. 163, 539 S.E. 2d 106, 112 (2000), the West Virginia Supreme Court held that "[u]nexcused conduct that results in the entry of a default judgment is no less of an implicit waiver of a right to arbitration than any other procedural forfeiture." Appellants attempt to discount the *Barden* Court's holding by claiming that West Virginia had not adopted an arbitration act at the time of the ruling; this is simply untrue. West Virginia codified an arbitration act as far back as 1926 and has since adopted the Uniform Arbitration Act, as has South Carolina.

West Virginia is not the only state to have found waiver of the right to demand arbitration by virtue of a party's default. *See, e.g., Bland v. Green Acres Group, L.L.C.*, 12 So. 3d 822, 824 (Fla. 4th Dist. App. 2009) ("Here, a default was entered against Bland, the effect of which was to admit the complaint's well pled allegations. . . . Assuming proper service of process and actual knowledge of the case, it is difficult to imagine a more emphatic repudiation of the right to arbitrate than an admission that a court is a proper forum to determine the claim." (internal citations omitted)); *Bojadzijev v. Roanoke Tech. Corp.*, 997 So. 2d 1251, 1253 (Fla. 5th Dist. App. 2009) ("Here, Bojadzijev waived his right to seek arbitration by failing to raise the issue before the trial court in a timely motion to compel arbitration. Accordingly, the trial court did not err in denying Bojadzijev's motion to vacate the default final judgment on this basis."); *Samuel J. Marranca Gen. Contracting Co., Inc. v. Amerimar Cherry Hill Associates Ltd. Partn.*, 610 A.2d 499, 501 (Pa. Super. 1992) (citing *Foster v. Philadelphia Manufacturers*, 140 Pa. Cmwlth. 186, 592 A.2d 131 (1991) ("In the instant case, the pleadings are devoid of any mention of the defense of arbitration and, therefore, we find that it is waived.")); *Sigma Motors, Inc. v. Klien*, 1 CA-CV 07-0831, 2008 WL 4853611, at *3 (Ariz. App. 1st Div. Nov. 6, 2008) ("Affirming the lower court's holding that: The Court further finds that the contractual arbitration provision is a defense that could have been raised and that the failure to raise the right or claim to arbitration under the contract was waived by electing not to answer or defend the underlying action."); *Discount Corp. v. RCK Corp., Inc.*, 110 F.3d 69, 1997 WL 133239, at *1 (9th Cir. 1997) ("Because [defendant] failed to assert the arbitration issue in a timely fashion, we find no merit to his contention that the court should have set aside the default judgment.") (citation omitted); *Cho Yang Shipping*

Co., Ltd. v. American Freight Lines, Ltd., No. 94 Civ. 0347, 1994 WL 577006, at *2 (S.D.N.Y. Oct. 19, 1994) ("[Plaintiff's] failure to initiate arbitration proceedings may have amounted to a breach of contract, in which case [defendant] had the option of asserting a counter-claim or moving to compel arbitration. [Defendant's] options did not include ignoring this action.").

In the present case, Appellants' failure to respond to the complaint and subsequent failure to raise the arbitration provision operates as a waiver of Restorations Specialists' right to demand arbitration.[5]

4. Waiver by Participation in Litigation and Acts Inconsistent with Arbitration Rights

Facts in further support of the argument that Restoration Specialists waived its right to arbitration include the Appellants' filing of affidavits (in support of the motion for continuance and the motion to be relieved from default) and motions (motion for continuance and motion to be relieved from default), appearing at a hearing on June 6, 2016 without raising the arbitration provision, and participating in discovery. Appellants answered PCG's interrogatories and requests for production on July 7, 2016 and then made three separate document productions on July 6, 11, and 13, 2016. It was only after the Court indicated that the motion to be relieved from default may not be granted[6] that Appellants moved to compel arbitration to delay the damages hearing. Even after the motion to compel arbitration was filed by Appellants, Appellants sought to conduct their

---

[5] The same would be applicable to Mark and Lynnette Ward; however, they are not signatories to any contract containing any arbitration provision and have no right to demand arbitration.

[6] THE COURT: "Your Motion for Relief from the Entry of Default - I'm not going to rule on yet. There's not much I saw in that affidavit that would give me indication that I would grant that motion. I can tell you that right now. Okay?" (ROA 466, at 11:20-24).

own discovery, but the request was denied by the Master because Appellants are in default. *See* ROA 467 at 9:22–10:1 ("MS. ARIAIL: Your Honor, I would ask since I have in good faith participated in discovery that I at least be allowed to serve some form of discovery related to damages so that I can prepare properly for the damages hearing."). These acts are all inconsistent with the right to demand arbitration.

Pursuant to Section 3 of the FAA, "a party may demand a stay of federal judicial proceedings pending exercise of a contractual right to have the subject matter of the federal action decided by arbitration, unless the party seeking arbitration is 'in default' of that right." *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985) (citing 9 U.S.C. § 3 (1982)). Courts have interpreted the term "default" under Section 3 as a material breach of an arbitration agreement, which includes a party's refusal to arbitrate when arbitration is sought by an opposing party. *See, e.g., Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1010–12 (9th Cir. 2005) ("A party who is in material breach of an arbitration agreement (e.g., by refusing to arbitrate) is in default of that right and cannot compel arbitration."). Here, PCG filed a motion to stay and compel the arbitration of those claims that are subject to the arbitration. The motion was personally served on Appellants, and rather than respond and consent to arbitration, Appellants ignored the pleadings, refusing to arbitrate. Appellants are barred by Section 3 of the FAA from demanding arbitration. If estoppel is applicable in this case, it operates as a bar to Appellants' arbitration demand, not PCG's objection to it. It is Appellants' conduct that has been inconsistent with the intent to arbitrate, and it is PCG who is prejudiced by its reliance on Appellants' inconsistent conduct. *See S.C. Elec. & Gas Co. v. Hix*, 410 S.E.2d 582, 585 (S.C. App. 1991); *infra*, Part V.D.5.a.

5. Appellants' Affirmative Defenses

a. Estoppel

Appellants first argue that PCG is estopped from objecting to Appellants' belated demand for arbitration and from obtaining a default judgment against Appellants because PCG filed a motion to compel arbitration with its complaint. Appellants' Brief at 25. First, as discussed *supra*, Appellants motion sought mediation and arbitration in the event of unsuccessful mediation, and only PCG's claim arising out of Restoration Services' breach of its subcontract with PCG, which contains the arbitration provision, is subject to arbitration. All other claims are wholly independent from the subcontract, can be maintained without any reference to it, and arise out of the bond and indemnity agreements with the surety, Hanover, which have no arbitration provision. Neither Mark or Lynnette Ward are signatories to the subcontract; thus, they have no arbitration provision. They are, however, parties to the indemnity agreement. PCG had every intention of arbitrating with Restoration Specialists, which is why a copy of the motion to compel arbitration was served with the complaint. (ROA 42–60). However, when Restoration Specialists and the other Appellants chose to ignore the pleadings and instead go into default, PCG took steps in reliance on those actions including withdrawing the motion to compel arbitration and referring the case to the Master in Equity. PCG had every right to change its position and pursue a default judgment after personal service was made and no response was received.

Second, Appellants are unable to prove any of the elements of estoppel. The elements of estoppel are: (1) conduct by the plaintiff calculated to convey the impression that the facts are otherwise than and inconsistent with the position he subsequently asserts in his cause of action; (2) plaintiff's intention or expectation that the defendant will act upon such conduct; (3) plaintiff's knowledge, actual or constructive, of the facts; (4)

defendant's lack of knowledge of the facts; (5) defendant's reasonable reliance on plaintiff's prior inconsistent conduct; and (6) defendant's detrimental change of position as a result of his reliance. *Hix*, 410 S.E.2d at 585. PCG has taken no inconsistent position of fact; it chose to withdraw its motion to compel arbitration based on the Appellants' default. PCG had no intention or expectation that Appellants would take any action as they ignored both the complaint and the motion to compel arbitration that were personally served on them. Appellants had full knowledge of all the facts and took no actions in reliance on PCG's conduct. Indeed, it was PCG that changed its position in reliance on the default of the Appellants. Appellants' argument that PCG is estopped fails.

b. Failure to Raise an Affirmative Defense

Appellants argue that 4th Circuit has held the failure to raise arbitration as an affirmative defense does not constitute a waiver of that right, relying on *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 205 (4th Cir. 2004). However, in *Patten*, the 4th Circuit recognized that the failure to raise arbitration as an affirmative defense in a party's answer can constitute a waiver of the right to arbitration and even recognized that this analysis is distinct from the more common "waiver by participation in litigation" analysis. The *Patten* Court held:

> Although Patten does not formally make the following distinction, under Federal Rule of Civil Procedure 8(c), Skanska's failure to invoke the arbitration clause in its answer to Patten's complaint arguably constitutes a waiver of that right, and thus an issue that is seemingly distinct from whether Skanska's participation in the litigation during the resulting delay in asserting that right amounts to a default under the FAA.

Id. The *Patten* Court did not conduct a separate analysis as it reasoned both arguments (waiver by the failure to raise the affirmative defense of arbitration and waiver by participation in litigation) require a showing of prejudice, which Patten was unable to

demonstrate. In the case *sub judice*, PCG has been severely prejudiced. See *supra*, Part IV.C.3.

Appellants also cite *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 982 (4th Cir. 1985) for the proposition that failing to raise the arbitration provision as an affirmative defense and going into default in the litigation does not operate as a waiver of the right to raise the provision. However, the third-party defendant seeking arbitration in *Maxum* filed its motion to dismiss pursuant to the arbitration clause as part of its answer. Of course, there would be no finding of waiver as the arbitration clause was properly raised. *Id.*

Most importantly, neither of the foregoing 4th Circuit cases cited by Appellants involves a party that failed to answer the complaint and was held in default before attempting to raise the affirmative defense of arbitration by motion months later. By contrast, the *Maxum* defendant sought arbitration by motion as part of its answer to the complaint against it, and the *Patten* defendant answered the complaint and made a motion for arbitration shortly thereafter – a motion for affirmative relief the defendant could make because it was not in default. Appellants spend almost 40 pages attempting to disprove black letter assertions (e.g., that arbitration is an affirmative defense and parties that are in default cannot seek affirmative relief without showing good cause sufficient to lift the default) and citing a plethora of cases where waiver of an arbitration provision is based on active participation in litigation inconsistent with arbitration rights.[7] However, in its 50-page brief, Appellants cite only one case in the context of a defaulting party moving for

[7] PCG asserts Appellants have waived their right to demand arbitration even under this test as was discussed more fully *supra*, Part V.D.4.

arbitration, the Supreme Court of Utah's opinion in *Cedar Surgery Center, LLC v. Bonelli*, 96 P. 3d 911, 2004 UT 58 (2004).

c. The Cedar Surgery Center case

In the one case Appellants cite in the context of a defaulting party moving for arbitration, the Utah Court reasons that the failure of the defendants to answer the complaint and participate in the litigation evidenced their intent to enforce the parties' arbitration provision.[8] However, in this case, the Appellants' failure to respond to the complaint and the accompanying motion to stay the litigation and compel arbitration evidences the opposite. Here, PCG served its own motion for arbitration with its complaint. If Restoration Specialists intended to enforce the arbitration provision, it could have simply answered and consented to arbitration.[9] Further, in this case Appellants did participate in the litigation by appearing at hearings, filing two motions and two affidavits, answering PCG's written discovery and providing three separate document productions to PCG all before raising the arbitration provision. When the Appellants chose to ignore the pleadings, PCG took steps in reliance on that inaction, including asking the circuit court to refer the case and withdrawing its own motion to compel arbitration. As the *Cedar Surgery Center* Court stated, Appellants should have "raised the contractual arbitration clause in an answer...and then brought a motion to compel arbitration, rather than simply ignoring" the

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[8] "By declining to answer Cedar Surgery's complaint or otherwise respond to the litigation, the Bonellis were, in effect, refusing to acknowledge Cedar Surgery's efforts to circumvent the arbitration process with which it had contractually agreed to abide." *Cedar Surgery Ctr., LLC*, 96 P.3d at 915.

[9] The failure of the Appellants to appear and consent to the arbitration motion made PCG constitutes a default under the FAA at 9 U.S.C. § 3 (1982) and operates as a bar to Appellants belated and improper arbitration demand as was discussed in more detail in section V.D.4 of this brief.

litigation. *Id.* at 915. Appellants only sought to compel arbitration after they were unsuccessful before the Master. Appellants' motion to compel arbitration is more akin to forum shopping than preserving any contractual rights. As the Pennsylvania court stated: Appellants "[h]ad every opportunity to raise and pursue the issue of arbitration but failed to do so. [Appellants] cannot avail themselves of the judicial process and then pursue an alternate route when they receive an adverse judgement. *DeLage Linden Fin. Services, Inc. v. Raynes, McCarty, Binder, Ross & Mundy*, 51 Pa. D. & C. 4th 57, 61–62 (Pa. Com. Pl. 2001) (internal citations omitted).

VI. CONCLUSION

Appellants are in default, and this appeal was filed before a damages hearing was held or a final judgment entered. Being unsuccessful before the Master, Appellants moved for arbitration to delay this case. This Court should dismiss this interlocutory appeal and remand.

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On this 12th day of September, 2017
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master in Equity

RECEIVED
SEP 27 2017
SC Court of Appeals

2016-CP-10-1143
Appellate Case No.: 2016-002308

Palmetto Construction Group, LLC Respondent,

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward, Appellants.

CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(b) SCRAP

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b) SCRAP.

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On this 26th day of September, 2017
Charleston, South Carolina

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v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward — Appellants

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STATEMENT OF ISSUES ON APPEAL

I. DID THE COURT ERR IN FAILING TO SET ASIDE THE ENTRY OF DEFAULT?

II. DID THE COURT ERR IN FAILING TO STAY THIS ACTION AND COMPEL MANDATORY MEDIATION/ARBITRATION?

STATEMENT OF THE CASE

This action arises out of a construction project in Augusta, Georgia. The Respondent and Appellant Restoration Specialists, LLC ("Appellant Restoration") entered into a Subcontract Agreement in connection with the Project. Respondent filed this lawsuit

on March 7, 2016, alleging a breach of the Subcontract Agreement. (R.pp. 9-41). Simultaneously with filing the lawsuit, Respondent filed a Motion to Stay and to Compel on March 7, 2016. (R.pp. 42-60). The basis of Respondent's Motion to Stay and to Compel was that the Subcontract Agreement contained mandatory mediation/arbitration provisions requiring the Court to stay the litigation and the parties to mediate in Georgia or other agreed upon location and, if necessary, arbitrate all claims contained in Respondent's lawsuit. (R.pp. 42-60).

Respondent simultaneously served all Appellants with both the Complaint and Motion to Stay and to Compel on March 14, 2016. (R.pp. 66-71).

Respondent filed a Motion to Refer to the Master in Equity and for Entry of Default on April 18, 2016. (R.pp. 61-71). The Circuit Court entered default against the Appellants on April 21, 2016. (R.p. 3).

On the evening of June 2, 2016, the Appellants were served with a Notice of Hearing scheduling the default damages hearing for June 6, 2016. (R.pp. 72-73 and 476). The Appellants were unaware of the default status of the case and the scheduling of the damages hearing until they received this hearing Notice on June 2, 2016. (R.pp. 74-76). Upon receipt of this Notice of Hearing, the Appellants immediately retained legal counsel on June 3, 2016. (R.pp. 74-76; R.p. 79, lines 13-14). Appellants' counsel immediately filed a Motion for Continuance of the damages hearing and a Motion to Set Aside Entry of Default on June 3, 2016, citing the mandatory mediation/arbitration provisions and Respondent's Motion to Stay and Compel mediation/arbitration as one of their grounds for relief. (R.pp. 77-87).

At the hearing on June 6, 2016, the Master in Equity ("Master") granted Appellants'

Motion for Continuance of the damages hearing and held the Motion to Set Aside Entry of Default in abeyance. (R.p. 466, Tr. p. 11, line 18 – p. 12, line 4). The Master then directed the Appellants to provide financial information relative to the Project to see what could be resolved between the parties and scheduled the matter to reconvene for a status conference on July 14, 2016. (R.p. 466, Tr.p.12, lines 6-23). Per the Master's direction, the Appellants provided certain relevant documents and basic written discovery responses to Respondent.

On July 11, 2016, the Appellants filed a formal Motion to Stay and to Compel on the basis of the mandatory contractual mediation/arbitration provisions. (R.pp. 88-93). In addition, the Appellants joined in and consented to Respondent's Motion to Stay and to Compel, rendering that motion a joint Motion to Stay and to Compel mandatory mediation/arbitration ("Joint Motion"). (R.pp. 88-93). As such, Appellants' singular and joint Motions to Stay and Compel mandatory mediation/arbitration were pending before the Master at this time.[1]

The parties reconvened before the Master on July 14, 2016. (R.p. 467). The Appellants also filed a Memorandum in Support of their Motion to Lift Entry of Default on July 14, 2016, which included Appellants' continued assertion of their right to arbitration. (R.pp. 94-124). During the reconvened hearing the Master stated that the Clerk of Court "closed out" the Respondent's Motion to Stay and Compel. (R.p. 467, Tr. p. 9, lines 5-8). The Clerk's closure of the motion occurred despite Appellant's joinder in the motion. The Master issued a bench ruling finding that the Clerk's action constituted an adjudication of this motion. (R.p. 467, Tr. p. 9, lines 5-9). The Master further ruled from

[1] While Respondent asserts that it "set aside" or "withdrew" its Motion to Stay and Compel, Appellants have not been provided a copy of documentation reflecting Respondent's setting aside or withdrawal of said motion, and, there is likewise nothing in the record substantiating same.

the bench finding Appellants in default, denying Appellants' Motion to Lift Entry of Default and scheduling a default damages hearing for October 4, 2016. (R.p. 467, Tr. p. 9, lines 12-17 and Tr. p. 12, lines 7-8).

Upon completion of the reconvened hearing, the Master issued a formal order dated July 14, 2016. (R.p. 4). The Master's formal order: (a): Denied Appellants' Motion to Lift Entry of Default for lack of good cause; (b): Denied Appellants' Motion to Stay and Compel mandatory mediation/arbitration on the basis of default; and (c): Set a damages hearing for October 4, 2016. (R.p. 4). Appellants received written notice of entry of these orders on July 18, 2016. (R.pp. 477-482).

The Appellants filed a timely Motion to Reconsider and to Alter and Amend the Master's orders pursuant to SCRCP 59(e) and applicable case law on July 27, 2016. (R.pp. 125-129). The Master scheduled the hearing on Appellants' Rule 59(e) motion to be held on October 11, 2016, seven days after the scheduled damages hearing on October 4, 2016. (R.pp. 483-484).

On September 7, 2016 standing on their rights to mandatory mediation/arbitration, the Appellants requested in writing that the Master schedule the hearing on Appellants' Rule 59(e) motion prior to the October 4, 2016 damages hearing. (R.p. 485).

On September 7, 2106, the Master replied to Appellants' request and made the decision to switch the hearing dates, with the motions hearing to be held on October 4, 2016 and, if necessary, the damages hearing to be held on October 11, 2016. (R.pp. 486-492). The Master asked the parties to advise if this plan was acceptable. (R.pp. 486-492). The Appellants informed the Master that this plan was acceptable. (R.pp. 486-492). The Respondent notified the Master that it would defer to the Master, but preferred the damages

hearing to proceed on October 4, 2016 and the motions hearing to be held thereafter on October 11, 2016. (R.pp. 486-492).

After further consideration, the Master then rendered a decision not to switch the hearing dates and informed the parties that the damages hearing would proceed on October 4, 2016 and the motions hearing would be held on October 11, 2016. (R.pp. 486-492). The Appellants received written notice of the Master's decision on September 12, 2016. (R.pp. 486-492).

The Master's decision to proceed with the damages hearing and not hear the Appellants' Rule 59(e) motion prior thereto effectively denied this motion as proceeding with the damages hearing under these circumstances would severely prejudice, and potentially force a waiver of Appellants' rights to arbitration and foreclose any appeal therefrom. Therefore, subject to, without waiving and fully reserving their rights to arbitration, the Appellants commenced an appeal in this matter on September 30, 2016. (R.pp. 496-500).

On September 30, 2016, after service of the Notice of Appeal on Respondent, the Appellants filed the Notice of Appeal with the Charleston County Clerk of Court. (R.pp. 508-511). On October 3, 2016, the Respondent filed its first Motion to Dismiss Appeal. (R.pp. 458-464). The Court of Appeals returned Respondent's first Motion to Dismiss on October 4, 2016 because no Notice of Appeal had been filed with the Court of Appeals as of that date. (R.p. 533).

On October 5, 2016, the Appellants filed the Notice of Appeal, along with the filing fee and copies of the orders challenged on appeal with the Clerk of the Court of Appeals. (R.pp. 512-522). The copies of the orders filed with the Clerk of the Court of Appeals

included the Master's Bench Order contained in the transcript of the July 14, 2016 hearing and the Master's formal written order dated July 14, 2016. (R.pp. 512-522). The Appellants simultaneously served the Respondent with a copy of the October 5, 2016 filing with the Clerk of the Court of Appeals on October 5, 2016. (R.pp. 512-522)..

On October 6, 2016, the Appellants refiled the Notice of Appeal, along with a second filing fee and copies of the orders challenged on appeal with the Clerk of the Court of Appeals. (R.pp. 523-532). The Appellants refiled these documents to include the court reporter's certification of the July 14, 2016 hearing transcript containing the Master's bench order. (R.pp. 523-532). The court reporter's certification had been inadvertently omitted from the Appellants' October 5, 2016 filing with the Clerk of the Court of Appeals. (R.pp. 523-532). The Appellants simultaneously served the Respondent with a copy of the October 6, 2016 filing with the Clerk of the Court of Appeals on October 6, 2016. (R.pp. 523-532).

Although this case was under appeal, the Master notified all parties that he intended to go forward with the hearing set for October 4, 2016. (R.pp. 493-495). During that hearing, the Master did not proceed with the damages hearing nor issue a ruling on the Rule 59(e) motion, but stated that he wished to establish a record for appellate court review of this matter. (R.p. 470, Tr. p. 9, lines 14-19). Accordingly, the Master accepted Appellants' Memorandum in Support of Defendant's Motion to Reconsider and to Alter or Amend (R.pp. 130-136), discussed the procedural posture of the case (R.pp. 468-470), allowed the parties to proffer information related to Appellants' Motion to Reconsider and to Alter or Amend (R.pp. 470-474) and allowed Respondent to proffer information related to damages alleged (R.pp. 474-475), to which Appellants' vehemently objected (R.p. 475). Further,

the Court asked Respondent to provide a responsive memorandum to Appellants' Rule 59(e) motion within ten (10) days, and allowed Appellants' five (5) days to reply. (R.p. 473, Tr. p. 22, lines 5-9 and R.p. 475, Tr. p. 31, line 23 – p. 32, line 6). Respondent filed its memorandum in opposition on October 26, 2016 (R.pp. 137-148) and Appellants replied thereto on October 25, 2016. (R.pp. 149-327).

On October 27, 2016, the Respondent filed its second Motion to Dismiss Appeal. (R.pp. 328-367). Thereafter, on November 10, 2016, the Court of Appeals issued an order stating that based on the Master's actions at the October 4, 2016 hearing, it appeared the Master intended to issue a final written order on the Rule 59(e) motion. (R.p. 7). Accordingly, the Court of Appeals dismissed Appellants' initial appeal without prejudice ruling that the Appellants could appeal after the Master's issuance of a final, written order on the Rule 59(e) motion. (R.p. 7).

On October 28, 2016, the Master issued an order ruling on Appellants' motion to reconsider pursuant to Rule 59, SCRCP. (R.pp. 5-6). The Master's Order: (a): Denied Defendants' Motion to Amend on the basis that Defendants did not show good cause to lift the default, and (b): Denied Defendants' Motion to Stay and Compel filed July 11, 2016 on the basis that the affirmative defense of arbitration had been waived and therefore the motion was not properly made. (R.pp. 5-6). Appellants received written notice of entry of this order on November 2, 2016. (R.pp. 501-502).

The Appellants commenced the instant appeal on November 14, 2016, appealing the Orders of the Honorable Mikell R. Scarborough dated July 14, 2016 and October 28, 2016. (R.pp. 501-507). On December 2, 2016, the Respondent filed a Motion to Dismiss Appeal. (R.pp. 368-376). Thereafter, the parties fully briefed Respondent's motion and,

on February 1, 2016, the Court of Appeals issued an order denying Respondent's Motion to Dismiss Appeal and directing Appellants to file their initial brief and designation of matter. (R.p. 8).

FACTS

This case arises out of a construction project in Augusta, Georgia. (R.p. 13, lines 1-3). On March 29, 2012, the Appellant, Restoration Specialists ("Appellant Restoration") was awarded a contract to construct the Charlie Norwood VAMC Parking Garage in Augusta, Georgia. ("the Norwood Parking Garage Project" or the "Project"). (R.p. 94). Prior to the contract award, the Respondent entered into a Teaming Agreement with Appellant Restoration in December 2011 (R.pp. 32-37). The Respondent entered into a Subcontract Agreement with Appellant Restoration on September 10, 2014 in connection with the Project. (R.pp. 17-31).

Respondent's Complaint alleges that Appellant Restoration has failed to pay the contract balance due under the Subcontract Agreement and asserts additional claims relating to the Project against the Appellants, Reuben Mark Ward and Lynnette Pennington Ward ("Ward Appellants"). (R.pp. 12-16).

ARGUMENTS

I. BECAUSE GOOD CAUSE EXISTS FOR RELIEF FROM THE ENTRY OF DEFAULT, THE COURT ERRED WHEN IT DENIED APPELLANTS' MOTION TO SET ASIDE ENTRY OF DEFAULT.

(A): Appellate Standard Of Review.

The decision whether to set aside an entry of default lies solely within the sound discretion of the circuit court. *Harbor Island Owners' Ass'n v. Preferred Island Props.*,

369 S.C. 540, 544, 633 S.E. 2d 497, 499 (2006). The circuit court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E. 2d 321, 322-23 (Ct. App. 1988). An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E. 2d 454, 459 (Ct. App. 1997).

(B): The Standard For Granting Relief From An Entry Of Default Under Rule 55(c), SCRCP Is Mere Good Cause.

The standard for granting relief from an entry of default under Rule 55(c), is mere "good cause." Rule 55(c), SCRCP. *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 753 S.E. 2d 537 (2014). This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E. 2d 885, 888 (2009). Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted. *Id.* at 607-08, 681 S.E. 2d at 888.

The law does not favor defaults. Therefore, in applying this standard, Rule 55(c) "is liberally construed to promote justice and dispose of cases on the merits." *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 178, 463 S.E. 2d 636, 638 (Ct. App. 1995).

(C): The Appellants' Rights To Mandatory Mediation/Arbitration Under The Contract Constitute Good Cause For Relief From The Entry Of Default.

In the present case, the contract giving rise to this action requires all claims arising out of or related to the contract to be mediated, and if not resolved by mediation, to be resolved by binding arbitration. Pursuant to these provisions, and contemporaneously with the commencement of this action, the Respondent made and served upon Appellants a demand for mandatory mediation/arbitration in its Motion to Stay and Compel. By doing so, the Respondent informed Appellants that it had made a demand for mandatory mediation/arbitration of this dispute under the terms of the contract. Respondent's demand also triggered the requirements of the South Carolina Uniform Arbitration Act and/or Federal Arbitration Act mandating a stay of this action and compulsory mediation/arbitration. Respondent's demand was consistent with the parties' rights to arbitration under the contract and Appellants' reliance thereon was justified.

Within twenty-four (24) hours of learning of Respondent's application for default and the entry of default against them, the Appellants immediately moved to be relieved from default, citing the mandatory mediation/arbitration provisions and Respondent's Motion to Stay and Compel mediation/arbitration as a grounds for relief. Appellants filed their Motion to Lift Entry of Default within one and a half (1 ½) months of the entry of default. Also, Appellants formally joined in Respondent's motion and filed a separate Motion to Stay and Compel mandatory mediation/arbitration less than four (4) months after Respondent's commencement of suit.

The Court's good cause analysis must include the application of the proper legal standards to these contract provisions as well as the question of waiver/default of

the arbitration rights thereunder. The proper legal standards are discussed in the Brief of Appellants, Arguments Section II.(E)(2) below. Applying any other standards would be an error of law and modify the long standing arbitration jurisprudence of South Carolina, the United States District Court for the District of South Carolina and the Fourth Circuit Court of Appeals.

Applying the proper legal standard to the evidence on record establishes that the mandatory mediation/arbitration provisions apply to the Respondent's claims and that the Appellants have neither waived nor defaulted upon their rights to arbitration. *See* Brief of Appellants, Arguments Section II.

Since there has been no waiver or default upon Appellants' rights to mandatory mediation/arbitration, the Court is required to stay this litigation and submit the matter to mediation/arbitration. *See* Brief of Appellants, Arguments Section II. Furthermore, by virtue of this requirement to stay the litigation and compel arbitration, the Court must divest itself of subject matter jurisdiction upon submission to mediation/arbitration. *See* Brief of Appellants, Arguments Section II.

Standing alone, these facts and the legal conclusions arising therefrom constitute good cause for lifting the entry of default, staying this action and compelling mandatory mediation/arbitration. *See* Rule 55(c), SCRCP; *see also* Brief of Appellants, Arguments Section II.

The Master's failure to apply the proper legal standards governing the arbitration rights of the Appellants constitutes an error of law and abuse of discretion under Rule 55(c), SCRCP. Therefore, the Master's Orders of July 14, 2016 and October 28, 2016 should be reversed and the Appellants should be relieved from default.

(D): The Appellants' Provided A Satisfactory Explanation For The Default And Vacation Of The Entry Of Default Will Serve The Interests Of Justice And Reverse The Error Of Law Regarding Appellants' Arbitration Rights.

The Appellants did not file a timely response to the complaint due to an unintentional and good faith misunderstanding of the status of Appellants' arrangements with The Hanover Insurance Company ("Hanover") and the relation of Respondent's lawsuit thereto. (R.pp. 74-75).

Hanover is the surety under the Payment Bond on the Project referenced by Respondent in its Complaint (R.pp. 12-16, 38-39). Respondent references an indemnity agreement with Hanover in its Complaint and alleges that the Appellants must indemnify the surety and Respondent to the extent it is required to pay. (R.pp. 12-16). Respondent further claims that, due to Appellants' alleged failure to pay the contract balance due, claims have been made by other subcontractors upon the Payment Bond and as a consequence subcontractors are making claims against Respondent and its surety, Hanover. (R.pp. 12-16).

Based on these allegations in the complaint, the Appellants did not understand that Plaintiff's lawsuit was separate and apart from the bond claims that they had been working directly with Hanover to address. The Appellants are not attorneys, are unversed in the procedural rules of court and assumed the lawsuit was being handled as part and parcel of their arrangements with Hanover.

The Appellants' misunderstanding in this regard was innocent and carried no intention of gaining an unfair advantage over the Respondent or delaying legal proceedings. Upon learning of their error, Appellants immediately retained legal counsel

to appear and respond on their behalf in this matter.

Furthermore, the law does not favor defaults. As such, Rule 55(c) is liberally construed to promote justice and dispose of cases on the merits. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 463 S.E. 2d 636. The Appellants' short delay in making their appearance and responding to Respondent's lawsuit constitutes no prejudice to Respondent. *See* Brief of Appellants, Arguments Section I(G). Also, the Appellants have asserted various defenses to Respondent's lawsuit, which if prevailed upon, would render a verdict contrary to the result reached by the entry of default. *See* Brief of Appellants, Arguments Section I.(F). Finally, the Appellants are entitled to mandatory mediation/arbitration and the Master's finding of a default or waiver of these rights due to the entry of default or waiver of affirmative defenses is an abuse of discretion under Rule 55(c), and, therefore, reversible error.

For these reasons, vacating the entry of default is proper and would serve the interests of justice and promote disposition of the case on the merits.

(E): The Appellants Promptly And Timely Filed Their Motion Seeking Relief From The Entry Of Default.

The Respondent filed a Motion to Refer to the Master in Equity and for Entry of Default on April 18, 2016. Thereafter, the Court entered default against the Appellants on April 21, 2016.

On the evening of June 2, 2016, the Appellants were served with a Notice of Hearing scheduling the default damages hearing for June 6, 2016. The Defendants were unaware of the default status of the case and the scheduling of the damages hearing until they received this Notice of Hearing on June 2, 2016.

Upon receipt of the Notice of Hearing, the Appellants immediately retained legal counsel on June 3, 2016. Appellants' counsel immediately filed a Motion for Continuance of the damages hearing and a Motion to Set Aside Entry of Default on June 3, 2016.

As established by the above timeline, the Appellants took immediate action upon learning of the default status and receipt of the Notice of Hearing for the damages hearing. This action included the retention of defense counsel within 24 hours of becoming aware of the default status and damages hearing followed by the immediate filing of the Motion to Set Aside Entry of Default. Thus, the Appellants satisfied the good cause timely motion filing requirement of Rule 55(c), SCRCP.

(F): The Appellants Are Entitled to Mandatory Mediation/Arbitration Of This Matter and Have Meritorious Defenses To The Plaintiff's Lawsuit.

The Appellants are entitled to mandatory mediation/arbitration of the claims in Respondent's lawsuit for the reasons set forth in the Brief of Appellants, Arguments Section II. In addition, the Appellants have asserted further substantive defenses to Respondent's claims as raised in their Motion to Lift Entry of Default and set forth below:

(1): Respondent has been paid in full under the Subcontract Agreement, including an overpayment in excess of Fourteen Thousand ($14,000.00) Dollars;

(2): There is no agreement for profit sharing between the parties. Per the Teaming Agreement, entered into between Respondent and Appellant Restoration in connection with the Project, "[n]othing herein shall be construed as providing for the sharing of profits or losses arising out of the efforts of either or both of the Parties; except as may be provided for in any resultant contractual arrangement agreed to between the Parties." (R.p. 33, lines 12-15). Further, there is nothing in the Subcontract Agreement between the parties related

to the project that allows for profit sharing (R.pp. 17-31);

(3): The Payment Bond delineates the obligation for payment of Project subcontractors and vendors as that of Restoration, as Principal, and The Hanover Insurance Company, as Surety. (R.pp. 38-39). Appellants dispute the claims made by many of the subcontractors which have made claims against the Payment Bond;

(4): Appellant Restoration has not paid all subcontractors and vendors in full as the Department of Veterans' Affairs has not made final payment under the Contract;

(5): The Teaming Agreement includes a waiver of damages, specifically: "ARTICLE 9 DAMAGES – Neither Party shall be liable to the other for any indirect, special or consequential losses, whether arising in contract, tort (including negligence), or otherwise." (R.pp. 94-124).

If Appellants prevail on any of the above-enumerated defenses, the outcome would be contrary to the result rendered by the entry of default. Therefore, the Appellants have set forth a meritorious defense sufficient to satisfy the good cause standard of Rule 55(c), SCRCP.

(G): The Respondent Will Not Suffer Prejudice If The Court Lifts The Entry Of Default And/Or Stays The Action And Compels Mandatory Mediation/Arbitration.

The Appellants responded to Respondent's lawsuit with the retention of counsel and filing of a Motion to Set Aside Entry of Default on June 3, 2016. The Appellants took these actions within 51 days of the date on which Appellants' answer to the Complaint was originally due, within 43 days of the entry of default, and within 24 hours of first learning of the default status and damages hearing. The Appellants' brief delay was short and creates no prejudice to the Respondent's ability to litigate the case. This brief delay has

caused no actual prejudice to Respondent such as loss of evidence, increased difficulties of discovery, opportunity for fraud or collusion, or undue expense or damage to the Respondent's legal position.

Respondent attempts to claim prejudice through its' counsel's statements in Respondent's memorandum in opposition to Appellants' Rule 59(e) Motion to Reconsider Alter or Amend. Specifically, Respondent's counsel states that "Palmetto would be severely prejudiced if the default were lifted as the passage of time pushed Palmetto closer to closing their doors, and further, Palmetto has taken actions, like withdrawal of its motion to compel arbitration and referral of the action to the Master in Equity, as a result of [Appellants] failure to timely answer." (R.p. 139, lines 12-16).

The statement related to Respondent "closing [its] doors" is a bald assertion of its counsel and is not supported by evidence in the record. Proof of prejudice cannot be speculative, nor based on conclusory allegations. *General Equip. & Supply Co., Inc. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001); *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F. 3d 200 (4th Cir. 2004); *see also* Brief of Appellants, Arguments Section II (and cases cited therein).

Respondent's remaining claims of "prejudice" proffered by its' counsel's allegations in the referenced legal memorandum refer to activities which are either not supported by the record or are nominal at best and insufficient to establish actual prejudice under applicable law. *See* Brief of Appellants, Arguments Section II. (and cases cited therein).

Furthermore, the Respondent itself demanded mandatory mediation/arbitration of its claims at the time it filed its lawsuit. Certainly, it cannot now reverse its position and complain of any prejudice which would result from setting aside the default and submitting

the claims to mediation/arbitration.

In fact, the corollary to the lack of prejudice to the Respondent is the extreme prejudice the Appellants will suffer if the default is not lifted and the court proceeds with a default damages hearing. In this circumstance, the Respondent will have received significant undue advantage in achieving a default based litigation result that is not based on the merits of the case. Moreover, this result will obtain in a case Respondent acknowledges is governed by contractually agreed upon mandatory mediation/arbitration and over which the court is mandated to cede jurisdiction to the arbitration forum. This extreme prejudice will be further magnified by the significant limitations and restrictions imposed upon Appellants' rights to defend against Respondent's claims in the damages hearing forum.

For these reasons, and as no prejudice will result to Respondent in setting aside the entry of default, this good cause factor under Rule 55(c), SCRCP is satisfied.

II. BECAUSE THE CONTRACT CONTAINS MANDATORY MEDIATION/ARBITRATION PROVISIONS AND THE APPELLANTS HAVE NOT DEFAULTED UPON NOR WAIVED THEIR RIGHTS TO MEDIATION/ARBITRATION, THE COURT ERRED WHEN IT FAILED TO STAY THIS ACTION AND COMPEL MEDIATION/ARBITRATION.

(A): Appellate Standard of Review.

The denial of a motion to compel arbitration, based on a finding of waiver, is a legal conclusion subject to *de novo* review on appeal. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E. 2d 868 (Ct. App. 2013); *MailSource, LLC v. M.A. Bailey & Assoc.*, 356 S.C. 370, 374, 588 S.E. 2d 639, 641 (Ct. App. 2003).

(B): Public Policy Supports Contractually Agreed Arbitration.

The parties' contract is clearly an integrated and executed written agreement

whereby Respondent and the Appellants agreed to resolve their disputes through mandatory mediation, and if necessary, through arbitration. (R.pp. 17-31); *see also* Brief of Appellants, Arguments Section II.(C). Pursuant to South Carolina Code Annotated §15-48-10, such an agreement is "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." South Carolina Code Ann. § 15-48-10. Likewise, under federal law such an agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Moreover, "the policy of the United States and South Carolina is to favor arbitration of disputes." *Tritech Elec. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E. 2d 864 (Ct. App. 2000) (quoting *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E. 2d 135, 136 (1995). Further, South Carolina and federal courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. *See Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 569 S.E. 2d 349 (2002); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E. 2d 839 (Ct. App. 1999); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("[A] as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself *or an allegation of waiver, delay, or a like defense...*") (emphasis added).

Given both the United States and South Carolina's well recognized and articulated preference for arbitration, and the fact that the parties entered into a written agreement to arbitrate all disputes arising out of or related to the contract, the South Carolina Court of Appeals should reverse the lower court's ruling and stay this action and compel the matter

to mandatory mediation/arbitration.

(C): All Appellants Are Entitled to Mediation/Arbitration Under the Alternative Dispute Resolution Provisions of the Contract.

The Respondent's Complaint and the causes of action asserted against all Appellants, including the individual Appellants, Reuben Mark Ward and Lynnette Pennington Ward ("Ward Appellants"), allegedly arise out of or are related to the contract containing the arbitration provisions. These provisions require all claims arising out of or related to the contract to be mediated, and if not resolved by mediation, to be resolved by binding arbitration.

Moreover, the arbitration provisions of the contract expressly allow for the joinder of non-signatories, such as the Ward Appellants, to the arbitration. Specifically, § 6.3.4 of the contract states in relevant part:

"Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder." (R.p. 25, lines 1-4).

Based on the allegations in the Complaint, the Ward Appellants are first party Defendants substantially involved in common questions of law and fact whose presence is required for a complete resolution of this matter. The Ward Appellants consented in writing to their joinder in the arbitration in their Motion to Stay and to Compel Pursuant to SCRCP 12(b)(1) and Applicable Case Law. Specifically, the Ward Appellants stated in their motion:

"The Plaintiff has moved the Court to stay this action and compel mediation, and if

necessary, arbitration by the parties to proceed as contractually required by the mandatory mediation/arbitration provisions contained in Article 6 of the contract. *The Defendants hereby join in and consent to Plaintiff's motion and the relief requested therein, including the stay of this matter and submission of Plaintiff's claims to mediation and, if necessary, binding arbitration.*" (emphasis added). (R.p. 90, line 17 – p. 91, line 1).

Furthermore, the Respondent is equitably estopped from denying the applicability of the mandatory mediation/arbitration clause as to all Appellants. The record establishes that Plaintiff initially acknowledged the validity of the arbitration provisions to all claims in this matter by filing its Motion to Stay and Compel at the commencement of this action. The Respondent's Motion to Stay and Compel demanded that all claims in this action, including Respondent's claims against the Ward Appellants, be stayed and compelled to mediation, and if necessary, to arbitration. "The very essence of equitable estoppel is to prevent a party from taking one position when it is to that party's advantage, and taking the opposite position when it is to that party's disadvantage." *See U.S. ex rel. Coast Roofing v. P. Browne & Assoc.*, 585 F. Supp. 2d. 708, 715 (D.S.C. 2007). Thus, the fact that Respondent acknowledged the validity of the arbitration provision, as well as Appellants' standing to be involved in mediation and arbitration under that provision, "strongly speaks to both the provision's validity and [all of] the Appellants' standing to enforce the arbitration provision in the agreement." *See id.*

In addition to Respondent's own acknowledgement of the Appellants' standing under the arbitration clauses, the "intertwined claims" test further equitably estops Respondent from denying all Appellants, including the Ward Appellants, standing to enforce the arbitration provisions.

Under the intertwined claims test, "the circuits have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.' *Id.* (quoting *Thomson-CSF, S.S. v. Am. Arbitration Assoc.*, 64 F.3d 773, 779 (2d Cir. 1995); *see also Choctaw Generation Ltd. P'ship v. American Home Assur. Co.*, 271 F. 3d 403, 406 (2d Cir. 2001)). To be equitably estopped from denying the applicability of an arbitration clause, the signatory need not necessarily assert a cause of action against the nonsignatory for breach of the contract containing the arbitration clause. *Id.* Instead, estoppel is appropriate if "in substance [the signatory's underlying] complaint [is] based on the [nonsignatory's] alleged breach of the obligations and duties assigned to it in the agreement." *Am. Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623, 627-28 (4th Cir. 2006) (quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F. 3d 753, 757 (11th Cir. 1993)).

Such is unquestionably the case here. While Respondent does not include a cause of action for breach of the Subcontract Agreement against the Ward Appellants in its Complaint, at the heart of its various claims against the Ward Appellants are its allegations that: (a) Respondent relied to its detriment on representations made by Appellant Mark Ward that he would manage the construction Project awarded under the primary contract and that all monies therefrom would be used to pay for material and labor supplied to the Project; and (b) all Appellants, including the Ward Appellants, are contractually bound to pay funds on claims made on the surety bond required by the primary contract for the Project. Therefore, it is clear that Respondent's claims are substantively "intertwined" with the obligations it alleges the Ward Appellants assumed in connection with the primary

contract. *See U.S. ex. Rel. Coast Roofing*, 585 F. Supp. 2d. 708.

Based on the above, as well as the remaining authorities cited below in the Brief of Appellants, all of the Appellants, including the Ward Appellants, have standing to enforce the mandatory mediation/arbitration provisions and be involved in mediation and arbitration of the claims asserted in this matter. *Id.*

(D): The Respondent's Motion To Stay And Compel, Which Motion The Appellants Joined In And Consented To, Should Be Properly Adjudicated And The Relief Requested Therein Granted.

The Respondent filed and served a Motion to Stay and Compel mandatory mediation/arbitration contemporaneously with the commencement of this action. The Appellants joined in and consented to this motion as a part of their Motion to Stay and Compel filed on July 11, 2016, thus rendering the motion a joint motion for all parties to the case.

The Clerk of Court "closed out' this motion due to the referral of the case to the Master. (R.p. 467, Tr. p. 9, lines 5-8). The Clerk's closure of the motion occurred despite Appellants' formal joinder in the motion. The Master issued a bench ruling, finding that the Clerk's action constituted an adjudication of this motion. (R.p. 467, T. p. 9, lines 5-9). The Master's ruling became final in his written order denying Appellants' Motion to Stay and Compel dated July 14, 2016. The summary closure of this joint motion as an administrative matter and the Master's "adjudication" of this motion on that basis does not constitute a proper adjudication of this motion nor a valid basis for waiver of Appellants' arbitration rights. *See General Equipment v. Keller Rigging,* 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001) (finding that the referral of a case to the Master-in-Equity does not

constitute a waiver of the right to arbitration).

For this reason, and based on the remaining controlling authorities cited below in the Brief of Appellants, the joint motion should be properly adjudicated and a judicial decision rendered granting the motion and submitting the matter to mandatory mediation/arbitration.

(E): The Defendants Have Not Defaulted Upon Nor Waived Their Right To Mediation/Arbitration Under The Mandatory Alternative Dispute Resolution Provisions Of The Contract And Applicable Law.

(1): The Master's Ruling That The Right To Arbitration Is An Affirmative Defense Which Has Been Waived By Appellants Constitutes An Error Of Law And Should Be Reversed.

The Master, without citing any supporting authority, ruled in his October 28, 2016 order that "the affirmative defense of arbitration has been waived and Defendants' Motion to Stay and Compel filed July 11, 2016 was not properly made." The Respondent raised various arguments before the Master asserting that Appellants' right to arbitration under the arbitration agreement is an affirmative defense which has been waived by Appellants under both state and federal law.

State Law Analysis

The Respondent first claims that "arbitration" is an affirmative defense as *specifically defined* by Rule 8(c) SCRCP. However, neither the right to arbitration nor the existence of an arbitration agreement are listed as specific defenses under Rule 8(c) SCRCP. Instead, the only arbitration defense *specifically defined* in Rule 8(c) is the defense of "arbitration and award." The defense of "arbitration and award" is an

affirmative defense asserting that the subject matter of the action has already been settled in arbitration. *Black's Law Dictionary* 120 (9th ed. 2009). Thus, the specified arbitration defense contained in Rule 8(c) is limited to the situation where a dispute already have been arbitrated and an award has been obtained. *Id.* Neither of these events has occurred in this case and Respondent's reliance on Rule 8(c) is erroneous.

The Respondent next asserts that South Carolina courts have consistently held that arbitration is an affirmative defense. Respondent cites two South Carolina cases for this proposition; namely, *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E. 2d 312 (2012) and *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 689 S.E. 2d (2010).

As a procedural matter, the defendant in the *Bradley* case asserted *lack of jurisdiction* due to an arbitration agreement as an affirmative defense in its responsive pleading. The defendant asserted its **right to arbitration in a motion to stay the proceedings and compel arbitration** filed concurrently with its responsive pleading. The plaintiff in the *Bradley* case initially opposed defendant's motion to compel arbitration on the ground that defendant waived the right to assert the *jurisdictional* affirmative defense due to defendant's delay in responding to discovery requests. Thus, the issue of whether, in South Carolina, the right to arbitration is an affirmative defense that is waived if not pled in a defendant's answer was not before the *Bradley* court. Furthermore, the *Bradley* court specifically stated that it did not need to address plaintiff's waiver argument *concerning delayed discovery* in light of its disposition on the merits.

Regarding the merits, the plaintiff claimed that the arbitration agreement in question was not subject to the Uniform Arbitration Act ("UAA") or the Federal Arbitration Act ("FAA"). In response, the defendant argued that even if the arbitration

provision in the agreement did not comply with the requirements of the UAA, it was subject to the FAA as the transaction involved interstate commerce.

The *Bradley* court found that the arbitration agreement did not meet the requirements of the UAA and spent the remainder of its analysis on the legal issue of whether the transaction involved interstate commerce thus rendering the arbitration agreement enforceable under the FAA. The *Bradley* court ultimately held that the motion to stay the proceedings and compel arbitration must be denied due to a lack of sufficient evidence of interstate commerce.

In short, the *Bradley* court did not hold or otherwise rule that, in South Carolina, the right to compel arbitration is an affirmative defense that is waived if not pled by a defendant in a responsive pleading.

In the *Partain* case, the defendant asserted three affirmative defenses in its Answer, including an arbitration agreement with plaintiff. While a statement of fact as to the mechanics of defendant's answer and the defenses asserted therein, the *Partain* court's reference to these defenses in the procedural history of the case does not constitute a ruling that the right to arbitration is an affirmative defense that is waived if not pled under South Carolina law. In fact, the sole legal issue before the *Partain* court was whether the plaintiff's claims were within the scope of the arbitration agreement. Once again, the *Partain* court did not hold or otherwise rule as a matter of South Carolina law that the right to compel arbitration is an affirmative defense that is waived by a defendant if not pled in a responsive pleading.

The Respondent concluded its state law arguments before the Master with the assertion that an affirmative defense is waived if not pled in South Carolina. Respondent

cites three South Carolina cases for this proposition. A review of these remaining three cases establish that they are distinguishable and inapposite to the arbitration issues before this court.

The first case cited is *Delta Apparel, Inc. v. Farino,* 406 S.C. 257, 750 S.E. 2d 615 (Ct. App. 2013). The *Delta* case does not involve an arbitration agreement nor the issue of waiver of the right to arbitration. Also, the *Delta* case does not involve a situation wherein, as here, all parties to the litigation applied for arbitration via motions to stay and compel arbitration. Instead, the *Delta* case concerns the defenses of res judicata and collateral estoppel.

The second case cited is *Howard v. S.C. Dep't of Highways,* 343 S.C. 149, 538 S.E. 2d 291 (Ct. App. 2000). Likewise, the *Howard* case does not involve an arbitration agreement, the issue of waiver of the right to arbitration, nor the filing of applications for arbitration by all parties to the litigation. Instead, the *Howard* case concerns the defense of assumption of the risk.

The third and final case cited by Respondent is *RIM Assoc. v. Blackwell,* 359 S.C. 170, 597 S.E. 2d 152 (Ct. App. 2004). Once again, the *RIM Assoc.* case does not involve an arbitration agreement, the issue of waiver of the right to arbitration, nor the filing of applications for arbitration by all parties to the action. Instead, the *RIM Assocs.* case concerns the defense of res judicata.

On the other hand, contrary to the Respondent's arguments and cited cases, is the Court of Appeals opinion rendered in *General Equipment v. Keller Rigging,* 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001). In *General Equipment,* the defendants filed an answer denying the plaintiff's allegations, but did not include an affirmative defense of arbitration.

Six months later, two weeks prior to the scheduled trial, the defendants filed a motion to compel arbitration. The Master denied defendant's motion to compel arbitration and the defendants appealed. If, under South Carolina law, the defendants has waived their right to arbitration by failing to plead arbitration as an affirmative defense, the appellate court would have been bound to affirm the Master's denial of defendant's motion to compel arbitration. As a corollary, the appellate court would not have analyzed the traditional issues under South Carolina's established standard for waiver concerning the extent of the parties involvement in litigation, the period of delay and the undue burden and prejudice caused by that delay. Instead, the Court of Appeals applied the established South Carolina standard for waiver, held that the defendants had not waived their rights to arbitration and reversed the Master's decision.

Based on the above, as well as the remaining controlling authorities cited in the Brief of Appellants, the Appellants have not waived their right to arbitration under South Carolina law.

Federal Law Analysis

The Respondent first claims that "arbitration" is an affirmative defense as *specifically defined* by Rule 8(c) FRCP. However, neither the right to arbitration nor the existence of an arbitration agreement are listed as specific affirmative defenses under Rule 8(c) FRCP. To the contrary, the only arbitration defense *specifically defined* in Rule 8(c) is the defense of "arbitration and award." The defense of "arbitration and award" is an affirmative defense asserting that the subject matter of the action has already been settled in arbitration. *Black's Law Dictionary* 120 (9th ed. 2009). Thus, the specified arbitration defense contained in Rule 8(c) is limited to the situation where a dispute already has been

arbitrated and an award has been obtained. *Id.; Lee v. Grandcor Medical Systems, Inc.*, 702 F. Supp. 252 (D. Colo. 1988). Neither of these events have occurred in this case and Respondent's reliance on Rule 8(c) is erroneous.

The Respondent next cites *McDonnell v. Dean Witter Reynolds, Inc.*, 620 F. Supp. 152 (D. Conn. 1985) for the proposition that under federal law arbitration is an affirmative defense that must appear in the answer and that "a party's failure to plead an affirmative defense bars its invocation at later stages of the litigation." *Id.*, 620 F.Supp. 152, 155-56.

The *McDonnell* case is an opinion issued by the United States District Court for the District of Connecticut. The District of Connecticut is not within the Fourth Circuit Court of Appeals; instead, it is located within the Second Circuit Court of Appeals. In the *McDonnell* case the plaintiff filed his federal action in April 1982. He filed claims against his securities broker, Dean Witter, Reynolds, Inc. ("Dean Witter") and a former Dean Witter employee for the alleged mismanagement of his securities account. Plaintiff filed his original and several amended complaints during the period between April 1982 and February 1983. Defendants filed a motion to dismiss and an answer during this 11 month period. The defendants' motion and answer failed to assert the right to arbitration.

Thereafter, for almost 2 years the parties engaged in lengthy discovery proceedings including interrogatories, depositions and production of documents. *Id.* On several occasions, the Court's intervention was necessary to resolve disputes which arose during the discovery process. *Id.*

Finally, in an effort to dispose of the case, the District Court ordered the parties to try the action in January 1985. *Id.* However, the case was continued to allow completion of discovery two times up until a trial date was set on April 4, 1985. *Id.*

Three days before jury selection, defendant Dean Witter *for the first time* sought by way of motion to compel arbitration of Plaintiff's state law claims. *Id.* On April 4, 1985, defendant Dean Witter amended its motion to request arbitration of plaintiff's federal law claims as well. *Id.* On April 26, 1985, defendants moved to amend their answer to assert a "Sixth Affirmative Defense" for arbitration. *Id.* at 155. On May 2, 1985 defendants filed a "Clarified Motion to Compel Arbitration and for a Stay of Proceedings." *Id.*

The *McDonnell* court started its analysis by stating that arbitration is an affirmative defense that will be waived if not pled in a party's answer. *Id.* at 155. In making this statement, the *McDonnell* court was citing the standard applied in the United States Court of Appeals for the Second Circuit. The court was not citing the standard applied in the federal district courts in South Carolina and the Fourth Circuit Court of Appeals.

The *McDonnell* court next addressed the issue of whether the motion to amend the answer to assert the arbitration defense should be granted. The court determined that under the facts of the case it would be unfair and unjust to grant defendants' motion to amend. Specifically, the court held that: (a) granting the motion would cause prejudice and injustice to the plaintiff due to his engagement in comprehensive and expensive discovery, motion practice, and other proceedings preparatory to a trial in the court; (b) denying the motion would not be unjust or prejudicial to defendants since they would have a forum in this court to raise their defensed to plaintiff's claims and they had already expended substantial sums for discovery in this court, so that the only additional expense to defendants would be the expense of trial; and (c) the delay in seeking arbitration via the motion to amend was blatantly tardy, overwhelming and undue since the motion to amend was filed after the case was assigned for trial three times, and only three days before a jury

was to be selected in this three-year old case. *Id.* at 156.

After issuing this ruling, the *McDonnell* court turned to the merits of the arbitration waiver question and fully analyzed this issue *even though the defendants had not asserted arbitration as an affirmative defense in their pleading.* The court cited the following standards as the proper test by which to determine the question of waiver in cases pending in the Second Circuit: (1) whether the delay in the filing of a motion to compel arbitration prejudices the opposing party; or (2) whether there has been the litigation of substantial issues going to the merits by the time an intention to arbitrate was communicated by the defendant to the plaintiff. *Id.* at 159. Also, the court stated that the giving of notice of an intention to arbitrate to the party opposing arbitration was an important factor in Second Circuit cases as well. *Id.*

Applying these principles to the facts of the case, the *McDonnell* court stated "it is clear that Dean Witter has waived its right to arbitrate. Plaintiff, without notice that Dean Witter might move to compel arbitration, embarked on lengthy and expensive discovery and will be greatly prejudiced and inconvenienced by the delay. For its part, Dean Witter has engaged in robust pretrial litigation over a period of nearly three years, and *at no point raised the arbitration defense in an answer* ***or other filing.*** (emphasis added). In addition to moving for several extensions and attending chambers conferences, Dean Witter has engaged in discovery that would not have been available to it if it had gone to arbitration. The instant motion was filed only after this case was assigned and reassigned for trial. Under these circumstances, not only has Dean Witter's delay prejudiced plaintiff, but Dean Witter also has litigated "substantial issues going to the merits." *Sweater Bee,* 754 F. 2d at 461. Accordingly, under either of the standards set forth in *Sweater Bee* and *Caricich,*

Dean Witter has waived its right to compel arbitration of this dispute." *McDonnell*, 620 F. Supp. At 159.

Turning to the present case, none of the Second Circuit factors considered dispositive by the *McDonnell* court are present. Specifically, in the present case: (1) there has been no substantial discovery or proceedings preparatory for trial in the lower court; (2) notice of the right to arbitration was timely inasmuch as Respondent itself moved to stay this action and compel arbitration contemporaneously with the commencement of litigation and Appellants joined in this motion and filed their own motion to stay and compel arbitration less than four (4) months thereafter; (3) while Appellants did not raise the arbitration defense in an answer, they did raise the defense early and often both in their Motion to Lift Entry of Default and Motion to Stay and Compel arbitration, and in their joinder in Respondent's Motion to Stay and Compel arbitration; (4) there has been no litigation whatsoever of substantial issues going to the merits; (5) there has been no prejudice to the Respondent associated with Appellants' application for arbitration; and (6) pursuant to the Master's orders below, the Appellants will be prejudiced since they will be restricted to a damages hearing and not have a forum in the court to raise their substantive defenses to Respondent's claims. Thus, under even the Second Circuit standard the Appellants have not waived their right to arbitration.

More importantly, under the proper and applicable standard applied by the federal district courts in South Carolina and the Fourth Circuit Court of Appeals, it is equally clear the Appellants have not waived their right to arbitration thereunder.

In *Patten Grading & Paving v. Skanska USA Building*, 380 F.3d 200 (4th Cir. 2004), the defendant appealed the denial of its motion to stay and compel arbitration under the

Federal Arbitration Act ("FAA") by the United States District Court for the District of South Carolina. The defendant did not assert arbitration as an affirmative defense in a responsive pleading. Instead, it filed a motion to stay and compel arbitration eight (8) months after the filing of plaintiff's complaint. Opposing defendant's motion, the plaintiff in *Patten Grading* asserted, as one of its grounds, the same claim as raised by the Respondent herein; namely, that the defendant's failure to raise arbitration as an affirmative defense constituted a waiver of its right to arbitration.

On that issue, the court stated "[a]lthough Patten does not formally make the following distinction, under Federal Rule of Civil Procedure 8(c), Skanska's failure to invoke the arbitration clause in its answer to Patten's complaint *arguably* (emphasis added) constitutes a waiver of that right, and thus an issue that is seemingly distinct from whether Skanska's participation in the litigation during the resulting delay in asserting that right amounts to a default under the FAA. However, it is well established that an affirmative defense is not waived absent unfair surprise or prejudice. *See, e.g., S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co.*, 353 F.3d 367, 373-74 (4th Cir. 2003). Because both rules require a showing of prejudice, we do not consider these to be distinct issues. *Cf. MicroStrategy*, 268 F.3d at 249 (noting "this principle of 'default' [in the FAA] is akin to waiver" (internal quotations omitted))." *Patten Grading*, 380 F. 3d at 209.

Rejecting the claim that defendant's failure to raise arbitration as an affirmative defense constituted a waiver, the *Patten Paving* court applied the established federal standard of waiver in the Fourth Circuit, ruled that the defendant had not waived its rights to arbitration and reversed the district court's decision. *Id.*, 380 F.2d 200.

The case of *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974 (4th Cir. 1985)

further illustrates the Fourth Circuit finding of non-waiver in cases where the defendant fails to plead arbitration as an affirmative defense. In *Maxum*, the appeals court held that the defendant had not waived its right to arbitration when it did not raise arbitration as an affirmative defense in its answer, it delayed three (3) months after the complaint to file a motion to dismiss on the basis of the arbitration agreement, and it filed the motion to dismiss after discovery had been initiated in the action. *Id.*

Based on the above, as well as the remaining controlling authorities cited below in the Brief of Appellants, the Appellants have not waived their right to arbitration under federal law.

2. The Court Is Required To Apply The Proper Legal Standard To The Question Of Whether Appellants Waived Or Defaulted Upon Their Right to Mandatory Mediation/Arbitration.

The parties' contract contains mandatory alternative dispute resolution provisions requiring the parties to mediate, and if necessary, arbitrate their disputes. The question before this court is whether the Appellants have waived or defaulted upon these rights based on the application of the proper legal standard to the facts of this case.

State Law Standard

The standards for establishing waiver of the right to arbitration are well established in South Carolina. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E. 2d 868 (Ct. App. 2013). In South Carolina, "[i]n order to establish waiver of the right to enforce an arbitration clause, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E. 2d 749, 753 (Ct. App. 1999). "There is no set rule as to what constitutes a waiver of the

right to arbitrate; the question depends on the facts of each case." *Id.* (internal quotation marks omitted).

The Court of Appeals has recognized three factors to consider when determining whether a party has waived its right to compel arbitration. These three factors are as follows: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E. 2d 799, 807 (Ct. App. 2011) (internal quotation marks omitted).

To establish prejudice, the non-moving party must show something more than mere inconvenience. *Id.* (internal quotation marks omitted). In addition to the above factors, the Court of Appeals has also considered the extent to which the parties have availed themselves of the circuit court's assistance. *See id.* at 133, 713 S.E. 2d at 808.

Federal Law Standard

The standards to determine waiver are equally well established in federal law jurisprudence. *Brown v. Green Tree Services, LLC*, 585 F. Supp. 2d 770 (D.S.C. 2008). Under federal law governing arbitration agreements subject to the Federal Arbitration Act, the party opposing arbitration bears a heavy burden of proving default or waiver. *Id.* Default or waiver only arises when the party seeking arbitration "so substantially utilize[ed] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F. 3d 200 (4th Cir. 2004); *see also, Brown v. Green Tree*, 585 F. Supp. 2d 770;

Rich v. Walsh, 357 S.C. 64, 590 S.E. 2d 506 (Ct. App. 2003). Because of the strong federal policy favoring arbitration the federal courts do not lightly infer the circumstances constituting waiver. *Patten Grading*, 380 F. 3d 200.

3. Applying The Proper Legal Standard To The Facts Of This Case Establishes Appellants Have Not Waived Nor Defaulted Upon Their Right To Mandatory Mediation/Arbitration.

In the present case, the Appellants moved to set aside the entry of default, one of the grounds for which included Appellants' right to arbitration, within 2 ½ months after commencement of this action and within 1 ½ months after the entry of default. In addition, the Appellants filed their motion to compel arbitration less than four (4) months after commencement of the action, within 2 ½ months after the entry of default and within 5 weeks of learning of the entry of default.

Discovery has been extremely limited in this case. No depositions have been taken in this action. The Appellants have not served interrogatories, requests to produce nor any other form of written discovery. The Respondent has not responded to any interrogatories, requests to produce or any other form of written discovery. In fact, the only discovery to date is in the form of Appellants' answers to Respondent's basic First Set of Interrogatories and First Request for Production. This participation in discovery by Appellants was minimal and carried out pursuant to the direction of the Master. This minimal discovery does not constitute a waiver of Appellants' contractual right to arbitration. *See, Patten Grading*, 380 F. 3d at 206 (reciting precedent that the party seeking arbitration will not "lose its contractual right by prudently pursuing discovery in the face of a court-ordered deadline.").

The Master's assistance has been limited to: (a) 2 brief motions hearings concerning motions for a continuance of the damages hearing, to lift entry of default and to stay this action and compel mediation/arbitration; and (b) 1 brief status conference to allow the proffer of information for the record on appeal and Respondent's alleged damages.

Finally, the Respondent has failed to show prejudice through an undue burden caused by the short delay in Appellants' demand for arbitration. The record contains no evidence which demonstrates prejudice to Respondent in this matter. *See* Brief of Appellants, Section I.(G).

The proper legal standard is set forth in the Brief of Appellants, Section II.(E)(2) above. Applying the proper standard to the above-cited facts in this case, it is clear that the Appellants have not defaulted upon nor waived their right to mandatory mediation/arbitration under either state or federal law. *See Toler's Cove Homeowners Ass'n v. Trident Const. Co., Inc.*, 355 S.C. 605, 586 S.E. 2d 581; *Carlson v. South State Plastering, LLC*, 404 S.C. 250, 743 S.E. 2d 860 (Ct. App. 2013); *General Equip & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001); *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F. 3d 200 (4th Cir. 2004); *Brown v. Green Tree Services, LLC*, 585 F. Supp. 2d 770 (D.S.C. 2008); *Rich v. Walsh*, 357 S.C. 64, 590 S.E. 506 (Ct. App. 2003).

4. The Entry Of Default Does Not Constitute A Default Or Waiver Of Appellants' Right To Mandatory Mediation/Arbitration.

The Master, without citing any supporting authority, ruled in his July 14, 2016 order that "Defendants' motion to stay and to compel arbitration is denied as Defendant is in default." However, because there is no set rule as to what constitutes a waiver of the right

to arbitrate, the entering of default alone cannot constitute a waiver of arbitration rights as a matter of law. *See Liberty Builders*, 336 S.C. 658, 521 S.E. 2d 749. Instead, all facts must be considered and the question turns on the facts of each case. *Id.; see also* Brief of Appellants (and cases cited therein).

The Respondent, however, argues that in the context of a litigant in default seeking to compel arbitration, unless the movant is able to show good cause for its default, the defaulting party has waived its right to assert arbitration against continued litigation in the circuit court. The Respondent cites one West Virginia case to support its proposition. The case cited by Respondent is *State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 539 S.E. 2d 106 (2000). This West Virginia case is distinguishable from the case at bar on numerous grounds.

The *Barden* case applies West Virginia law, not the controlling South Carolina law nor federal law from the District of South Carolina and the Fourth Circuit. While a default judgment was entered in the *Barden* case, the legal principles and foundation upon which this West Virginia case is based is entirely different than the case at bar. At the time of this decision, West Virginia **had not** enacted the Uniform Arbitration Act, and furthermore, had no codified codes or statutes that applied to the general application of arbitration to legal disputes. The West Virginia code made sporadic and cursory references to arbitration only in terms of specific situations.

South Carolina, on the other hand, is one of the majority of states that have enacted in one form or another the Uniform Arbitration Act. The Uniform Arbitration Act as adopted in South Carolina contains the following sections that clearly distinguish South Carolina from the West Virginia law applied in *Barden* in multiple critical areas:

S.C. Code §15-48-10(a) (2005) states in pertinent part: A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or equity for the revocation of any contract.

S.C. Code §15-48-20(a) (2005) states in pertinent part: On application of a party showing an agreement described in §15-48-10, and the opposing party's refusal to arbitrate, the court **shall** order the parties to proceed with arbitration...(emphasis added.).

S.C. Code §15-48-20(c) (2005) states in pertinent part: If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this section, the application shall be made herein.

S.C. Code §15-48-20(d) (2005) states in pertinent part: Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section...When the application is made in such action or proceeding, the order for arbitration shall include such stay.

S.C. Code §15-48-170 states in pertinent part: Except as otherwise provided, **an application to the court under this chapter shall be made by motion** and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. (emphasis added.).

The above noted statutes clearly delineate that the standards and foundation upon which the South Carolina courts are working under the South Carolina Uniform Arbitration Act are wholly and substantially different than those employed by the West Virginia Court of Appeals in the *Barden* case.

A review of the Federal Arbitration Act ("FAA") statutes render the same result. The review below substitutes the word "Court" for any reference to the federal courts in the statutes in recognition of the South Carolina courts addressing FAA issues in cases before them involving interstate commerce.

9 U.S.C. §2 states in pertinent part: A written provision in a contract evidencing a transaction involving commerce to settle by arbitration a controversy hereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon

such grounds as exist at law or equity for the revocation of the contract.

9 U.S.C. §3 states in pertinent part: If any suit or proceeding be brought [in Court]...upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties** stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.
See Patten Grading & Paving, Inc. v. Skanska USA Building, Inc., 380 F. 3d 200 (4th Cir. 2004) (noting the principle of default in the FAA is akin to waiver.).

9 U.S.C. §4 states in pertinent part: A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any [Court] which, save for such agreement, would have jurisdiction...in a civil action of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement...The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the [Court] in which the petition for an order directing such arbitration is filed.

9 U.S.C. §6 states: Any application to the court hereunder **shall be made and heard in the manner provided by law for the making and hearing of motions,** except as otherwise herein expressly provided. (emphasis added.).

Similar to South Carolina's Uniform Arbitration Act, the FAA employs a standard and foundation totally and significantly different than the West Virginia standard used in the *Barden* case.

Furthermore, while fully acknowledging that other courts find the arbitration defense in Rule 8(c) pertains exclusively to completed arbitration proceedings, the *Barden* court states that arbitration is an affirmative defense that *may, under appropriate circumstances, be deemed waived* if not pled under W. Va. R. Civ. P. 8(c). Thus, even under West Virginia law the failure to assert arbitration as an affirmative defense does not automatically constitute waiver. Instead, further *appropriate circumstances* are required, and even then, this *may be,* but is not required to be deemed a waiver.

However, the review of controlling South Carolina jurisprudence and federal court opinions from the Fourth Circuit contained in previous sections of the Brief of Appellants establishes that failure to raise a valid arbitration clause in initial and even subsequent court filings does not, in and of itself, nullify the existence of enforceability of the arbitration clause in these jurisdictions. Neither the South Carolina Uniform Arbitration Act nor the FAA requires arbitration to be pled as an affirmative defense or considers the right to arbitrate waived if the "defense" is not raised. In fact, these statutes make no reference to affirmative defenses. Instead, these acts expressly state that the proper method of application for arbitration shall be made by motion. *See* S.C. Code §15-48-10, et al (2005); 9 U.S.C. §§1-16.

Finally, the well-reasoned opinions of other jurisdictions employing waiver standards similar to the South Carolina state law standard and the District of South Carolina and Fourth Circuit federal standard are instructive on this issue in the context of default situations. For example, the case of *Cedar Surgery Center v. Bonelli,* 96 P. 3d 911, 2004 UT 58 (Utah 2004) applies the Utah standard of waiver of the right to arbitration. Utah shares the basic framework of South Carolina law and 4th Circuit federal law for deciding whether a party has waived a contractual right to arbitration.

The *Cedar* court framed the issue before it as whether defendants waived their contractual right to arbitration when they declined to participate in the underlying litigation and filed a motion to compel arbitration only after default judgement had been entered against them.

In the *Cedar* case, when the defendants failed to answer or file a responsive pleading to the complaint, the court entered a default judgment against them. When the

defendants also failed to respond to the court's notice of a hearing to determine damages, the court entered a judgment for damages in the amount of $381,370 against the defendants.

Following the entry of judgment for damages, the defendants made their first appearance in the case by filing a Rule 60(b) motion for relief from default judgment and a motion to compel arbitration based on the arbitration clause in the parties' contract. In analyzing the defendants' motion, the *Cedar* court first stated the Utah standard for determining waiver.

The court stated that under Utah law, "for a court to find that a party has waived its arbitration right, the party alleging waiver must demonstrate: (1) that the party seeking arbitration substantially participated in the underlying litigation to a point inconsistent with the intent to arbitrate; and (2) that this participation resulted in prejudice to the opposing party." *Cedar,* 96 P. 3d at 914.

Applying this standard to the facts of the case the *Cedar* court stated that "[i]deally, the [defendants] would have raised the contractual arbitration clause in an answer to [plaintiff's] complaint and then brought a motion to compel arbitration, rather than simply ignoring the district court proceedings altogether. However, we do not find that such failure evidences an intent on the part of the [defendants] to waive their right to arbitration and pursue redress through litigation." *Id.,* 96 P 3d at 915.

Accordingly, the *Cedar* court found that the defendants' failure to participate in the underlying litigation and the entry of default judgment resulting therefrom **did not** constitute a waiver of their right to arbitration. *Id.* The *Cedar* court, therefore, held that the lower court did not abuse its discretion in setting aside the default judgment and compelling arbitration. *Id.*

Based on the above authorities, the entry of default against Appellants herein does not constitute a waiver or default of Appellants' right to mandatory mediation/arbitration of the parties' disputes. In light of the applicable and well established standards discussed throughout the Brief of Appellants, the Court should reverse the Master's ruling, stay this action and compel the parties to mediate, and if necessary, arbitrate their disputes pursuant to their contractual agreement.

(F): The Mandatory Requirements To Stay This Action And Submit The Matter To Mediation/Arbitration Shall Divest The Court of Subject Matter Jurisdiction

The contract giving rise to this action requires mandatory mediation and, if necessary, binding arbitration. The Respondent acknowledged this fact and the mandatory nature of the alternative dispute resolution provisions at the inception of this litigation in its Motion to Stay and Compel. In fact, the Respondent made a formal demand for mandatory mediation/arbitration in its Motion to Stay and Compel filed with the Court.

Upon the filing of this motion, mandatory requirements of either the South Carolina Uniform Arbitration or the Federal Arbitration Act were triggered requiring the court to stay this action and submit the matter to mediation/arbitration. These same mandatory requirements were invoked a second time upon the Appellants joinder in Respondent's motion as well as the filing of their own Motion to Stay and Compel.

By virtue of the mandatory mediation/arbitration provisions in the contract, the applications of all parties for mediation/arbitration and the triggering effect of those applications upon the mandatory requirements to stay and compel arbitration under both the state and federal arbitration statutes, the Court is required to stay this litigation and submit the matter to mediation/arbitration. This stay of litigation requirement is mandatory

under both federal and South Carolina law. *U.S. ex rel. Coastal Roofing Co., Inc. v. P. Browne & Associates, Inc.*, 585 F. Supp. 2d 708 (D.S.C.); *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.C. 172 (Ct. App. 2009).

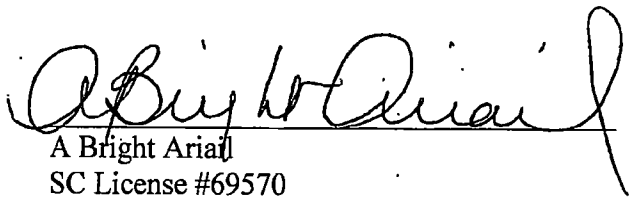
Under both federal and South Carolina law, when a case is sent to arbitration, the court is divested of jurisdiction over the case. *Id.*; *Main Corp. v. Black*, 357 S.C. 179, 592 S.E. 2d 300 (2004). By virtue of the requirements of a mandatory stay and submission to mandatory mediation/arbitration, the Court shall be divested of jurisdiction over the matter.

CONCLUSION

For the reasons stated above, this Court should reverse the rulings of the circuit court, lift the entry of default, stay this action and compel mandatory mediation/arbitration pursuant to the contractual agreement of the parties.

Respectfully submitted,

LAW OFFICE OF A. BRIGHT ARIAIL, LLC



A Bright Ariail
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125 Wappoo Creek Drive
Building E, Suite 202
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ATTORNEY FOR APPELLANTS

September 26, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
SEP 27 2017
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143
[Appellate Case No. 2016-002308]

Palmetto Construction Group, LLC — Respondent

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward — Appellants

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

September 26, 2017

A. Bright Ariail
SC License #69570
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125E Wappoo Creek Drive, Suite 202
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843/814-8805
Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

SEP 06 2017

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143
[Appellate Case No. 2016-002308]

Palmetto Construction Group, LLC — Respondent

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward — Appellants

RECORD ON APPEAL
VOLUME I OF IV

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	CASE NO. 2016-CP-10[illegible]-1143 **ORDER**

FILED
2016 APR 21 PM 2:37
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court on the motion of Plaintiff seeking a referral to the Master in Equity and that the Defendants be declared in default.

WHEREAS an affidavit of default was filed on April 18, 2016;

WHEREAS from the affidavit of default, it appears that no pleading has been filed and no appearance on behalf of the Defendants made;

WHEREAS the Plaintiff seeks to have this matter referred to the Master in Equity and seeks a default against Defendants;

IT IS ORDERED that the Defendants are in default and this matter is referred to the Master in Equity pursuant to Rule 53(b) SCRCP for all purposes including entry of final judgment against Defendants.

IT IS SO ORDERED.

The Honorable Roger M. Young, Sr.
Chief Administrative Judge
Ninth Judicial Circuit

On this 20th day of April 2016
Charleston, SC

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs.	)	CASE NO. 2016-CP-10-1143
RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	)	**ORDER**

FILED
2016 JUL 20 PM 12:02
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

THIS MATTER CAME BEFORE ME on Defendants' motion to be relieved from default;

WHEREAS based on the record and the affidavits before me, Defendants failed to show good cause such that they should be relieved from default;

WHEREAS Defendants filed, on July 11, 2016, a motion to stay and to compel arbitration;

IT IS ORDERED THAT:

1) Defendants' motion to be relieved from default is DENIED;
2) A damages hearing is set for October 4, 2016 at 2:00pm; and
3) ~~No ruling is made on~~ Defendants' motion to stay and to compel arbitration is denied as Δ is in default.

The Honorable Mikell R. Scarborough
Master in Equity, Charleston County

On this 14 day of July 2016
Charleston, SC

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-10-1143

Palmetto Construction Group LLC

PLAINTIFF(S)

Restoration Specialists, LLC, et al.

DEFENDANT(S)

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

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

FILED
2016 NOV -2 PM 2:53
JULIE J. ARMSTRONG
CLERK OF COURT
BY

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: This matter came before the court for argument on October 11, 2016 on Cross-Motions to Reconsider pursuant to Rule 59, SCRCP. After a review of the file and memoranda submitted by counsel, the court finds as follows: 1) Defendants' Motion to Amend is respectfully DENIED, insomuch as Defendants have not shown good cause to lift the default; and 2) the affirmative defense of arbitration has been waived and Defendant's Motion to Stay and Compel filed July 11, 2016 was not properly made.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
NA	NA	$NA
		$
		$

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

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

Circuit Court Judge

3062
Judge Code

10/28/16
Date

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

The South Carolina Court of Appeals

Palmetto Construction Group, LLC, Respondent,

v.

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, Appellants.

Appellate Case No. 2016-002096

ORDER

Appellants have served and filed a notice of appeal from the master's "effective" denial of Appellants' Rule 59(e), SCACR motion. However, because the master discussed the Rule 59(e) motion during the hearing, accepted memoranda regarding the motion, and allowed the parties to proffer information relating to the motion, it appears the master intends to issue a final, written order on the Rule 59(e) motion. *See* Rule 58(a), SCRCP (stating no order is final until it is written and entered). Accordingly, this appeal is dismissed without prejudice. *See Hudson v. Hudson*, 290 S.C. 215, 216, 349 S.E.2d 341, 342 (1986) (requiring dismissal without prejudice when there is a pending Rule 59(e) motion filed with the lower court and providing (1) any party can appeal within ten days after the order disposing of the post-trial motions and (2) a second filing fee will not be collected from a party who previously appealed). The remittitur will be sent as required by Rule 221, SCACR.

FOR THE COURT

Columbia, South Carolina

cc:
Andrew K. Epting, Jr., Esquire
Michelle Nicole Endemann, Esquire
A. Bright Ariail, Esquire

FILED
November 10, 2016

The South Carolina Court of Appeals

Palmetto Construction Group, LLC, Respondent,

v.

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, Appellants.

Appellate Case No. 2016-002308

ORDER

The motion to dismiss is denied. *See Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) (providing an order denying a motion to compel arbitration is immediately appealable); *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (providing an order finding that a party waived its right to compel arbitration is immediately appealable). Nothing prevents the parties from arguing the issue of appealability in their briefs.

FOR THE COURT

Columbia, South Carolina

FILED
February 1, 2017

cc:
Andrew K. Epting, Jr., Esquire
Michelle Nicole Endemann, Esquire
A. Bright Ariail, Esquire

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2016 -CP - 10- 1143

PALMETTO CONSTRUCTION GROUP, LLC.,)
Plaintiff(s))

vs.)

RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD,)
Defendant(s))

Submitted By: ANDREW K. EPTING, JR. ESQUIRE and MICHELLE N. ENDEMANN, ESQUIRE
Address: ANDREW K. EPTING, JR., LLC
46A State Street
Charleston SC 29401

SC Bar #: SC Bar 01908 and 79894
Telephone #: 843-377-1871
Fax #: 843-377-1310
Other: ake@epting-law.com
E-mail: mne@epting-law.com

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

DOCKETING INFORMATION (*Check all that apply)*

***If Action is Judgment/Settlement do not complete*

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

FILED
2016 MAR -7 PM 12:26
JULIE J. ARMSTRONG
CLERK OF COURT

NATURE OF ACTION *(Check One Box Below)*

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

Torts - Professional Malpractice
- [ ] Dental Malpractice (200)
- [ ] Legal Malpractice (210)
- [ ] Medical Malpractice (220)

Previous Notice of Intent Case # 20____-NI-____-_____
- [ ] Notice/ File Med Mal (230)
- [ ] Other (299) _____

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

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

Inmate Petitions
- [ ] PCR (500)
- [ ] Mandamus (520)
- [ ] Habeas Corpus (530)
- [ ] Other (599) _____

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- [ ] Judicial Review (810)
- [ ] Relief (820)
- [ ] Permanent Injunction (830)
- [ ] Forfeiture-Petition (840)
- [ ] Forfeiture—Consent Order (850)
- [ ] Other (899) _____

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- [ ] Foreign Judgment (710)
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- [ ] Minor Settlement (730)
- [ ] Transcript Judgment (740)
- [ ] Lis Pendens (750)
- [ ] Transfer of Structured Settlement Payment Rights Application (760)
- [ ] Confession of Judgment (770)
- [ ] Petition for Workers Compensation Settlement Approval (780)
- [ ] Other (799) _____

Appeals
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- [ ] Magistrate-Civil (910)
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- [ ] Municipal (930)
- [ ] Probate Court (940)
- [ ] SCDOT (950)
- [ ] Worker's Comp (960)
- [ ] Zoning Board (970)
- [ ] Public Service Comm. (990)
- [ ] Employment Security Comm (991)
- [ ] Other (999) _____

Special/Complex /Other
- [ ] Environmental (600)
- [ ] Automobile Arb. (610)
- [ ] Medical (620)
- [ ] Other (699) _____
- [ ] Sexual Predator (510)
- [ ] Pharmaceuticals (630)
- [ ] Unfair Trade Practices (640)
- [ ] Out-of State Depositions (650)
- [ ] Motion to Quash Subpoena in an Out-of-County Action (660)
- [ ] Pre-Suit Discovery (670)

Submitting Party Signature: _____ **Date:** 02/12/2016

9

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

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

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

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

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

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

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	CASE NO. 2016-CP-10- 1143 **SUMMONS**

FILED
2016 MAR -7 PM 12: 36
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is served upon you, and to serve a copy of your written response to the said Complaint on the subscribers at the law office of Andrew K. Epting, Jr., LLC, 46A State Street, Charleston, South Carolina 29401, within thirty (30) days after the date of service hereof, exclusive of the day of service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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

DATED: February 12, 2016
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	)	CASE NO. 2016-CP-10-_1143 **COMPLAINT**

FILED
2016 MAR -7 PM 12:36
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The above-named Plaintiff, subject to its simultaneously filed Motion to Stay and to Compel, states as follows:

1. Plaintiff Palmetto Construction Group, LLC ("Palmetto"), is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Charleston, South Carolina.

2. Defendant Restoration Specialists, LLC ("Restoration"), is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Charleston, South Carolina.

3. Defendant Reuben Mark Ward ("Mr. Ward") is an individual residing in the State of South Carolina at 1042-A East Montague Avenue, Charleston, SC 29405 and doing business in Charleston County, South Carolina as the Managing Member of Restoration.

4. Defendant Lynnette Pennington Ward ("Mrs. Ward") is an individual residing in the State of South Carolina and doing business in Charleston County, South Carolina.

5. Palmetto entered into a contract with Restoration on or about September 10, 2014 for the construction of facilities for the United States government on a project located in Augusta, Georgia.

6. That venue is proper in this court and this court has jurisdiction over the parties.

7. Attached as Exhibit A is the contract between Palmetto and Restoration together with a Teaming Agreement, Exhibit B, dated November 28, 2011.

8. That Palmetto has performed its contract and has completed all of its work on the project aforesaid.

9. Restoration has failed to pay the contract balances due under the contract and furthermore has failed to account for the profit sharing funds. As a consequence, Restoration has defaulted under its agreements with Palmetto.

10. Palmetto, Restoration, and, individually, Mr. Ward and Mrs. Ward, all signed an indemnity agreement with a surety in relation to a Payment Bond for this project (Exhibit C). Accordingly, Restoration, Mr. Ward, and Mrs. Ward must indemnify the surety and Plaintiffs to the extent that they are required to pay.

11. Claims have been made by other subcontractors upon the Payment Bond and as a consequence subcontractors are making claims against Palmetto and its surety.

FOR A FIRST CAUSE OF ACTION
BREACH OF AGREEMENTS

12. Palmetto restates each and every allegation above.

13. Restoration has received funds from the United States of America and has not paid those funds as required by its agreements with Palmetto as well as other subcontractors performing services for Restoration.

14. As a consequence of Restoration's default under its agreements with Palmetto and other subcontractors, Palmetto has been damaged in a sum to be determined.

FOR A SECOND CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION

15. Palmetto restates each and every allegation above.

16. Mr. Ward represented that he would manage this project and that all monies from the project would be used to pay for material and work supplied to or performed on the project.

17. Mr. Ward has a pecuniary interest in the project.

18. The representations of Mr. Ward were material and were relied upon by Palmetto. Mr. Ward is personally liable for his own tortious conduct.

19. Palmetto's justifiable reliance upon Mr. Ward has resulted in damages in a sum to be determined.

FOR A THIRD CAUSE OF ACTION
CONSTRUCTIVE AND ACTUAL FRAUD

20. Palmetto restates each and every allegation above.

21. Mr. Ward knew or should have known that his statements were material and would be relied upon by Palmetto.

22. Mr. Ward intended and induced Palmetto to rely upon his representations.

23. Palmetto's justifiable reliance has damaged Palmetto in a sum to be determined.

24. Palmetto, in addition to requesting actual damages, requests punitive damages.

FOR A FOURTH CAUSE OF ACTION
OTHER LEGAL AND EQUITABLE RELIEF

25. Plaintiff restates each and every allegation above.

26. All Defendants are contractually bound to pay funds if there are claims on the surety bond.

27. There are claims on the surety bond.

28. Plaintiff requests legal and equitable relief against the Defendants.

FOR A FIFTH CAUSE OF ACTION
INJUNCTIVE RELIEF

29. Palmetto restates each and every allegation above.

30. Palmetto requests that this court enter its order mandating that any funds held or to be received by Restoration be utilized to pay Palmetto the sums due.

31. Upon information and belief, given Restoration and Mr. Ward's financial viability, an award of monetary damages would not protect Palmetto from injury.

FOR A SIXTH CAUSE OF ACTION
ACCOUNTING

32. Palmetto restates each and every allegation above.

33. Because Palmetto does not know all funds Mr. Ward has received and what has been distributed Palmetto asks for an accounting.

WHEREFORE, Palmetto requests actual and punitive damages, injunctive relief, an accounting, and such other relief as is just and proper.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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

ATTORNEYS FOR PLAINTIFFS

DATED: February 12, 2016
Charleston, South Carolina

AIA® Document A401™ – 2007

Standard Form of Agreement Between Contractor and Subcontractor

AGREEMENT made as of the 10 day of September in the year 2014
(In words, indicate day, month and year.)

BETWEEN the Contractor:
(Name, legal status, address and other information)

Restoration Specialists LLC a South Carolina Corporation
1042-A East Montague Ave.
Charleston, SC 29405

and the Subcontractor:
(Name, legal status, address and other information)

Palmetto Construction Group, LLC
2265 Clements Ferry Road, Suite 204
Charleston, SC 29492

The Contractor has made a contract for construction (hereinafter, the Prime Contract) dated: March 29, 2012

with the Owner:
(Name, legal status, address and other information)

Department of Veterans Affairs / Charlie Norwood VAMC
950 15th Street
Augusta, GA 30901

for the following Project:
(Name, location and detailed description)

CHARLIE NORWOOD VAMC PARKING GARAGE
950 15th Street
August, GA 30901
Phase I – Uptown Temporary Parking Lot
Phase II – Downtown Parking Garage Sitework

The Prime Contract provides for the furnishing of labor, materials, equipment and services in connection with the construction of the Project. A copy of the Prime Contract, consisting of the Agreement Between Owner and Contractor (from which compensation amounts may be deleted) and the other Contract Documents enumerated therein, has been made available to the Subcontractor.

The Architect for the Project:
(Name, legal status, address and other information)

Structured Parking Solutions
21 South Tarragona Street, Suite 101

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

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

AIA Document A201™–2007, General Conditions of the Contract for Construction, is adopted in this document by reference.

This document has been approved and endorsed by the Associated Specialty Contractors, Inc.

Binderak #CIEX

A

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Pensacola, FL 32502

The Contractor and the Subcontractor agree as follows.

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ARTICLE 1 THE SUBCONTRACT DOCUMENTS

§ 1.1 The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement; (4) other documents listed in Article 16 of this Agreement; and (5) Modifications to this Subcontract issued after execution of this Agreement. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein. The Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Subcontract Documents, other than Modifications issued subsequent to the execution of this Agreement, appears in Article 16.

§ 1.2 Except to the extent of a conflict with a specific term or condition contained in the Subcontract Documents, the General Conditions governing this Subcontract shall be the AIA Document A201™–2007, General Conditions of the Contract for Construction.

§ 1.3 The Subcontract may be amended or modified only by a Modification. The Subcontract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and the Subcontractor, (2) between the Owner and the Subcontractor, or (3) between any persons or entities other than the Contractor and Subcontractor.

§ 1.4 The Contractor shall make available the Subcontract Documents to the Subcontractor prior to execution of this Agreement, and thereafter, upon request, but the Contractor may charge the Subcontractor for the reasonable cost of reproduction.

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ARTICLE 2 MUTUAL RIGHTS AND RESPONSIBILITIES

The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201–2007 apply to this Agreement pursuant to Section 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

ARTICLE 3 CONTRACTOR

§ 3.1 SERVICES PROVIDED BY THE CONTRACTOR

§ 3.1.1 The Contractor shall cooperate with the Subcontractor in scheduling and performing the Contractor's Work to avoid conflicts or interference in the Subcontractor's Work and shall expedite written responses to submittals made by the Subcontractor in accordance with Section 4.1 and Article 5. Promptly after execution of this Agreement, the Contractor shall provide the Subcontractor copies of the Contractor's construction schedule and schedule of submittals, together with such additional scheduling details as will enable the Subcontractor to plan and perform the Subcontractor's Work properly. The Contractor shall promptly notify the Subcontractor of subsequent changes in the construction and submittal schedules and additional scheduling details.

§ 3.1.2 The Contractor shall provide suitable areas for storage of the Subcontractor's materials and equipment during the course of the Work. Additional costs to the Subcontractor resulting from relocation of such storage areas at the direction of the Contractor, except as previously agreed upon, shall be reimbursed by the Contractor.

§ 3.1.3 Except as provided in Article 14, the Contractor's equipment will be available to the Subcontractor only at the Contractor's discretion and on mutually satisfactory terms.

§ 3.2 COMMUNICATIONS

§ 3.2.1 The Contractor shall promptly make available to the Subcontractor information, including information received from the Owner, that affects this Subcontract and that becomes available to the Contractor subsequent to execution of this Subcontract.

§ 3.2.2 The Contractor shall not give instructions or orders directly to the Subcontractor's employees or to the Subcontractor's Sub-subcontractors or material suppliers unless such persons are designated as authorized representatives of the Subcontractor.

§ 3.2.3 The Contractor shall permit the Subcontractor to request directly from the Architect information regarding the percentages of completion and the amount certified on account of Work done by the Subcontractor.

§ 3.2.4 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Contractor, a subcontractor or anyone directly or indirectly employed by them (other than the Subcontractor), the Contractor shall, prior to harmful exposure of the Subcontractor's employees to such substance, give written notice of the chemical composition thereof to the Subcontractor in sufficient detail and time to permit the Subcontractor's compliance with such laws.

§ 3.2.5 The Contractor shall furnish to the Subcontractor within 30 days after receipt of a written request, or earlier if so required by law, information necessary and relevant for the Subcontractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property, usually referred to as the site, on which the Project is located and the Owner's interest therein.

§ 3.2.6 If the Contractor asserts or defends a claim against the Owner that relates to the Work of the Subcontractor, the Contractor shall promptly make available to the Subcontractor all information relating to the portion of the claim that relates to the Work of the Subcontractor.

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§ 3.3 CLAIMS BY THE CONTRACTOR

§ 3.3.1 Liquidated damages for delay, if provided for in Section 9.3 of this Agreement, shall be assessed against the Subcontractor only to the extent caused by the Subcontractor or any person or entity for whose acts the Subcontractor may be liable, and in no case for delays or causes arising outside the scope of this Subcontract.

§ 3.3.2 The Contractor's claims for the costs of services or materials provided due to the Subcontractor's failure to execute the Work shall require

.1 seven days' written notice prior to the Contractor's providing services or materials, except in an emergency; and

.2 written compilations to the Subcontractor of services and materials provided by the Contractor and charges for such services and materials no later than the fifteenth day of the month following the Contractor's providing such services or materials.

.3 Liquidated Damages will be assessed at $ N/A per calendar day past the established completion date.

§ 3.4 CONTRACTOR'S REMEDIES

If the Subcontractor defaults or neglects to carry out the Work in accordance with this Agreement and fails within five working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by appropriate Modification, and without prejudice to any other remedy the Contractor may have, make good such deficiencies and may deduct the reasonable cost thereof from the payments then or thereafter due the Subcontractor.

ARTICLE 4 SUBCONTRACTOR

§ 4.1 EXECUTION AND PROGRESS OF THE WORK

§ 4.1.1 For all Work the Subcontractor intends to subcontract, the Subcontractor shall enter into written agreements with Sub-subcontractors performing portions of the Work of this Subcontract by which the Subcontractor and the Sub-subcontractor are mutually bound, to the extent of the Work to be performed by the Sub-subcontractor, assuming toward each other all obligations and responsibilities that the Contractor and Subcontractor assume toward each other and having the benefit of all rights, remedies and redress each against the other that the Contractor and Subcontractor have by virtue of the provisions of this Agreement.

§ 4.1.2 The Subcontractor shall supervise and direct the Subcontractor's Work, and shall cooperate with the Contractor in scheduling and performing the Subcontractor's Work to avoid conflict, delay in or interference with the Work of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.1.3 The Subcontractor shall promptly submit Shop Drawings, Product Data, Samples and similar submittals required by the Subcontract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Contractor or other subcontractors.

§ 4.1.4 The Subcontractor shall furnish to the Contractor periodic progress reports on the Work of this Subcontract as mutually agreed, including information on the status of materials and equipment that may be in the course of preparation, manufacture, or transit.

§ 4.1.5 The Subcontractor agrees that the Contractor and the Architect each have the authority to reject Work of the Subcontractor that does not conform to the Prime Contract. The Architect's decisions on matters relating to aesthetic effect shall be final and binding on the Subcontractor if consistent with the intent expressed in the Prime Contract.

§ 4.1.6 The Subcontractor shall pay for all materials, equipment and labor used in connection with the performance of this Subcontract through the period covered by previous payments received from the Contractor, and shall furnish satisfactory evidence, when requested by the Contractor, to verify compliance with the above requirements.

§ 4.1.7 The Subcontractor shall take necessary precautions to protect properly the work of other subcontractors from damage caused by operations under this Subcontract.

§ 4.1.8 The Subcontractor shall cooperate with the Contractor, other subcontractors, the Owner, and separate contractors whose work might interfere with the Subcontractor's Work. The Subcontractor shall participate in the preparation of coordinated drawings in areas of congestion, if required by the Prime Contract, specifically noting and

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advising the Contractor of potential conflicts between the Work of the Subcontractor and that of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.2 PERMITS, FEES, NOTICES, AND COMPLIANCE WITH LAWS

§ 4.2.1 The Subcontractor shall give notices and comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on performance of the Work of this Subcontract. The Subcontractor shall secure and pay for permits, fees, licenses and inspections by government agencies necessary for proper execution and completion of the Subcontractor's Work, the furnishing of which is required of the Contractor by the Prime Contract.

§ 4.2.2 The Subcontractor shall comply with Federal, state and local tax laws, social security acts, unemployment compensation acts and workers' compensation acts insofar as applicable to the performance of this Subcontract.

§ 4.3 SAFETY PRECAUTIONS AND PROCEDURES

§ 4.3.1 The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime Contract. The Subcontractor shall report to the Contractor within three days an injury to an employee or agent of the Subcontractor which occurred at the site.

§ 4.3.2 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Subcontractor, the Subcontractor's Sub-subcontractors or anyone directly or indirectly employed by them, the Subcontractor shall, prior to harmful exposure of any employees on the site to such substance, give written notice of the chemical composition thereof to the Contractor in sufficient detail and time to permit compliance with such laws by the Contractor, other subcontractors and other employers on the site.

§ 4.3.3 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a hazardous material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Subcontractor, the Subcontractor shall, upon recognizing the condition, immediately stop Work in the affected area and promptly report the condition to the Contractor in writing. When the material or substance has been rendered harmless, the Subcontractor's Work in the affected area shall resume upon written agreement of the Contractor and Subcontractor. The Subcontract Time shall be extended appropriately and the Subcontract Sum shall be increased in the amount of the Subcontractor's reasonable additional costs of demobilization, delay and remobilization, which adjustments shall be accomplished as provided in Article 5 of this Agreement.

§ 4.3.4 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Subcontractor, the Subcontractor's Sub-subcontractors, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 4.3.3 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

§ 4.3.5 The Subcontractor shall indemnify the Contractor for the cost and expense the Contractor incurs (1) for remediation of a material or substance brought to the site and negligently handled by the Subcontractor or (2) where the Subcontractor fails to perform its obligations under Section 4.3.3, except to the extent that the cost and expense are due to the Contractor's fault or negligence.

§ 4.4 CLEANING UP

§ 4.4.1 The Subcontractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations performed under this Subcontract. The Subcontractor shall not be held responsible for conditions caused by other contractors or subcontractors.

§ 4.4.2 As provided under Section 3.3.2, if the Subcontractor fails to clean up as provided in the Subcontract Documents, the Contractor may charge the Subcontractor for the Subcontractor's appropriate share of cleanup costs.

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§ 4.5 WARRANTY

The Subcontractor warrants to the Owner, Architect, and Contractor that materials and equipment furnished under this Subcontract will be of good quality and new unless the Subcontract Documents require or permit otherwise. The Subcontractor further warrants that the Work will conform to the requirements of the Subcontract Documents and will be free from defects, except for those inherent in the quality of the Work the Subcontract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Subcontractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Subcontractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect and Contractor, the Subcontractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 4.6 INDEMNIFICATION

§ 4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6.

§ 4.6.2 In claims against any person or entity indemnified under this Section 4.6 by an employee of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 4.6.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor or the Subcontractor's Sub-subcontractors under workers' compensation acts, disability benefit acts or other employee benefit acts.

§ 4.7 REMEDIES FOR NONPAYMENT

If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate Modification, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization.

ARTICLE 5 CHANGES IN THE WORK

§ 5.1 The Owner may make changes in the Work by issuing Modifications to the Prime Contract. Upon receipt of such a Modification issued subsequent to the execution of the Subcontract Agreement, the Contractor shall promptly notify the Subcontractor of the Modification. Unless otherwise directed by the Contractor, the Subcontractor shall not thereafter order materials or perform Work that would be inconsistent with the changes made by the Modification to the Prime Contract.

§ 5.2 The Subcontractor may be ordered in writing by the Contractor, without invalidating this Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions, deletions or other revisions, including those required by Modifications to the Prime Contract issued subsequent to the execution of this Agreement, the Subcontract Sum and the Subcontract Time being adjusted accordingly. The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for adjustment to the Subcontract Sum and Subcontract Time for such revised Work in a manner consistent with requirements of the Subcontract Documents.

§ 5.3 The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time

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by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

ARTICLE 6 MEDIATION AND BINDING DISPUTE RESOLUTION

§ 6.1 MEDIATION

§ 6.1.1 Any claim arising out of or related to this Subcontract, except those waived in this Subcontract, shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 6.1.2 The parties shall endeavor to resolve their claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to this Subcontract and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section, the parties may nonetheless proceed to the selection of the arbitrators(s) and agree upon a schedule for later proceedings.

§ 6.1.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 6.2 BINDING DISPUTE RESOLUTION

For any claim subject to, but not resolved by mediation pursuant to Section 6.1, the method of binding dispute resolution shall be as follows:
(Check the appropriate box. If the Contractor and Subcontractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, claims will be resolved by litigation in a court of competent jurisdiction.)

[X] Arbitration pursuant to Section 6.3 of this Agreement

[ ] Litigation in a court of competent jurisdiction

[ ] Other: *(Specify)*

§ 6.3 ARBITRATION

§ 6.3.1 If the Contractor and Subcontractor have selected arbitration as the method of binding dispute resolution in Section 6.2, any claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Subcontract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded.

§ 6.3.2 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim.

§ 6.3.3 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

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§ 6.3.4 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a claim not described in the written consent.

§ 6.3.5 The Contractor and Subcontractor grant to any person or entity made a party to an arbitration conducted under this Section 6.3, whether by joinder or consolidation, the same rights of joinder and consolidation as the Contractor and Subcontractor under this Agreement.

§ 6.3.6 This agreement to arbitrate and any other written agreement to arbitrate with an additional person or persons referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 7 TERMINATION, SUSPENSION OR ASSIGNMENT OF THE SUBCONTRACT

§ 7.1 TERMINATION BY THE SUBCONTRACTOR

The Subcontractor may terminate the Subcontract for the same reasons and under the same circumstances and procedures with respect to the Contractor as the Contractor may terminate with respect to the Owner under the Prime Contract, or for nonpayment of amounts due under this Subcontract for 60 days or longer. In the event of such termination by the Subcontractor for any reason which is not the fault of the Subcontractor, Sub-subcontractors or their agents or employees or other persons performing portions of the Work under contract with the Subcontractor, the Subcontractor shall be entitled to recover from the Contractor payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

§ 7.2 TERMINATION BY THE CONTRACTOR

§ 7.2.1 If the Subcontractor repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Subcontract and fails within a ten-day period after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by written notice to the Subcontractor and without prejudice to any other remedy the Contractor may have, terminate the Subcontract and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

§ 7.2.2 If the Owner terminates the Prime Contract for the Owner's convenience, the Contractor shall promptly deliver written notice to the Subcontractor.

§ 7.2.3 Upon receipt of written notice of termination, the Subcontractor shall

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

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

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

§ 7.2.4 In case of such termination for the Owner's convenience, the Subcontractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

§ 7.3 SUSPENSION BY THE CONTRACTOR FOR CONVENIENCE

§ 7.3.1 The Contractor may, without cause, order the Subcontractor in writing to suspend, delay or interrupt the Work of this Subcontract in whole or in part for such period of time as the Contractor may determine. In the event of suspension ordered by the Contractor, the Subcontractor shall be entitled to an equitable adjustment of the Subcontract Time and Subcontract Sum.

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§ 7.3.2 An adjustment shall be made for increases in the Subcontract Time and Subcontract Sum, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent that

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

.2 an equitable adjustment is made or denied under another provision of this Subcontract.

§ 7.4 ASSIGNMENT OF THE SUBCONTRACT

§ 7.4.1 In the event the Owner terminates the Prime Contract for cause, this Subcontract is assigned to the Owner pursuant to Section 5.4 of AIA Document A201–2007 provided the Owner accepts the assignment.

§ 7.4.2 Without the Contractor's written consent, the Subcontractor shall not assign the Work of this Subcontract, subcontract the whole of this Subcontract, or subcontract portions of this Subcontract.

ARTICLE 8 THE WORK OF THIS SUBCONTRACT

The Subcontractor shall execute the following portion of the Work described in the Subcontract Documents, including all labor, materials, equipment, services and other items required to complete such portion of the Work, except to the extent specifically indicated in the Subcontract Documents to be the responsibility of others.

(Insert a precise description of the Work of this Subcontract, referring where appropriate to numbers of Drawings, sections of Specifications and pages of Addenda, Modifications and accepted alternates.)

ARTICLE 9 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 9.1 Subcontract Time is the period of time, including authorized adjustments, allotted in the Subcontract Documents for Substantial Completion of the Work described in the Subcontract Documents. The Subcontractor's date of commencement is the date from which the Subcontract Time of Section 9.3 is measured; it shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Contractor.

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

§ 9.2 Unless the date of commencement is established by a notice to proceed issued by the Contractor, or the Contractor has commenced visible Work at the site under the Prime Contract, the Subcontractor shall notify the Contractor in writing not less than five days before commencing the Subcontractor's Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

§ 9.3 The Work of this Subcontract shall be substantially completed not later than .

(Insert the calendar date or number of calendar days after the Subcontractor's date of commencement. Also insert any requirements for earlier substantial completion of certain portions of the Subcontractor's Work, if not stated elsewhere in the Subcontract Documents.)

Portion of Work	Substantial Completion Date
Provide supervision and management of concrete subcontractor (Atlantic Concrete Contractors). See PCG Subcontract Breakdown spreadsheet dated 9/5/14 provided, attached. **Note:** It is the subcontractor's responsibility to visit Submittal Exchange (www.submittalexchange.com) to access and verify they are using the latest revisions of all contract documents. An email invitation will be sent to each subcontractor's point of contact to initiate	Commence Work: Mobilize 9/22/14 Completion Date: Final Completion 7/7/15

Init.

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access to the site. ALL SUBMITTALS FROM SUBCONTRACTORS ARE TO BE SUBMITTED TO RESTORATION SPECIALISTS BY UPLOADING PDF DOCUMENTS TO THE SUBMITTAL EXHANGE SITE.
Schedule: As follows
Submittals: Submittals are due no later than 9/23/14 (submitted electronically via. Submittal Exchange)

, subject to adjustments of this Subcontract Time as provided in the Subcontract Documents.
(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)

§ 9.4 With respect to the obligations of both the Contractor and the Subcontractor, time is of the essence of this Subcontract.

§ 9.5 No extension of time will be valid without the Contractor's written consent after claim made by the Subcontractor in accordance with Section 5.3.

ARTICLE 10 SUBCONTRACT SUM

§ 10.1 The Contractor shall pay the Subcontractor in current funds for performance of the Subcontract the Subcontract Sum of One million eighty two thousand three hundred forty two dollars and 10/100, ($ 1,082,342.10), subject to additions and deductions as provided in the Subcontract Documents.

§ 10.2 The Subcontract Sum is based upon the following alternates, if any, which are described in the Subcontract Documents and have been accepted by the Owner and the Contractor:
(Insert the numbers or other identification of accepted alternates.)

§ 10.3 Unit prices, if any:
(Identify and state the unit price, and state the quantity limitations, if any, to which the unit price will be applicable.)

Item	Units and Limitations	Price Per Unit ($0.00)
N/A		

§ 10.4 Allowances included in the Subcontract Sum, if any:
(Identify allowance and state exclusions, if any, from the allowance price.)

Item	Price
N/A	

ARTICLE 11 PROGRESS PAYMENTS

§ 11.1 Based upon applications for payment submitted to the Contractor by the Subcontractor, corresponding to applications for payment submitted by the Contractor to the Government, and certificates for payment issued by the Government, the Contractor shall make progress payments on account of the Subcontract Sum to the Subcontractor as provided below and elsewhere in the Subcontract Documents. Unless the Contractor provides the Government with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor and Subcontractor for Work properly performed by their contractors and suppliers shall be held by the Contractor and Subcontractor for those contractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor or Subcontractor for which payment was made to the Contractor by the Owner or to the Subcontractor by the Contractor, as applicable. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor or Subcontractor, shall create any fiduciary liability or tort liability on the

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part of the Contractor or Subcontractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor or Subcontractor for breach of the requirements of this provision.

§ 11.2 The period covered by each application for payment shall be one calendar month ending on the last day of the month, or as follows:

§ 11.3 Provided an application for payment is received by the Contractor not later than the 25th day of a month, the Contractor shall include the Subcontractor's Work covered by that application in the next application for payment which the Contractor is entitled to submit to the Government. The Contractor shall pay the Subcontractor each progress payment no later than seven working days after the Contractor receives payment from the Government.

§ 11.4 If the Subcontractor's application for payment is received by the Contractor after the application date fixed above, the Subcontractor's Work covered by it shall be included by the Contractor in the next application for payment submitted to the Architect.

§ 11.5 The Subcontractor shall submit to the Contractor a schedule of values prior to submitting the Subcontractor's first Application for Payment. Each subsequent application for payment shall be based upon the most recent schedule of values submitted by the Subcontractor in accordance with the Subcontract Documents. The schedule of values shall allocate the entire Subcontract Sum among the various portions of the Subcontractor's Work and be prepared in such form and supported by such data to substantiate its accuracy as the Contractor may require. This schedule, unless objected to by the Contractor, shall be used as a basis for reviewing the Subcontractor's applications for payment.

§ 11.6 Applications for payment submitted by the Subcontractor shall indicate the percentage of completion of each portion of the Subcontractor's Work as of the end of the period covered by the application for payment.

§ 11.7 Subject to the provisions of the Subcontract Documents, the amount of each progress payment shall be computed as set forth in the sections below.

§ 11.7.1 Take that portion of the Subcontract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Subcontractor's Work by the share of the total Subcontract Sum allocated to that portion of the Subcontractor's Work in the schedule of values, less that percentage actually retained, if any, from payments to the Contractor on account of the Work of the Subcontractor. Pending final determination of cost to the Contractor of changes in the Work that have been properly authorized by the Contractor, amounts not in dispute shall be included to the same extent provided in the Prime Contract, even though the Subcontract Sum has not yet been adjusted;

§ 11.7.2 Add that portion of the Subcontract Sum properly allocable to materials and equipment delivered and suitably stored at the site by the Subcontractor for subsequent incorporation in the Subcontractor's Work or, if approved by the Contractor, suitably stored off the site at a location agreed upon in writing, less the same percentage retainage required by the Prime Contract to be applied to such materials and equipment in the Contractor's application for payment;

§ 11.7.3 Subtract the aggregate of previous payments made by the Contractor; and

§ 11.7.4 Subtract amounts, if any, calculated under Section 11.7.1 or 11.7.2 that are related to Work of the Subcontractor for which the Architect has withheld or nullified, in whole or in part, a certificate of payment for a cause that is the fault of the Subcontractor.

§ 11.8 Upon the partial or entire disapproval by the Contractor of the Subcontractor's application for payment, the Contractor shall provide written notice to the Subcontractor. When the basis for the disapproval has been remedied, the Subcontractor shall be paid the amounts withheld.

§ 11.9 SUBSTANTIAL COMPLETION

When the Subcontractor's Work or a designated portion thereof is substantially complete and in accordance with the requirements of the Prime Contract, the Contractor shall, upon application by the Subcontractor, make prompt application for payment for such Work. Within 30 days following issuance by the Architect of the certificate for

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payment covering such substantially completed Work, the Contractor shall, to the full extent allowed in the Prime Contract, make payment to the Subcontractor, deducting any portion of the funds for the Subcontractor's Work withheld in accordance with the certificate to cover costs of items to be completed or corrected by the Subcontractor. Such payment to the Subcontractor shall be the entire unpaid balance of the Subcontract Sum if a full release of retainage is allowed under the Prime Contract for the Subcontractor's Work prior to the completion of the entire Project. If the Prime Contract does not allow for a full release of retainage, then such payment shall be an amount which, when added to previous payments to the Subcontractor, will reduce the retainage on the Subcontractor's substantially completed Work to the same percentage of retainage as that on the Contractor's Work covered by the certificate.

ARTICLE 12 FINAL PAYMENT

§ 12.1 Final payment, constituting the entire unpaid balance of the Subcontract Sum, shall be made by the Contractor to the Subcontractor when the Subcontractor's Work is fully performed in accordance with the requirements of the Subcontract Documents, the Architect has issued a certificate for payment covering the Subcontractor's completed Work and the Contractor has received payment from the Owner. If, for any cause which is not the fault of the Subcontractor, a certificate for payment is not issued or the Contractor does not receive timely payment or does not pay the Subcontractor within seven days after receipt of payment from the Owner, final payment to the Subcontractor shall be made upon demand.
(Insert provisions for earlier final payment to the Subcontractor, if applicable.)

§ 12.2 Before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied. Acceptance of final payment by the Subcontractor shall constitute a waiver of claims by the Subcontractor, except those previously made in writing and identified by the Subcontractor as unsettled at the time of final application for payment.

ARTICLE 13 INSURANCE AND BONDS

§ 13.1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability as will protect the Subcontractor from claims that may arise out of, or result from, the Subcontractor's operations and completed operations under the Subcontract:

Type of insurance or bond	Limit of liability or bond amount ($1,000,000.00 per incident)
Commercial General Liability Insurance	$ 1,000,000.00 (per incident)
Business Automobile Liability Insurance	$ 1,000,000.00 (per incident)
Commercial Umbrella Coverage	$ 1,000,000.00 (limits must include as insureds all entities that are additional insureds on the CGL)
Worker's Compensation and Employer's Liability Insurance	$ 1,000,000.00 (per incident & per employee)

§ 13.2 Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Subcontractor's Work until the date of final payment and termination of any coverage required to be maintained after final payment to the Subcontractor, and, with respect to the Subcontractor's completed operations coverage, until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Prime Contract.

§ 13.3 Certificates of insurance acceptable to the Contractor shall be filed with the Contractor prior to commencement of the Subcontractor's Work. These certificates and the insurance policies required by this Article 13 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final application for payment as required in Article 12. If any information concerning reduction of coverage is not furnished by the insurer, it shall be furnished by the Subcontractor with reasonable promptness according to the Subcontractor's information and belief.

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§ 13.4 The Subcontractor shall cause the commercial liability coverage required by the Subcontract Documents to include: (1) the Contractor, the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's operations; and (2) the Contractor as an additional insured for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's completed operations.

§ 13.5 The Contractor shall furnish to the Subcontractor satisfactory evidence of insurance required of the Contractor under the Prime Contract.

§ 13.6 The Contractor shall promptly, upon request of the Subcontractor, furnish a copy or permit a copy to be made of any bond covering payment of obligations arising under the Subcontract.

§ 13.7 Performance Bond and Payment Bond:
(If the Subcontractor is to furnish bonds, insert the specific requirements here.)

Bond type	Bond amount ($0.00)	Bond delivery date	Bond form
N/A			

§ 13.8 PROPERTY INSURANCE

§ 13.8.1 When requested in writing, the Contractor shall provide the Subcontractor with copies of the property and equipment policies in effect for the Project. The Contractor shall notify the Subcontractor if the required property insurance policies are not in effect.

§ 13.8.2 If the required property insurance is not in effect for the full value of the Subcontractor's Work, then the Subcontractor shall purchase insurance for the value of the Subcontractor's Work, and the Subcontractor shall be reimbursed for the cost of the insurance by an adjustment in the Subcontract Sum.

§ 13.8.3 Property insurance for the Subcontractor's materials and equipment required for the Subcontractor's Work, stored off site or in transit and not covered by the Project property insurance, shall be paid for through the application for payment process.

§ 13.9 WAIVERS OF SUBROGATION

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

ARTICLE 14 TEMPORARY FACILITIES AND WORKING CONDITIONS

§ 14.1 The Contractor shall furnish and make available at no cost to the Subcontractor the Contractor's temporary facilities, equipment and services, except as noted below:

Temporary Facility, Equipment or Service	Cost, if any ($0.00)

§ 14.2 Specific working conditions:
(Insert any applicable arrangements concerning working conditions and labor matters for the Project.)

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ARTICLE 15 MISCELLANEOUS PROVISIONS

§ 15.1 Where reference is made in this Subcontract to a provision of another Subcontract Document, the reference refers to that provision as amended or supplemented by other provisions of the Subcontract Documents.

(Insert rate of interest agreed upon, if any.)

%

(Paragraphs deleted)

§ 15.3 Retainage and any reduction thereto are as follows:

0% (zero)

(Paragraph deleted)

ARTICLE 16 ENUMERATION OF SUBCONTRACT DOCUMENTS

§ 16.1 The Subcontract Documents, except for Modifications issued after execution of this Subcontract, are enumerated in the sections below.

§ 16.1.1 This executed AIA Document A401–2007, Standard Form of Agreement Between Contractor and Subcontractor.

§ 16.1.2 The Prime Contract, consisting of the Agreement between the Owner and Contractor dated as first entered above and the other Contract Documents enumerated in the Owner-Contractor Agreement.

§ 16.1.3 The following Modifications to the Prime Contract, if any, issued subsequent to the execution of the Owner-Contractor Agreement but prior to the execution of this Agreement:

Modification	**Date**

§ 16.1.4 Additional Documents, if any, forming part of the Subcontract Documents:

.1 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed by the parties, or the following:

.2 Other documents:
(List here any additional documents that are intended to form part of the Subcontract Documents: Requests for proposal and the Subcontractor's bid or proposal should be listed here only if intended to be made part of the Subcontract Documents.)

1. PCG Subcontract Breakdown
2. Atlantic Concrete Subcontract

This Contract / P.O. Number will be: 1401-010000-005
This Contract / P.O. # is to be referenced on all billings / invoices / submittals, etc.

This Agreement entered into as of the day and year first written above.

RESTORATION SPECIALISTS, LLC	PALMETTO CONSTRUCTION GROUP, LLC
CONTRACTOR *(Signature)*	SUBCONTRACTOR *(Signature)*
Mark Ward – Managing Member	Jay Hannegan - Vice President
(Printed name and title)	*(Printed name and title)*

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TEAMING AGREEMENT

This Agreement is made and entered into as of the **28th** day of **November, 2011**, by and between **Restoration Specialists, LLC**, a **Georgia** limited liability company (hereinafter called "RS"), and **Palmetto Construction Group, LLC**, a **South Carolina** limited liability company (hereinafter called "PCG"), each a "Party" and together the "Parties", for the purpose of submitting a proposal for **Solicitation Number VA-247-11-RP-0211** (hereinafter the "Services") to **Department of Veteran Affairs** (the "Customer") for the **New SCIU Hospital Parking Deck Minor Project: 509-325** project (the "Project"). ***RS, cage code 5GXE1, is a "Verified" Service Disabled Veteran Owned Small Business and PCG, cage code 3P1G3, is a "Certified" Small Business. RS and PCG have a successful teaming record on previous contracts such as: FA4418-11-R-0017-0004***

ARTICLE 1 SUBMISSION OF PROPOSAL

RS and PCG shall each undertake to accomplish certain tasks in connection with the preparation of a proposal to be submitted to the Customer for the Project (the "Proposal"). The Proposal will identify RS as the prime contractor and PCG as the subcontractor that will perform the Services. The Proposal will be developed in conformance with the delineation of respective areas of responsibility and contract share set forth in Exhibit A. Both Parties have the right to determine the contents of the Proposal to the Customer as it relates to that Party. RS will be responsible for preparing the final copies of all Proposal documents and submitting the Proposal to the Customer.

ARTICLE 2 PERFORMANCE OF CONTRACTS

If RS is selected as the prime contractor as a result of the Proposal, RS and PCG will provide assistance and support to each other in the joint negotiation of the terms and conditions of the prime contract with Customer so as to obtain terms and conditions which are mutually agreeable to RS and PCG. Additionally, RS and PCG shall enter into a contractual arrangement between themselves on mutually acceptable terms and conditions. The Parties will endeavor to incorporate terms consistent with the Scope of Work substantially in accord with the provisions of Exhibit A and Exhibit B, Standard Subcontract Terms and Conditions, as may be modified subject to the terms and conditions described in the prime contract.

ARTICLE 3 EXCLUSIVE AGREEMENT

When mutually agreed to for a specific Project, to preserve the interests of the Parties hereto in the competition for such Project only, RS and PCG shall work exclusively with each other with respect to its area of responsibility and share of the contract in a proposal for the Project. RS and PCG acknowledge that it may be necessary to utilize other subcontractors on the team as may be mutually agreed.

ARTICLE 4 SCOPE OF AGREEMENT

This Agreement shall relate only to the solicitation specified herein, and nothing herein shall be deemed to:



(a) Confer any right or impose any obligation or restriction on either Party with respect to any other efforts or marketing activity at any time undertaken by either Party hereto, jointly or separately; or

(b) Preclude either Party hereto from soliciting or accepting any prime contract or subcontract from any third Party (or subcontractor of any tier) under any other solicitation during or after termination of this Agreement; or

(c) Limit the rights of either Party to promote, market, sell, lease, license or otherwise dispose of its standard products or services, except where such would conflict with the obligations of the Party under this Agreement.

ARTICLE 5 RELATIONSHIP

Nothing in this Agreement shall be deemed to constitute, create, give effect to, or otherwise recognize a joint venture, partnership, or formal business entity of any kind, and the rights and obligations of the Parties shall be limited to those expressly set forth herein. Nothing herein shall be construed as providing for the sharing of profits or losses arising out of the efforts of either or both of the Parties; except as may be provided for in any resultant contractual arrangement agreed to between the Parties. The cooperation of the Parties is for the purpose of complementing their respective capabilities in pursuit and execution of the subject solicitation.

ARTICLE 6 EXCHANGE OF CONFIDENTIAL INFORMATION

During the term of this Agreement, each Party agrees to receive from the other, cost, pricing and technical information and data, hereinafter referred to as "Data", for the purpose of responding to the request for proposal for the Project from the Customer. Such Data shall consist of that needed to satisfy the requirements of Exhibit "A" and Customer's request for proposal.

For a term of five (5) years from the date of this Agreement, each Party agrees to keep in confidence and to use its best efforts to prevent the disclosure to any person or persons outside its own organization all Data (i) which is designated in writing, by appropriate stamp (or legend) by the disclosing Party, to be of a proprietary or confidential nature, (ii) which is received from the disclosing Party under this Agreement, and (iii) which pertains to proprietary or confidential data regarding the disclosing Party's costs, pricing and technological techniques, processes, inventions, and research and development; provided, however, that neither Party shall be liable for use or disclosure of any such Data if the same:

(a) Is in the public domain at the time it is disclosed; or

(b) Is known, as demonstrated by written documentation, to the Party receiving it at the time of disclosure; or

(c) Is used or disclosed with the prior written approval of the other Party; or

(d) Becomes known to the receiving Party from a source other than the disclosing Party; or

(e) Is independently developed, separate from the activities undertaken pursuant to this Agreement; or

(f) Is disclosed under legal compulsion provided that the disclosing Party is given a reasonable opportunity to pursue injunctive relief.

ARTICLE 7 TERMINATION

All rights and obligations of the Parties under this Agreement shall terminate on the earliest of the following:

(a) Notice from Customer that the Project has been cancelled, or that the prime contract will not be awarded to RS or PCG;

(b) Award to other contractors to the exclusion of RS or PCG of contracts for all or substantially all of the Project work contemplated by the proposal;

(c) Notice from the Customer that RS or PCG is unacceptable in the role and function set forth in the proposal; however, if the Customer requests a change in the role and/or function of RS or PCG, this Agreement shall not be deemed terminated unless RS and PCG fail to agree to effect appropriate changes within the time period permitted by the Customer;

(d) Either Party hereto may exercise an option to terminate this Agreement for its convenience. A condition enabling this right is that the Party which withdraws shall not compete for this Project either as an individual firm or in combination with any other firm;

(e) Execution by both Parties hereto of the contractual arrangement between themselves contemplated by this Agreement, or failure of the Parties hereto to agree on the terms of the contemplated arrangement;

(f) The failure of the Parties hereto and the Customer to reach agreement on the terms of the contemplated prime contract;

(g) The expiration of 24 months from the effective date hereof; provided, however, if the proposal has been submitted and is under consideration by the Customer upon the expiration of such 24 month period, this Agreement shall continue to be in force until terminated pursuant to one of the foregoing conditions; and provided further that if an award is made by the Customer on the proposal at any time after the 24 month period is over, this Agreement shall be deemed to have continued in full force and effect.

(h) Mutual agreement of the Parties.

ARTICLE 8 COSTS

Each Party shall perform its obligations hereunder at its own cost unless the Parties agree in writing to other cost sharing arrangements.

ARTICLE 9 DAMAGES

Neither Party shall be liable to the other for any indirect, special or consequential losses, whether arising in contract, tort (including negligence), or otherwise.

ARTICLE 10 ASSIGNMENT

This Agreement shall not be assigned by either Party without the prior written approval of the other Party.

ARTICLE 11 NOTICE

All notices hereunder shall be given by letter addressed, except as each may change its address pursuant hereto, as follows:

Attention: **Mark Ward**
Restoration Specialists, LLC
PO Box 5352
Savannah, Ga. 31414
(912) 659-4355

Attention: **Jay Handegan**
Palmetto Construction Group, LLC
2265 Clements Ferry Rd. Suite 204
Charleston, SC 29492
(843) 971-7156

ARTICLE 12 ENTIRE AGREEMENT

This document contains the entire agreement between the Parties and supersedes any previous understandings, commitments or agreements, oral or written, with respect to the subject matter hereof. It shall not be varied, except by an instrument in writing of subsequent date, duly executed by an authorized representative of each Party. The validity, construction, scope, and performance of this Agreement shall be governed by the laws of the State of Georgia.

RESTORATION SPECIALISTS LLC

By: _____
(Authorized Signature)
Title: Managing Member
Date: 12-01-11

PALMETTO CONSTRUCTION GROUP

By: _____
(Authorized Signature)
Title: Vice President
Date: 12/7/11

EXHIBIT A

AREAS OF PROJECT PARTICIPATION

This Exhibit is based on Customer's stated plans to pursue the Project. It is currently contemplated that as the Project develops from the bid phase through the final contract award phase, one or more special purpose entities may be established to bid and execute the Project. The following represents a general distribution of Project participation. As the Project develops, this Exhibit will be modified as required as detailed scope of work responsibilities and specific contractual arrangements are determined.

AREAS OF RESPONSIBILITY

RS

Restoration Specialists, LLC, a Verified SDVOSB, will serve as the Prime Contractor on this project. The role of the prime will include contract administration, subcontractor administration, material procurement, project management, scheduling, site supervision, quality control and health and safety management.

PCG

Palmetto Construction Group, LLC, a Certified Small Business, shall provide field Project Managers and Superintendents and a qualified labor force to perform the construction of the New SCIU Parking Deck.

SPS

Structured Parking Solutions, a Certified Small Business, will provide all design services including architectural, mechanical, electrical, plumbing, structural and civil engineering and environmental consulting. If requested, SPS will provide contract administration, inspection and testing services during the construction phase of the projects.

Other Sub Contractors

Pre Casters

EXHIBIT B

Standard Subcontract Terms and Conditions

Bond No. 1944091

PAYMENT BOND *(See Instructions on reverse)*	DATE BOND EXECUTED *(Must be same or later than date of contract)*	OMB No.:9000-0045 Expires: 11/30/2012
	April 23, 2012	

Public reporting burden for this collection of information is estimate to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, DC 20405.

PRINCIPAL *(Legal name and business address)*	TYPE OF ORGANIZATION *("X" one)*
Restoration Specialists, LLC P. O. Box 5352 Savannah, GA 31414	☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☒ CORPORATION STATE OF INCORPORATION: GA
SURETY(IES) *(Name(s) and business address(es))*	PENAL SUM OF BOND
The Hanover Insurance Company 440 Lincoln Street Worcester, MA 01653	MILLION(S): 5 · THOUSAND(S): 999 · HUNDRED(S): 860 · CENTS: 00 CONTRACT DATE: March 13, 2012 · CONTRACT NO.: VA247-C-0035

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. for payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The above obligation is void if the Principal promptly makes payment to all persons having a direct relationship with the Principal or a subcontractor of the Principal for furnishing labor, material or both in the prosecution of the work provided for in the contract identified above, and any authorized modifications of the contract that subsequently are made. Notice of those modifications to the Surety(ies) are waived.

WITNESS:

The Principal and Surety(ies) executed this payment bond and affixed their seals on the above date.

Binderlek #CLEX

Restoration Specialists, LLC — PRINCIPAL

	1.	2.	3.	
SIGNATURE(S)	(Seal)	(Seal)	(Seal)	Corporate Seal
NAME(S) & TITLE(S) *(Typed)*	1.	2.	3.	

INDIVIDUAL SURETY(IES)

	1.	2.
SIGNATURE(S)	(Seal)	(Seal)
NAME(S) *(Typed)*	1.	2.

The Hanover Insurance Company — CORPORATE SURETY(IES)

SURETY A	NAME & ADDRESS	440 Lincoln Street, Worcester, MA 01653	STATE OF INC. NH	LIABILITY LIMIT $96,082,000
	SIGNATURE(S)	1.	2.	Corporate Seal
	NAME(S) & TITLE(S) *(Typed)*	1. Laura W. Dennison Attorney-in-Fact	2.	

AUTHORIZED FOR LOCAL REPRODUCTION
Previous edition is usable

STANDARD FORM 25A (REV. 10-98)
Prescribed by GSA-FAR (48 CFR) 53.2228(c)

CORPORATE SURETY(IES) *(Continued)*

SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		

INSTRUCTIONS

. This form, for the protection of persons supplying labor and material, is sed when a payment bond is required under the Act of August 24, 1935, 49 Stat. 793 (40 U.S.C. 270a-270e). Any deviation from this form will require the ritten approval of the Administrator of General Services.

. Insert the full legal name and business address of the Principal in the pace designated "Principal" on the face of the form. An authorized person hall sign the bond. Any person signing in a representative capacity (e.g., an ttorney-in-fact) must furnish evidence of authority if that representative is not member of the firm, partnership, or joint venture, or an officer of the orporation involved.

. (a) Corporations executing the bond as sureties must appear on the epartment of the Treasury's list of approved sureties and must act within the mitation listed therein. Where more than one corporate surety is involved, eir names and addresses shall appear in the spaces (Surety A, Surety B, tc.) headed "CORPORATE SURETY(IES)."

In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28) for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

Bond No. 1944091

PERFORMANCE BOND *(See Instructions on reverse)*	DATE BOND EXECUTED *(Must be same or later than date of contract)* April 23, 2012	OMB No.: 9000-0045

Public reporting burden for this collection of information is estimated to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, D.C. 20405

PRINCIPAL *(Legal name and business address)*

Restoration Specialists, LLC
P. O. Box 5352
Savannah, GA 31414

TYPE OF ORGANIZATION *("X" one)*

☐ INDIVIDUAL ☐ PARTNERSHIP
☐ JOINT VENTURE ☒ CORPORATION

STATE OF INCORPORATION: GA

SURETY(IES) *(Name(s) and business address(es))*

The Hanover Insurance Company
440 Lincoln Street
Worcester, MA 01653

PENAL SUM OF BOND

MILLION(S)	THOUSAND(S)	HUNDRED(S)	CENTS
5	999	860	00

CONTRACT DATE	CONTRACT NO.
March 13, 2012	VA247-C-0035

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The Principal has entered into the contract identified above.

THEREFORE:

The above obligation is void if the Principal –

(a)(1) Performs and fulfills all the undertakings, covenants, terms, conditions, and agreements of the contract during the original term of the contract and any extensions thereof that are granted by the Government, with or without notice to the Surety(ies), and during the life of any guaranty required under the contract, and (2) performs and fulfills all the undertakings, covenants, terms conditions, and agreements of any and all duly authorized modifications of the contract that hereafter are made. Notice of those modifications to the Surety(ies) are waived.

(b) Pays to the Government the full amount of the taxes imposed by the Government, if the said contract is subject to the Mil[illegible] Act, (40 U.S.C. 270a-270e), which are collected, deducted, or withheld from wages paid by the Principal in carrying out the construction contra[illegible] with respect to which this bond is furnished.

WITNESS:

The Principal and Surety(ies) executed this performance bond and affixed their seals on the above date.

Restoration Specialists, LLC — **PRINCIPAL**

	1.	2.	3.	
SIGNATURE(S)	(Seal)	(Seal)	(Seal)	Corporate Seal
NAME(S) & TITLE(S) *(Typed)*	1.	2.	3.	

INDIVIDUAL SURETY(IES)

	1.	2.
SIGNATURE(S)	(Seal)	(Seal)
NAME(S) *(Typed)*	1.	2.

The Hanover Insurance Company — **CORPORATE SURETY(IES)**

SURETY A	NAME & ADDRESS	440 Lincoln Street Worcester, MA 01653	STATE OF INC. NH	LIABILITY LIMIT $96,082,000.00
	SIGNATURE(S)	1.	2.	Corporate Seal
	NAME(S) & TITLE(S) *(Typed)*	1. Laura W. Dennison Attorney-in-Fact	2.	

THE HANOVER INSURANCE COMPANY 1852

CORPORATE SURETY(IES) *(Continued)*

SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		

BOND PREMIUM	RATE PER THOUSAND $ $15 1st 500M; $12 next $2 mil; $9 next $2.5mil; $8 next $2.5 mil	TOTAL $61,999.00 $0.00

INSTRUCTIONS

1. This form is authorized for use in connection with Government contracts. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of the approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the paces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28) for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON PALMETTO CONSTRUCTION GROUP, LLC., Plaintiff, vs. RESTORATION SPECIALISTS, LLC., REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD, Defendant.	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2016-CP-10-1143 **MOTION AND ORDER INFORMATION** **FORM AND COVERSHEET**

Plaintiff's Attorney:	Defendant's Attorney:
SC, Bar No. 01908 Address: Andrew K. Epting, Jr., LLC Andrew K. Epting, Jr., Esquire SCBAR 01908 Michelle N. Endemann SCBAR 79894 46A State Street Charleston SC 29401 Phone: 843-377-1871Fax 843-377- E-mail: ake@epting-law.comOther: men@epting-law.com	_____, Bar No. _____ Address: _____ Phone: _____ Fax_____ E-mail: _____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: Motion to Stay and to Compel
Estimated Time Needed: 20 Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ 2-12-16
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, SCRCP)
- ☐ 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.	JUDGE CODE _____
☐ Other: _____	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	)	CASE NO. 2016-CP-10- 1143 **MOTION TO STAY AND TO COMPEL**

FILED
2016 MAR -7 PM 12:44
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Plaintiff, Palmetto Construction Group, LLC ("Palmetto"), hereby moves this court for an order staying this matter and compelling mediation and, if necessary, arbitration by the parties to proceed as contractually required by Article 6 of their Subcontract Agreement. In support thereof, Plaintiff states as follows:

1. Palmetto entered into a Subcontract Agreement (Exhibit A) with Restoration Specialists, LLC ("Restoration") on or about September 10, 2014 for the construction of facilities for the United States government on a project located in Augusta, Georgia.

2. The Subcontract Agreement contains a provision (Section 6.1.1) requiring the submission of any claim arising out of or related to the agreement to mediation as a condition precedent to binding dispute resolution. Additionally, Section 6.1.2 sets out specifically that the mediation shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the agreement.

3. Section 6.1.2 of the Subcontract Agreement provides that a request for mediation may be made concurrently with the filing of binding dispute resolution proceedings. Under Section 6.2, any claim subject to but not resolved by mediation shall be resolved by binding arbitration pursuant to Section 6.3 of the agreement. Further, Section 6.3.1 provides that the arbitration shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the agreement.

4. Palmetto now alleges that a dispute has arisen out of and involving said Subcontract Agreement and that the Defendants are bound to mediate and arbitrate.

WHEREFORE, Palmetto prays that an order of this court be made directing that the claims asserted by Palmetto against the Defendants that arise out of the parties dealings be stayed, that mediation, and, if necessary, arbitration proceed in the manner provided for in said agreement, and for such other and further relief as to the court may seem proper.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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

ATTORNEYS FOR PLAINTIFFS

On this 17 day of February 2016
Charleston, SC

AIA® Document A401™ – 2007

Standard Form of Agreement Between Contractor and Subcontractor

AGREEMENT made as of the 10 day of September in the year 2014
(In words, indicate day, month and year.)

BETWEEN the Contractor:
(Name, legal status, address and other information)

Restoration Specialists LLC a South Carolina Corporation
1042-A East Montague Ave.
Charleston, SC 29405

and the Subcontractor:
(Name, legal status, address and other information)

Palmetto Construction Group, LLC
2265 Clements Ferry Road, Suite 204
Charleston, SC 29492

The Contractor has made a contract for construction (hereinafter, the Prime Contract) dated: March 29, 2012

with the Owner:
(Name, legal status, address and other information)

Department of Veterans Affairs / Charlie Norwood VAMC
950 15th Street
Augusta, GA 30901

for the following Project:
(Name, location and detailed description)

CHARLIE NORWOOD VAMC PARKING GARAGE
950 15th Street
August, GA 30901
Phase I – Uptown Temporary Parking Lot
Phase II – Downtown Parking Garage Sitework

The Prime Contract provides for the furnishing of labor, materials, equipment and services in connection with the construction of the Project. A copy of the Prime Contract, consisting of the Agreement Between Owner and Contractor (from which compensation amounts may be deleted) and the other Contract Documents enumerated therein, has been made available to the Subcontractor.

The Architect for the Project:
(Name, legal status, address and other information)

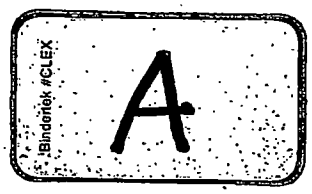
Structured Parking Solutions
21 South Tarragona Street, Suite 101

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

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

AIA Document A201™–2007, General Conditions of the Contract for Construction, is adopted in this document by reference.

This document has been approved and endorsed by the Associated Specialty Contractors, Inc.



Init.
/
AIA Document A401™ – 2007. Copyright © 1915, 1925, 1937, 1951, 1958, 1961, 1963, 1966, 1967, 1972, 1978, 1987, 1997 and 2007 by The American Institute of Architects. All rights reserved. WARNING: This AIA® Document is protected by U.S. Copyright Law and International Treaties. Unauthorized reproduction or distribution of this AIA® Document, or any portion of it, may result in severe civil and criminal penalties, and will be prosecuted to the maximum extent possible under the law. This document was produced by AIA software at 12:04:41 on 03/17/2015 under Order No.9014699599_1 which expires on 06/03/2015, and is not for resale.
User Notes:

Pensacola, FL 32502

The Contractor and the Subcontractor agree as follows.

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User Notes:
(1114130519)

Init.

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TABLE OF ARTICLES

1 THE SUBCONTRACT DOCUMENTS

2 MUTUAL RIGHTS AND RESPONSIBILITIES

3 CONTRACTOR

4 SUBCONTRACTOR

5 CHANGES IN THE WORK

6 MEDIATION AND BINDING DISPUTE RESOLUTION

7 TERMINATION, SUSPENSION OR ASSIGNMENT OF THE SUBCONTRACT

8 THE WORK OF THIS SUBCONTRACT

9 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

10 SUBCONTRACT SUM

11 PROGRESS PAYMENTS

12 FINAL PAYMENT

13 INSURANCE AND BONDS

14 TEMPORARY FACILITIES AND WORKING CONDITIONS

15 MISCELLANEOUS PROVISIONS

16 ENUMERATION OF SUBCONTRACT DOCUMENTS

ARTICLE 1 THE SUBCONTRACT DOCUMENTS

§ 1.1 The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement; (4) other documents listed in Article 16 of this Agreement; and (5) Modifications to this Subcontract issued after execution of this Agreement. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein. The Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Subcontract Documents, other than Modifications issued subsequent to the execution of this Agreement, appears in Article 16.

§ 1.2 Except to the extent of a conflict with a specific term or condition contained in the Subcontract Documents, the General Conditions governing this Subcontract shall be the AIA Document A201™–2007, General Conditions of the Contract for Construction.

§ 1.3 The Subcontract may be amended or modified only by a Modification. The Subcontract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and the Subcontractor, (2) between the Owner and the Subcontractor, or (3) between any persons or entities other than the Contractor and Subcontractor.

§ 1.4 The Contractor shall make available the Subcontract Documents to the Subcontractor prior to execution of this Agreement, and thereafter, upon request, but the Contractor may charge the Subcontractor for the reasonable cost of reproduction.

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User Notes:

ARTICLE 2 MUTUAL RIGHTS AND RESPONSIBILITIES

The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201–2007 apply to this Agreement pursuant to Section 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

ARTICLE 3 CONTRACTOR

§ 3.1 SERVICES PROVIDED BY THE CONTRACTOR

§ 3.1.1 The Contractor shall cooperate with the Subcontractor in scheduling and performing the Contractor's Work to avoid conflicts or interference in the Subcontractor's Work and shall expedite written responses to submittals made by the Subcontractor in accordance with Section 4.1 and Article 5. Promptly after execution of this Agreement, the Contractor shall provide the Subcontractor copies of the Contractor's construction schedule and schedule of submittals, together with such additional scheduling details as will enable the Subcontractor to plan and perform the Subcontractor's Work properly. The Contractor shall promptly notify the Subcontractor of subsequent changes in the construction and submittal schedules and additional scheduling details.

§ 3.1.2 The Contractor shall provide suitable areas for storage of the Subcontractor's materials and equipment during the course of the Work. Additional costs to the Subcontractor resulting from relocation of such storage areas at the direction of the Contractor, except as previously agreed upon, shall be reimbursed by the Contractor.

§ 3.1.3 Except as provided in Article 14, the Contractor's equipment will be available to the Subcontractor only at the Contractor's discretion and on mutually satisfactory terms.

§ 3.2 COMMUNICATIONS

§ 3.2.1 The Contractor shall promptly make available to the Subcontractor information, including information received from the Owner, that affects this Subcontract and that becomes available to the Contractor subsequent to execution of this Subcontract.

§ 3.2.2 The Contractor shall not give instructions or orders directly to the Subcontractor's employees or to the Subcontractor's Sub-subcontractors or material suppliers unless such persons are designated as authorized representatives of the Subcontractor.

§ 3.2.3 The Contractor shall permit the Subcontractor to request directly from the Architect information regarding the percentages of completion and the amount certified on account of Work done by the Subcontractor.

§ 3.2.4 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Contractor, a subcontractor or anyone directly or indirectly employed by them (other than the Subcontractor), the Contractor shall, prior to harmful exposure of the Subcontractor's employees to such substance, give written notice of the chemical composition thereof to the Subcontractor in sufficient detail and time to permit the Subcontractor's compliance with such laws.

§ 3.2.5 The Contractor shall furnish to the Subcontractor within 30 days after receipt of a written request, or earlier if so required by law, information necessary and relevant for the Subcontractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property, usually referred to as the site, on which the Project is located and the Owner's interest therein.

§ 3.2.6 If the Contractor asserts or defends a claim against the Owner that relates to the Work of the Subcontractor, the Contractor shall promptly make available to the Subcontractor all information relating to the portion of the claim that relates to the Work of the Subcontractor.

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§ 3.3 CLAIMS BY THE CONTRACTOR

§ 3.3.1 Liquidated damages for delay, if provided for in Section 9.3 of this Agreement, shall be assessed against the Subcontractor only to the extent caused by the Subcontractor or any person or entity for whose acts the Subcontractor may be liable, and in no case for delays or causes arising outside the scope of this Subcontract.

§ 3.3.2 The Contractor's claims for the costs of services or materials provided due to the Subcontractor's failure to execute the Work shall require

.1 seven days' written notice prior to the Contractor's providing services or materials, except in an emergency; and

.2 written compilations to the Subcontractor of services and materials provided by the Contractor and charges for such services and materials no later than the fifteenth day of the month following the Contractor's providing such services or materials.

.3 Liquidated Damages will be assessed at $ N/A per calendar day past the established completion date.

§ 3.4 CONTRACTOR'S REMEDIES

If the Subcontractor defaults or neglects to carry out the Work in accordance with this Agreement and fails within five working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by appropriate Modification, and without prejudice to any other remedy the Contractor may have, make good such deficiencies and may deduct the reasonable cost thereof from the payments then or thereafter due the Subcontractor.

ARTICLE 4 SUBCONTRACTOR

§ 4.1 EXECUTION AND PROGRESS OF THE WORK

§ 4.1.1 For all Work the Subcontractor intends to subcontract, the Subcontractor shall enter into written agreements with Sub-subcontractors performing portions of the Work of this Subcontract by which the Subcontractor and the Sub-subcontractor are mutually bound, to the extent of the Work to be performed by the Sub-subcontractor, assuming toward each other all obligations and responsibilities that the Contractor and Subcontractor assume toward each other and having the benefit of all rights, remedies and redress each against the other that the Contractor and Subcontractor have by virtue of the provisions of this Agreement.

§ 4.1.2 The Subcontractor shall supervise and direct the Subcontractor's Work, and shall cooperate with the Contractor in scheduling and performing the Subcontractor's Work to avoid conflict, delay in or interference with the Work of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.1.3 The Subcontractor shall promptly submit Shop Drawings, Product Data, Samples and similar submittals required by the Subcontract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Contractor or other subcontractors.

§ 4.1.4 The Subcontractor shall furnish to the Contractor periodic progress reports on the Work of this Subcontract as mutually agreed, including information on the status of materials and equipment that may be in the course of preparation, manufacture, or transit.

§ 4.1.5 The Subcontractor agrees that the Contractor and the Architect each have the authority to reject Work of the Subcontractor that does not conform to the Prime Contract. The Architect's decisions on matters relating to aesthetic effect shall be final and binding on the Subcontractor if consistent with the intent expressed in the Prime Contract.

§ 4.1.6 The Subcontractor shall pay for all materials, equipment and labor used in connection with the performance of this Subcontract through the period covered by previous payments received from the Contractor, and shall furnish satisfactory evidence, when requested by the Contractor, to verify compliance with the above requirements.

§ 4.1.7 The Subcontractor shall take necessary precautions to protect properly the work of other subcontractors from damage caused by operations under this Subcontract.

§ 4.1.8 The Subcontractor shall cooperate with the Contractor, other subcontractors, the Owner, and separate contractors whose work might interfere with the Subcontractor's Work. The Subcontractor shall participate in the preparation of coordinated drawings in areas of congestion, if required by the Prime Contract, specifically noting and

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advising the Contractor of potential conflicts between the Work of the Subcontractor and that of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.2 PERMITS, FEES, NOTICES, AND COMPLIANCE WITH LAWS

§ 4.2.1 The Subcontractor shall give notices and comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on performance of the Work of this Subcontract. The Subcontractor shall secure and pay for permits, fees, licenses and inspections by government agencies necessary for proper execution and completion of the Subcontractor's Work, the furnishing of which is required of the Contractor by the Prime Contract.

§ 4.2.2 The Subcontractor shall comply with Federal, state and local tax laws, social security acts, unemployment compensation acts and workers' compensation acts insofar as applicable to the performance of this Subcontract.

§ 4.3 SAFETY PRECAUTIONS AND PROCEDURES

§ 4.3.1 The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime Contract. The Subcontractor shall report to the Contractor within three days an injury to an employee or agent of the Subcontractor which occurred at the site.

§ 4.3.2 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Subcontractor, the Subcontractor's Sub-subcontractors or anyone directly or indirectly employed by them, the Subcontractor shall, prior to harmful exposure of any employees on the site to such substance, give written notice of the chemical composition thereof to the Contractor in sufficient detail and time to permit compliance with such laws by the Contractor, other subcontractors and other employers on the site.

§ 4.3.3 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a hazardous material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Subcontractor, the Subcontractor shall, upon recognizing the condition, immediately stop Work in the affected area and promptly report the condition to the Contractor in writing. When the material or substance has been rendered harmless, the Subcontractor's Work in the affected area shall resume upon written agreement of the Contractor and Subcontractor. The Subcontract Time shall be extended appropriately and the Subcontract Sum shall be increased in the amount of the Subcontractor's reasonable additional costs of demobilization, delay and remobilization, which adjustments shall be accomplished as provided in Article 5 of this Agreement.

§ 4.3.4 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Subcontractor, the Subcontractor's Sub-subcontractors, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 4.3.3 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

§ 4.3.5 The Subcontractor shall indemnify the Contractor for the cost and expense the Contractor incurs (1) for remediation of a material or substance brought to the site and negligently handled by the Subcontractor or (2) where the Subcontractor fails to perform its obligations under Section 4.3.3, except to the extent that the cost and expense are due to the Contractor's fault or negligence.

§ 4.4 CLEANING UP

§ 4.4.1 The Subcontractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations performed under this Subcontract. The Subcontractor shall not be held responsible for conditions caused by other contractors or subcontractors.

§ 4.4.2 As provided under Section 3.3.2, if the Subcontractor fails to clean up as provided in the Subcontract Documents, the Contractor may charge the Subcontractor for the Subcontractor's appropriate share of cleanup costs.

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§ 4.5 WARRANTY

The Subcontractor warrants to the Owner, Architect, and Contractor that materials and equipment furnished under this Subcontract will be of good quality and new unless the Subcontract Documents require or permit otherwise. The Subcontractor further warrants that the Work will conform to the requirements of the Subcontract Documents and will be free from defects, except for those inherent in the quality of the Work the Subcontract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Subcontractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Subcontractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect and Contractor, the Subcontractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 4.6 INDEMNIFICATION

§ 4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6.

§ 4.6.2 In claims against any person or entity indemnified under this Section 4.6 by an employee of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 4.6.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor or the Subcontractor's Sub-subcontractors under workers' compensation acts, disability benefit acts or other employee benefit acts.

§ 4.7 REMEDIES FOR NONPAYMENT

If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate Modification, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization.

ARTICLE 5 CHANGES IN THE WORK

§ 5.1 The Owner may make changes in the Work by issuing Modifications to the Prime Contract. Upon receipt of such a Modification issued subsequent to the execution of the Subcontract Agreement, the Contractor shall promptly notify the Subcontractor of the Modification. Unless otherwise directed by the Contractor, the Subcontractor shall not thereafter order materials or perform Work that would be inconsistent with the changes made by the Modification to the Prime Contract.

§ 5.2 The Subcontractor may be ordered in writing by the Contractor, without invalidating this Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions, deletions or other revisions, including those required by Modifications to the Prime Contract issued subsequent to the execution of this Agreement, the Subcontract Sum and the Subcontract Time being adjusted accordingly. The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for adjustment to the Subcontract Sum and Subcontract Time for such revised Work in a manner consistent with requirements of the Subcontract Documents.

§ 5.3 The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time

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by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

ARTICLE 6 MEDIATION AND BINDING DISPUTE RESOLUTION

§ 6.1 MEDIATION

§ 6.1.1 Any claim arising out of or related to this Subcontract, except those waived in this Subcontract, shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 6.1.2 The parties shall endeavor to resolve their claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to this Subcontract and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section, the parties may nonetheless proceed to the selection of the arbitrators(s) and agree upon a schedule for later proceedings.

§ 6.1.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 6.2 BINDING DISPUTE RESOLUTION

For any claim subject to, but not resolved by mediation pursuant to Section 6.1, the method of binding dispute resolution shall be as follows:
(Check the appropriate box. If the Contractor and Subcontractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, claims will be resolved by litigation in a court of competent jurisdiction.)

[X] Arbitration pursuant to Section 6.3 of this Agreement

[ ] Litigation in a court of competent jurisdiction

[ ] Other: *(Specify)*

§ 6.3 ARBITRATION

§ 6.3.1 If the Contractor and Subcontractor have selected arbitration as the method of binding dispute resolution in Section 6.2, any claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Subcontract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded.

§ 6.3.2 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim.

§ 6.3.3 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

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§ 6.3.4 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a claim not described in the written consent.

§ 6.3.5 The Contractor and Subcontractor grant to any person or entity made a party to an arbitration conducted under this Section 6.3, whether by joinder or consolidation, the same rights of joinder and consolidation as the Contractor and Subcontractor under this Agreement.

§ 6.3.6 This agreement to arbitrate and any other written agreement to arbitrate with an additional person or persons referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 7 TERMINATION, SUSPENSION OR ASSIGNMENT OF THE SUBCONTRACT

§ 7.1 TERMINATION BY THE SUBCONTRACTOR

The Subcontractor may terminate the Subcontract for the same reasons and under the same circumstances and procedures with respect to the Contractor as the Contractor may terminate with respect to the Owner under the Prime Contract, or for nonpayment of amounts due under this Subcontract for 60 days or longer. In the event of such termination by the Subcontractor for any reason which is not the fault of the Subcontractor, Sub-subcontractors or their agents or employees or other persons performing portions of the Work under contract with the Subcontractor, the Subcontractor shall be entitled to recover from the Contractor payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

§ 7.2 TERMINATION BY THE CONTRACTOR

§ 7.2.1 If the Subcontractor repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Subcontract and fails within a ten-day period after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by written notice to the Subcontractor and without prejudice to any other remedy the Contractor may have, terminate the Subcontract and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

§ 7.2.2 If the Owner terminates the Prime Contract for the Owner's convenience, the Contractor shall promptly deliver written notice to the Subcontractor.

§ 7.2.3 Upon receipt of written notice of termination, the Subcontractor shall

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

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

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

§ 7.2.4 In case of such termination for the Owner's convenience, the Subcontractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

§ 7.3 SUSPENSION BY THE CONTRACTOR FOR CONVENIENCE

§ 7.3.1 The Contractor may, without cause, order the Subcontractor in writing to suspend, delay or interrupt the Work of this Subcontract in whole or in part for such period of time as the Contractor may determine. In the event of suspension ordered by the Contractor, the Subcontractor shall be entitled to an equitable adjustment of the Subcontract Time and Subcontract Sum.

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§ 7.3.2 An adjustment shall be made for increases in the Subcontract Time and Subcontract Sum, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent that

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

.2 an equitable adjustment is made or denied under another provision of this Subcontract.

§ 7.4 ASSIGNMENT OF THE SUBCONTRACT

§ 7.4.1 In the event the Owner terminates the Prime Contract for cause, this Subcontract is assigned to the Owner pursuant to Section 5.4 of AIA Document A201–2007 provided the Owner accepts the assignment.

§ 7.4.2 Without the Contractor's written consent, the Subcontractor shall not assign the Work of this Subcontract, subcontract the whole of this Subcontract, or subcontract portions of this Subcontract.

ARTICLE 8 THE WORK OF THIS SUBCONTRACT

The Subcontractor shall execute the following portion of the Work described in the Subcontract Documents, including all labor, materials, equipment, services and other items required to complete such portion of the Work, except to the extent specifically indicated in the Subcontract Documents to be the responsibility of others.
(Insert a precise description of the Work of this Subcontract, referring where appropriate to numbers of Drawings, sections of Specifications and pages of Addenda, Modifications and accepted alternates.)

ARTICLE 9 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 9.1 Subcontract Time is the period of time, including authorized adjustments, allotted in the Subcontract Documents for Substantial Completion of the Work described in the Subcontract Documents. The Subcontractor's date of commencement is the date from which the Subcontract Time of Section 9.3 is measured; it shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Contractor.
(Insert the date of commencement, if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)

§ 9.2 Unless the date of commencement is established by a notice to proceed issued by the Contractor, or the Contractor has commenced visible Work at the site under the Prime Contract, the Subcontractor shall notify the Contractor in writing not less than five days before commencing the Subcontractor's Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

§ 9.3 The Work of this Subcontract shall be substantially completed not later than .
(Insert the calendar date or number of calendar days after the Subcontractor's date of commencement. Also insert any requirements for earlier substantial completion of certain portions of the Subcontractor's Work, if not stated elsewhere in the Subcontract Documents.)

Portion of Work	Substantial Completion Date
Provide supervision and management of concrete subcontractor (Atlantic Concrete Contractors). See PCG Subcontract Breakdown spreadsheet dated 9/5/14 provided, attached. Note: It is the subcontractor's responsibility to visit Submittal Exchange (www.submittalexchange.com) to access and verify they are using the latest revisions of all contract documents. An email invitation will be sent to each subcontractor's point of contact to initiate	Commence Work: Mobilize 9/22/14 Completion Date: Final Completion 7/7/15

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access to the site. ALL SUBMITTALS FROM SUBCONTRACTORS ARE TO BE SUBMITTED TO RESTORATION SPECIALISTS BY UPLOADING PDF DOCUMENTS TO THE SUBMITTAL EXHANGE SITE.
Schedule: As follows
Submittals: Submittals are due no later than 9/23/14 (submitted electronically via. Submittal Exchange)

, subject to adjustments of this Subcontract Time as provided in the Subcontract Documents.
(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)

§ 9.4 With respect to the obligations of both the Contractor and the Subcontractor, time is of the essence of this Subcontract.

§ 9.5 No extension of time will be valid without the Contractor's written consent after claim made by the Subcontractor in accordance with Section 5.3.

ARTICLE 10 SUBCONTRACT SUM

§ 10.1 The Contractor shall pay the Subcontractor in current funds for performance of the Subcontract the Subcontract Sum of One million eighty two thousand three hundred forty two dollars and 10/100, ($ 1,082,342.10), subject to additions and deductions as provided in the Subcontract Documents.

§ 10.2 The Subcontract Sum is based upon the following alternates, if any, which are described in the Subcontract Documents and have been accepted by the Owner and the Contractor:
(Insert the numbers or other identification of accepted alternates.)

§ 10.3 Unit prices, if any:
(Identify and state the unit price, and state the quantity limitations, if any, to which the unit price will be applicable.)

Item	Units and Limitations	Price Per Unit ($0.00)
N/A		

§ 10.4 Allowances included in the Subcontract Sum, if any:
(Identify allowance and state exclusions, if any, from the allowance price.)

Item	Price
N/A	

ARTICLE 11 PROGRESS PAYMENTS

§ 11.1 Based upon applications for payment submitted to the Contractor by the Subcontractor, corresponding to applications for payment submitted by the Contractor to the Government, and certificates for payment issued by the Government, the Contractor shall make progress payments on account of the Subcontract Sum to the Subcontractor as provided below and elsewhere in the Subcontract Documents. Unless the Contractor provides the Government with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor and Subcontractor for Work properly performed by their contractors and suppliers shall be held by the Contractor and Subcontractor for those contractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor or Subcontractor for which payment was made to the Contractor by the Owner or to the Subcontractor by the Contractor, as applicable. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor or Subcontractor, shall create any fiduciary liability or tort liability on the

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part of the Contractor or Subcontractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor or Subcontractor for breach of the requirements of this provision.

§ 11.2 The period covered by each application for payment shall be one calendar month ending on the last day of the month, or as follows:

§ 11.3 Provided an application for payment is received by the Contractor not later than the 25th day of a month, the Contractor shall include the Subcontractor's Work covered by that application in the next application for payment which the Contractor is entitled to submit to the Government. The Contractor shall pay the Subcontractor each progress payment no later than seven working days after the Contractor receives payment from the Government.

§ 11.4 If the Subcontractor's application for payment is received by the Contractor after the application date fixed above, the Subcontractor's Work covered by it shall be included by the Contractor in the next application for payment submitted to the Architect.

§ 11.5 The Subcontractor shall submit to the Contractor a schedule of values prior to submitting the Subcontractor's first Application for Payment. Each subsequent application for payment shall be based upon the most recent schedule of values submitted by the Subcontractor in accordance with the Subcontract Documents. The schedule of values shall allocate the entire Subcontract Sum among the various portions of the Subcontractor's Work and be prepared in such form and supported by such data to substantiate its accuracy as the Contractor may require. This schedule, unless objected to by the Contractor, shall be used as a basis for reviewing the Subcontractor's applications for payment.

§ 11.6 Applications for payment submitted by the Subcontractor shall indicate the percentage of completion of each portion of the Subcontractor's Work as of the end of the period covered by the application for payment.

§ 11.7 Subject to the provisions of the Subcontract Documents, the amount of each progress payment shall be computed as set forth in the sections below.

§ 11.7.1 Take that portion of the Subcontract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Subcontractor's Work by the share of the total Subcontract Sum allocated to that portion of the Subcontractor's Work in the schedule of values, less that percentage actually retained, if any, from payments to the Contractor on account of the Work of the Subcontractor. Pending final determination of cost to the Contractor of changes in the Work that have been properly authorized by the Contractor, amounts not in dispute shall be included to the same extent provided in the Prime Contract, even though the Subcontract Sum has not yet been adjusted;

§ 11.7.2 Add that portion of the Subcontract Sum properly allocable to materials and equipment delivered and suitably stored at the site by the Subcontractor for subsequent incorporation in the Subcontractor's Work or, if approved by the Contractor, suitably stored off the site at a location agreed upon in writing, less the same percentage retainage required by the Prime Contract to be applied to such materials and equipment in the Contractor's application for payment;

§ 11.7.3 Subtract the aggregate of previous payments made by the Contractor; and

§ 11.7.4 Subtract amounts, if any, calculated under Section 11.7.1 or 11.7.2 that are related to Work of the Subcontractor for which the Architect has withheld or nullified, in whole or in part, a certificate of payment for a cause that is the fault of the Subcontractor.

§ 11.8 Upon the partial or entire disapproval by the Contractor of the Subcontractor's application for payment, the Contractor shall provide written notice to the Subcontractor. When the basis for the disapproval has been remedied, the Subcontractor shall be paid the amounts withheld.

§ 11.9 SUBSTANTIAL COMPLETION

When the Subcontractor's Work or a designated portion thereof is substantially complete and in accordance with the requirements of the Prime Contract, the Contractor shall, upon application by the Subcontractor, make prompt application for payment for such Work. Within 30 days following issuance by the Architect of the certificate for

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payment covering such substantially completed Work, the Contractor shall, to the full extent allowed in the Prime Contract, make payment to the Subcontractor, deducting any portion of the funds for the Subcontractor's Work withheld in accordance with the certificate to cover costs of items to be completed or corrected by the Subcontractor. Such payment to the Subcontractor shall be the entire unpaid balance of the Subcontract Sum if a full release of retainage is allowed under the Prime Contract for the Subcontractor's Work prior to the completion of the entire Project. If the Prime Contract does not allow for a full release of retainage, then such payment shall be an amount which, when added to previous payments to the Subcontractor, will reduce the retainage on the Subcontractor's substantially completed Work to the same percentage of retainage as that on the Contractor's Work covered by the certificate.

ARTICLE 12 FINAL PAYMENT

§ 12.1 Final payment, constituting the entire unpaid balance of the Subcontract Sum, shall be made by the Contractor to the Subcontractor when the Subcontractor's Work is fully performed in accordance with the requirements of the Subcontract Documents, the Architect has issued a certificate for payment covering the Subcontractor's completed Work and the Contractor has received payment from the Owner. If, for any cause which is not the fault of the Subcontractor, a certificate for payment is not issued or the Contractor does not receive timely payment or does not pay the Subcontractor within seven days after receipt of payment from the Owner, final payment to the Subcontractor shall be made upon demand.
(Insert provisions for earlier final payment to the Subcontractor, if applicable.)

§ 12.2 Before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied. Acceptance of final payment by the Subcontractor shall constitute a waiver of claims by the Subcontractor, except those previously made in writing and identified by the Subcontractor as unsettled at the time of final application for payment.

ARTICLE 13 INSURANCE AND BONDS

§ 13.1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability as will protect the Subcontractor from claims that may arise out of, or result from, the Subcontractor's operations and completed operations under the Subcontract:

Type of insurance or bond	Limit of liability or bond amount ($1,000,000.00 per incident)
Commercial General Liability Insurance	$ 1,000,000.00 (per incident)
Business Automobile Liability Insurance	$ 1,000,000.00 (per incident)
Commercial Umbrella Coverage	$ 1,000,000.00 (limits must include as insureds all entities that are additional insureds on the CGL)
Worker's Compensation and Employer's Liability Insurance	$ 1,000,000.00 (per incident & per employee)

§ 13.2 Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Subcontractor's Work until the date of final payment and termination of any coverage required to be maintained after final payment to the Subcontractor, and, with respect to the Subcontractor's completed operations coverage, until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Prime Contract.

§ 13.3 Certificates of insurance acceptable to the Contractor shall be filed with the Contractor prior to commencement of the Subcontractor's Work. These certificates and the insurance policies required by this Article 13 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final application for payment as required in Article 12. If any information concerning reduction of coverage is not furnished by the insurer, it shall be furnished by the Subcontractor with reasonable promptness according to the Subcontractor's information and belief.

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§ 13.4 The Subcontractor shall cause the commercial liability coverage required by the Subcontract Documents to include: (1) the Contractor, the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's operations; and (2) the Contractor as an additional insured for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's completed operations.

§ 13.5 The Contractor shall furnish to the Subcontractor satisfactory evidence of insurance required of the Contractor under the Prime Contract.

§ 13.6 The Contractor shall promptly, upon request of the Subcontractor, furnish a copy or permit a copy to be made of any bond covering payment of obligations arising under the Subcontract.

§ 13.7 Performance Bond and Payment Bond:
(If the Subcontractor is to furnish bonds, insert the specific requirements here.)

Bond type	Bond amount ($0.00)	Bond delivery date	Bond form
N/A			

§ 13.8 PROPERTY INSURANCE

§ 13.8.1 When requested in writing, the Contractor shall provide the Subcontractor with copies of the property and equipment policies in effect for the Project. The Contractor shall notify the Subcontractor if the required property insurance policies are not in effect.

§ 13.8.2 If the required property insurance is not in effect for the full value of the Subcontractor's Work, then the Subcontractor shall purchase insurance for the value of the Subcontractor's Work, and the Subcontractor shall be reimbursed for the cost of the insurance by an adjustment in the Subcontract Sum.

§ 13.8.3 Property insurance for the Subcontractor's materials and equipment required for the Subcontractor's Work, stored off site or in transit and not covered by the Project property insurance, shall be paid for through the application for payment process.

§ 13.9 WAIVERS OF SUBROGATION

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

ARTICLE 14 TEMPORARY FACILITIES AND WORKING CONDITIONS

§ 14.1 The Contractor shall furnish and make available at no cost to the Subcontractor the Contractor's temporary facilities, equipment and services, except as noted below:

Temporary Facility, Equipment or Service	Cost, if any ($0.00)

§ 14.2 Specific working conditions:
(Insert any applicable arrangements concerning working conditions and labor matters for the Project.)

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ARTICLE 15 MISCELLANEOUS PROVISIONS

§ 15.1 Where reference is made in this Subcontract to a provision of another Subcontract Document, the reference refers to that provision as amended or supplemented by other provisions of the Subcontract Documents.

(Insert rate of interest agreed upon, if any.)

%

(Paragraphs deleted)

§ 15.3 Retainage and any reduction thereto are as follows:

0% (zero)

(Paragraph deleted)

ARTICLE 16 ENUMERATION OF SUBCONTRACT DOCUMENTS

§ 16.1 The Subcontract Documents, except for Modifications issued after execution of this Subcontract, are enumerated in the sections below.

§ 16.1.1 This executed AIA Document A401–2007, Standard Form of Agreement Between Contractor and Subcontractor.

§ 16.1.2 The Prime Contract, consisting of the Agreement between the Owner and Contractor dated as first entered above and the other Contract Documents enumerated in the Owner-Contractor Agreement.

§ 16.1.3 The following Modifications to the Prime Contract, if any, issued subsequent to the execution of the Owner-Contractor Agreement but prior to the execution of this Agreement:

Modification	**Date**

§ 16.1.4 Additional Documents, if any, forming part of the Subcontract Documents:

.1 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed by the parties, or the following:

.2 Other documents:
(List here any additional documents that are intended to form part of the Subcontract Documents. Requests for proposal and the Subcontractor's bid or proposal should be listed here only if intended to be made part of the Subcontract Documents.)

1. PCG Subcontract Breakdown
2. Atlantic Concrete Subcontract

This Contract / P.O. Number will be: 1401-010000-005
This Contract / P.O. # is to be referenced on all billings / invoices / submittals, etc.

This Agreement entered into as of the day and year first written above.

RESTORATION SPECIALISTS, LLC	PALMETTO CONSTRUCTION GROUP, LLC
CONTRACTOR *(Signature)*	**SUBCONTRACTOR** *(Signature)*
Mark Ward – Managing Member	Jay Hannegan - Vice President
(Printed name and title)	*(Printed name and title)*

Init.

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON PALMETTO CONSTRUCTION GROUP, LLC. Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, AND LYNNETTE PENNINGTON WARD Defendant.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2016-CP-10-1143 **MOTION AND ORDER INFORMATION** **FORM AND COVERSHEET**

Plaintiff's Attorney: ANDREW K. EPTING, JR., Bar No. 1908 Address: 46A STATES STREET, CHARLESTON, SC 29401 Phone: 8433771871Fax 8433771310 E-mail: ake@epting-law.comOther: ____	Defendant's Attorney: ____, Bar No. ____ Address: ____ Phone: ____ Fax____ E-mail: ____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: Motion for Default Judgement AND Referral to the MIE
Estimated Time Needed: 15 Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Andrew K Epting, Jr. _____ ____
Signature of Attorney for ☒ Plaintiff /☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $_____
☐ 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, SCRCP)
- ☐ 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

Collected by: ____ Date Filed: ____
☐ MOTION FEE COLLECTED: $ ____

☐ CONTESTED – AMOUNT DUE: $ ____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	CASE NO. 2016-CP-10-1143 **MOTION TO REFER TO THE MASTER IN EQUITY AND FOR ENTRY OF DEFAULT**

FILED
2016 APR 18 PM 3:2
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Plaintiff, Palmetto Construction Group, LLC ("Palmetto"), hereby moves this Court for an order referring this case to the Master in Equity and for entry of default against the Defendants. As appears from the attached affidavit of default, Plaintiff served Defendants by way of process server with a copy of the summons and complaint and discovery requests on March 14, 2016. (See Exhibit A). Defendants have filed no pleading and have made no appearance in this case. Therefore, Plaintiff respectfully requests a default and that this matter be referred to the Master in Equity pursuant to Rule 53(b) SCRCP for all purposes including entry of final judgment against Defendants.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

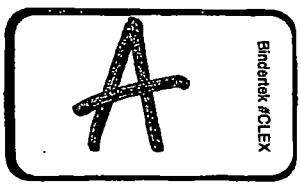
Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
46A State Street, Charleston, SC 29401
P: 843.377.1871
F: 843.377.1310
ake@epting-law.com; mne@epting-law.com
ATTORNEYS FOR PLAINTIFF

DATED: April 18, 2016
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	)	CASE NO. 2016-CP-10-1143 **AFFIDAVIT OF DEFAULT**

PERSONALLY APPEARED before me, Andrew K. Epting, Jr., who, being duly sworn, alleges and says as follows:

1. I am the attorney for Palmetto Construction Group, LLC. in the above captioned matter, and I have personal knowledge of the facts relating to this action.
2. On March 7, 2016, Plaintiff filed a Summons and Complaint against Defendants Restoration Specialist, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, in the Charleston County Court of Common Pleas.
3. A copy of the Summons and Complaint was served on Defendant Restoration Specialists, LLC, by personal service, as evidenced by the Affidavit of Service dated March 14, 2016, attached hereto as EXHIBIT 1.
4. A copy of the Summons and Complaint was served on Defendant Reuben Mark Ward by personal service, as evidenced by the Affidavit of Service dated March 14, 2016, and attached hereto as EXHIBIT 2.
5. A copy of the Summons and Complaint was served on Defendant Lynnette Pennington Ward by personal service, as evidenced by the Affidavit of Service dated



March 14, 2016, and attached hereto as EXHIBIT 3.

6. More than thirty (30) days have elapsed since service of Plaintiff's Summons and Complaint. Defendants Restoration Specialist, LLC, Reuben Mark Ward, and Lynnette Pennington Ward have failed to answer or otherwise respond to the Complaint. Neither the Defendants nor counsel for Defendants have made an appearance or contacted Plaintiff or counsel for plaintiff.
7. Defendant Restoration Specialists, LLC is in default.
8. Defendant Rueben Mark Ward is in default.
9. Defendant Lynnette Pennington Ward is in default.
10. Defendant Reuben Mark Ward is not a minor, incompetent or in the military service.
11. Defendant Lynnette Pennington Ward is not a minor, incompetent or in the military service.

Andrew K. Epting V

ANDREW K. EPTING, JR., ESQUIRE
Andrew K. Epting, Jr.
Michelle N. Endemann
Attorneys for Plaintiff
46A State Street
Charleston, SC 29401
Phone: (843) 722-6612
Fax: (843) 377-1310
ake@epting-law.com
mne@epting-law.com

SWORN TO BEFORE ME THIS
18 day of APRIL, 2016.

Notary Public for South Carolina

ANGELA GODDARD GROSS NOTARY PUBLIC SOUTH CAROLINA My Comm. Exp. 10-20-2018

AFFIDAVIT OF SERVICE

State of South Carolina **County of Charleston** **Common Pleas Court**

Case Number: 2016-CP-10-1143

Plaintiff:
Palmetto Construction Group, LLC
vs.
Defendant:
Restoration Specialists, LLC, Reuben Mark Ward, and Lynette Pennington Ward

For: Andrew Epting

Received by SERVE ONE PROCESS SERVING CORP to be served on **Restoration Specialists, LLC, Reuben Mark Ward, Registered Agent, 3 Bailey Reach, Savannah, GA 31411.** I, Bennett Crisp, being duly sworn, depose and say that on the 14th day of March, 2016 at 8:20pm., executed service by delivering a true copy of the **Summons, Complaint, Motion to Stay and to Compel, Plaintiff's First Set of Interrogatories to All Defendants, Plaintiff's First Set of Request for Production to Defendant and Exhibits** in accordance with state statutes in the manner marked below:

(X) CORPORATE SERVICE: By serving Reuben Ward as Registered Agent a person authorized to accept service.

( ) GOVERNMENT AGENCY: By serving _____ as _____ of the within named agency.

( ) NON SERVICE: Due to reasons detailed in Comments below.

COMMENTS: Served at: 7 Diamond Causeway, Savannah, GA 31406

Age 40 Sex (M) F Race White Height 5'10" Weight 185 Hair Bald Glasses Y (N)

Bindertek #CLEX 1

RECEIVED
MAR 22 2016
By _____

AFFIDAVIT OF SERVICE For 2016-CP-10-1143

I certify that I have no interest in the above action, am of legal age and have proper authority in the jurisdiction in which this service was made.

FILED
2016 DEC 29 PM 2:21
CLERK OF COURT
BERKELEY COUNTY, SC
BY

Subscribed and Sworn to before me on the 15 day of December, 2016 by the affiant who is personally known to me.

NOTARY PUBLIC

My Commission Expires: OCT. 15 2019

JOHN W. CRISP
NOTARY PUBLIC
CHATHAM CO., GEORGIA
MY COMMISSION EXPIRES

PROCESS SERVER # _____
Appointed in accordance with State Statute

SERVE ONE PROCESS SERVING CORP
P.O. Box 2584
Greenville, SC 29602
(864) 235-7766

Our Job Serial Number: 2016000516

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AFFIDAVIT OF SERVICE

State of South Carolina **County of Charleston** **Common Pleas Court**

Case Number: 2016-CP-10-1143

Plaintiff:
Palmetto Construction Group, LLC
vs.
Defendant:
Restoration Specialists, LLC, Reuben Mark Ward, and Lynette Pennington Ward

For: Andrew Epting

Received by SERVE ONE PROCESS SERVING CORP to be served on **Reuben Mark Ward, 3 Bailey Reach, Savannah, GA 31411.** I, Bennett Crisp, being duly sworn, depose and say that on the 14th day of March, 2016 at 8:10p.m., executed service by delivering a true copy of the **Summons, Complaint, Motion to Stay and to Compel, Plaintiff's First Set of Interrogatories to All Defendants, Plaintiff's First Set of Request for Production to Defendant and Exhibits** in accordance with state statutes in the manner marked below:

( ) INDIVIDUAL SERVICE: Served personally to the within-named.

(X) SUBSTITUTE SERVICE: By delivering to: Lynnete Ward, as co-resident/spouse, a person authorized to accept service and a person of discretion and appropriate age, residing at the residence of the within named person and present at said residence at the time of service.

( ) OTHER SERVICE: As described in the Comments below by serving _____ as _____.

( ) NON SERVICE:Due to reasons detailed in Comments below.

( ) MILITARY STATUS: Y N If Yes, what branch:_____

COMMENTS: _____

Age F Sex (M) F Race White Height 5'6" Weight 130 Hair Blond Glasses (Y) (N)

RECEIVED
MAR 23 2016
By _____

Binderek #CLEX 2

AFFIDAVIT OF SERVICE For 2016-CP-10-1143

I certify that I have no interest in the above action, am of legal age and have proper authority in the jurisdiction in which this service was made.

FILED
2016 MAR 29 AM 9:21
CLERK OF COURT
BERKELEY COUNTY, SC

Subscribed and Sworn to before me on the 15 day of March 2016 by the affiant who is personally known to me.

NOTARY PUBLIC

My Commission Expires: OCT. 15 2019

NOTARY PUBLIC CHATHAM CO., GEORGIA MY COMMISSION EXPIRES

PROCESS SERVER # _____
Appointed in accordance with State Statutes

SERVE ONE PROCESS SERVING CORP
P.O. Box 2584
Greenville, SC 29602
(864) 235-7766

Our Job Serial Number: 2016000515

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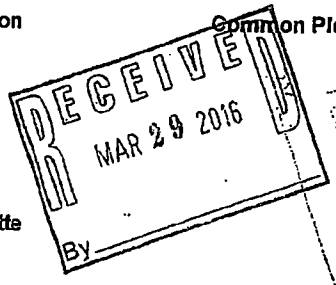
AFFIDAVIT OF SERVICE

State of South Carolina **County of Charleston** **Common Pleas Court**

Case Number: 2016-CP-10-1143

Plaintiff:
Palmetto Construction Group, LLC
vs.
Defendant:
Restoration Specialists, LLC, Reuben Mark Ward, and Lynette Pennington Ward

For: Andrew Epting



Received by SERVE ONE PROCESS SERVING CORP to be served on **Lynnete Pennington Ward, 3 Bailey Reach, Savannah, GA 31411**. I, Bennett Crisp, being duly sworn, depose and say that on the 14th day of March, 20 16 at 8:10p.m., executed service by delivering a true copy of the **Summons, Complaint, Motion to Stay and to Compel, Plaintiff's First Set of Interrogatories to All Defendants, Plaintiff's First Set of Request for Production to Defendant and Exhibits** in accordance with state statutes in the manner marked below:

(X) INDIVIDUAL SERVICE: Served personally to the within-named.

( ) SUBSTITUTE SERVICE: By delivering to:_____, as _____, a person authorized to accept service and a person of discretion and appropriate age, residing at the residence of the within named person and present at said residence at the time of service.

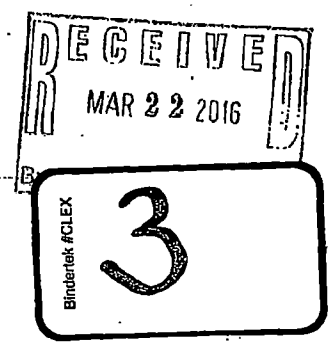
( ) OTHER SERVICE: As described in the Comments below by serving _____ as _____.

( ) NON SERVICE:Due to reasons detailed in Comments below.

( ) MILITARY STATUS: Y N If Yes, what branch:_____

COMMENTS: _____

Age 35 Sex M (F) Race White Height 5'6" Weight 130 Hair Blond Glasses Y (N)



AFFIDAVIT OF SERVICE For 2016-CP-10-1143

I certify that I have no interest in the above action, am of legal age and have proper authority in the jurisdiction in which this service was made.

FILED
2016 MAR 29 AM 9:20
CLERK OF COURT
BY

Subscribed and Sworn to before me on the 15 day of March 2016 by the affiant who is personally known to me.

NOTARY PUBLIC

My Commission Expires: OCT 15 2019

JOSEPH GRISP
NOTARY PUBLIC
CHATHAM CO., GEORGIA
MY COMMISSION EXPIRES

PROCESS SERVER # _____
Appointed in accordance with State Statutes

SERVE ONE PROCESS SERVING CORP
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Greenville, SC 29602
(864) 235-7766

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

PALMETTO CONSTRUCTION GROUP, LLC)

Plaintiff,)

v.)

RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
C/A NO. 2016-CP-10-1143

AFFIDAVIT OF REUBEN MARK WARD

FILED
2016 JUN -6 AM 11:
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PERSONALLY APPEARED BEFORE ME, Reuben Mark Ward, who having been first duly sworn, deposes and states as follows:

1. I am the Managing Member of Restoration Specialists, LLC ("Restoration Specialists").

I was served with the Notice of Hearing for the default damages hearing on June 2, 2016 at 6:30 p.m. by process server at my home located at 3 Bailey Reach, Savannah, Ga. 31411.

FURTHER DEPONENT SAYETH NAUGHT.

Reuben Mark Ward

Sworn to before me
This 3 th day of June 2016.

Notary Public for the State of Georgia

My Commission Expires 09/4/2019

REBECCA M MAZUR NOTARY PUBLIC CHATHAM COUNTY, GA Exp. Sept. 11, 2019

Law Office of A. Bright Ariail, LLC

June 6, 2016

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*
C/A No. 2016-CP-10-1143

Dear Julie;

Enclosed, please find the original and one copy of the *Affidavit of Reuben Mark Ward* related to the Motion for Continuance and Protection for filing in the above captioned case.

By copy of this letter, I am serving this Motion on all Counsel of Record.

With kindest regards, I am

Sincerely yours,

A. Bright Ariail

Enclosures

cc:
All Counsel

bright@brightariaillaw.com
125E Wappoo Creek Drive
Suite 202
Charleston, SC 29412
843/814-8805

STATE OF SOUTH CAROLINA) COUNTY OF CHARLESTON)) PALMETTO CONSTRUCTION) GROUP, LLC)) Plaintiff,)) v.)) RESTORATION SPECIALISTS,) LLC, REUBEN MARK WARD,) and LYNNETTE PENNINGTON) WARD)) Defendants.)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO. 2016-CP-10-1143 **AFFIDAVIT OF REUBEN MARK WARD**

FILED
2016 JUN -6 AM 11:
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PERSONALLY APPEARED BEFORE ME, Reuben Mark Ward, who having been first duly sworn, deposes and states as follows:

1. I am the Managing Member of Restoration Specialists, LLC ("Restoration Specialists").

2. On March 29, 2012, Restoration Specialists was awarded a contract to construct the Charlie Norwood VAMC Parking Garage in Augusta, Georgia (the "Project").

3. On April 23, 2012, pursuant to the terms of that contract, Restoration Specialists provided Payment Bond 1944091 (the "Bond"), which was issued by The Hanover Insurance Company ("Hanover"). The Bond is at issue in this action.

4. I received the Summons and Complaint in the above referenced action on or about March 14, 2016.

5. Prior to receipt of the Summons and Complaint, I was contacted by James E. Rudnik, Esq., the Director – Risk Mitigation|Surety for The Hanover Insurance Group regarding the Bond.

6. On or about March 10, 2016, Mr. Rudnik notified me of certain bond claims that had been made against the Bond.

7. Pursuant to my discussions with Mr. Rudnik, Restoration Specialists has made direct payment to several subcontractors deemed to have valid bond claims.

8. Further, Restoration Specialists continues to have discussions with Hanover regarding other bond claims made.

9. When I received the Summons and Complaint for the instant action, I thought that it was related to my arrangements with Hanover.

10. I am not an attorney and did not understand that the above captioned action was separate and apart from the bond claims that I have been working directly with Mr. Rudnik and Hanover to address.

11. I have no record and no recollection of receiving 1) a notice of motion hearing related to the Motion to Stay and to Compel, 2) the Motion to Refer to the Master in Equity and for Entry of Default, or 3) the Order for Entry of Default and Referral to the Master in Equity.

12. Upon receipt of the Notice of Hearing for the default damages hearing, the defendants understood for the first time that this was a separate action and immediately notified their attorney.

FURTHER DEPONENT SAYETH NAUGHT.

Reuben Mark Ward

Sworn to before me
This 3 th day of June 2016.

Notary Public for the State of Georgia

My Commission Expires 09/11/2019

REBECCA M MAZUR NOTARY PUBLIC CHATHAM COUNTY, GA Exp. Sept. 11, 2019

Law Office of A. Bright Ariail, LLC

June 6, 2016

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*
C/A No. 2016-CP-10-1143

Dear Julie;

Enclosed, please find the original and one copy of the *Affidavit of Reuben Mark Ward* related to the Motion to Set Aside Entry of Default for filing in the above captioned case.

By copy of this letter, I am serving this Motion on all Counsel of Record.

With kindest regards, I am.

Sincerely yours,

A. Bright Ariail

Enclosures

cc:
All Counsel

bright@brightariaillaw.com
125E Wappoo Creek Drive
Suite 202
Charleston, SC 29412
843/814-8805

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group,	)	
	)	MOTION AND ORDER INFORMATION
Plaintiff,	)	FORM AND COVER SHEET
vs.	)	
	)	
Restoration Specialists, LLC., *et al.*,	)	
	)	
Defendants.	)	

Plaintiff's Attorney: Andrew K. Epting, Jr. and Michelle Nicole Endemann Address: Andrew K. Epting, Jr. LLC 3 State Street Charleston, SC 29401 Phone: (843) 377-1871 Email: ake@epting-law.com;men@epting-law.com Other:	Defendant's Attorney: A. Bright Ariail S.C. Bar No. 69570 Address: Law Office of A. Bright Ariail, LLC 12E Wappoo Creek Dr., Suite 202 Charleston, SC 29412 Phone: (843) 814-8805 Email: bright@brightariaillaw.com Other:

X 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: Motion for Continuance and Protection
Estimated Time Needed: 15 min Court Reporter Needed: YES

SECTION II: Motion Type

X Written motion attached.
Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached consent order.

_____ _____
Signature of Attorney for Defendant Date submitted

SECTION III: Motion Fee

X PAID – AMOUNT: $25.00
EXEMPT: 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, SCRCP)
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: Motion Contained in Answer

JUDGE'S SECTION Motion Fee to be paid upon filing of the attached order.	_____ JUDGE

Other:	CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

MOTION FEE COLLECTED: _____

CONTESTED – AMOUNT DUE: _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	CASE NO.: 2016-CP-10-1143
)	
Palmetto Construction Group)	
)	
Plaintiff,)	**DEFENDANTS' NOTICE OF MOTION AND MOTION FOR CONTINUANCE AND PROTECTION PURSUANT TO SCRCP 6(d) and 40(i)**
)	
vs.)	
)	
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward)	
)	
Defendants.)	

FILED
2016 JUN -3 PM 3:52
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: ANDREW K. EPTING, JR., ESQUIRE, AND MICHELLE N. ENDEMANN, ESQUIRE, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, will move before the presiding Judge or Master in Equity of the Ninth Judicial circuit at a time and place to be arranged by the Court and counsel involved for an Order continuing the default damages hearing scheduled for Monday, June 6, 2016, at 11:30 a.m. before the Honorable Mikell R. Scarborough in the Court of Common Pleas and for an Order of Protection for the period of June 10 – 24, 2016. This Motion is made for good cause, pursuant to Rules 6(d) and 40(i) of the South Carolina Rules of Civil Procedure.

This Motion is made on the following grounds:

(1): The Defendants have promptly and timely filed a Motion to Set Aside Entry of Default, which Motion is pending before the Court for decision;

(2): The Defendants were served with the Notice of the default damages hearing on June 2, 2016 at 6:30 p.m. and; therefore, have not received timely notice of the hearing pursuant to SCRCP 6(d);

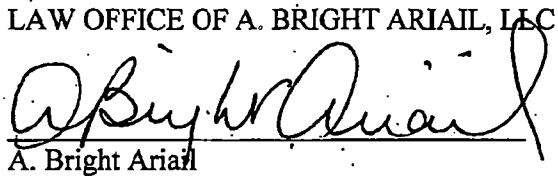
(3): The Defendants retained legal counsel on June 3, 2016 immediately after service of the hearing notice; and, said counsel has had insufficient time to prepare for the default damages hearing. Further, counsel has long standing vacation plans for the period of June 10 – 24, and while counsel has obtained Orders of Protection in all courts in which she has active cases, she has not obtained an Order of Protection in the Ninth Circuit as she had no active cases in that Court prior to this date; and

(4): The Plaintiff has filed a Motion to Stay the claims asserted by it against the Defendants and to

order mediation, and, if necessary, arbitration of these claims pursuant to the contract that is the subject of this action. This motion remains pending before the Court for decision.

This Motion is based upon the complete files and records in this action, such oral and documentary evidence as may be allowed at the hearing of this motion and upon all applicable law pertaining thereto.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC



A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

June 3, 2016
Charleston, SC 29412

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Palmetto Construction Group	)	Civil Action No. 2016-CP-10-1143
	)	
Plaintiff,	)	
	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward	)	
	)	
Defendants.	)	

FILED
2016 JUN -3 PM 3:3
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The undersigned hereby certifies, that on this 3rd day of June, 2016, a true and correct copy of the foregoing: **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR CONTINUANCE AND PROTECTION PURSUANT TO SCRCP 6(d) and 40(i)** has been served on the below counsel of record via hand delivery, email, facsimile and/or United States Mail with sufficient first class postage affixed thereto and addressed as follows:

Andrew K Epting, Jr., Esquire
Michelle N. Endemann, Esquire
ANDREW K. EPTING, JR., LLC
46A State Street
Charleston, SC 29401
ATTORNEYS FOR PLAINTIFF



A. Bright Ariail, Esquire
Law Office of A. Bright Ariail, LLC
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, S.C. 29412
ATTORNEY FOR DEFENDANTS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group,	)	
	)	MOTION AND ORDER INFORMATION
Plaintiff,	)	FORM AND COVER SHEET
vs.	)	
	)	
Restoration Specialists, LLC., *et al.*,	)	
	)	
Defendants.	)	

Plaintiff's Attorney: Andrew K. Epting, Jr. and Michelle Nicole Endemann Address: Andrew K. Epting, Jr. LLC 3 State Street Charleston, SC 29401 Phone: (843) 377-1871 Email: ake@epting-law.com;men@epting-law.com Other:	Defendant's Attorney: A. Bright Ariail S.C. Bar No. 69570 Address: Law Office of A. Bright Ariail, LLC 12E Wappoo Creek Dr., Suite 202 Charleston, SC 29412 Phone: (843) 814-8805 Email: bright@brightariaillaw.com Other:

X 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: Motion to Set Aside Entry of Default
Estimated Time Needed: 30 min Court Reporter Needed: YES

SECTION II: Motion Type

X Written motion attached – **Motion to Set Aside Entry of Default**
Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached consent order.

Signature of Attorney for Defendant — Date submitted: 30 June 16

SECTION III: Motion Fee

X PAID – AMOUNT: $25.00
EXEMPT: 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, SCRCP)
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: Motion Contained in Answer

JUDGE'S SECTION Motion Fee to be paid upon filing of the attached order.	_____ JUDGE

Other:	CODE:	Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

MOTION FEE COLLECTED: _____

CONTESTED – AMOUNT DUE: _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group	)	
	)	
Plaintiff,	)	**DEFENDANTS' NOTICE OF MOTION AND MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT TO SCRCP 55(c)**
	)	
vs.	)	
	)	
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward	)	
	)	
Defendants.	)	

FILED
2016 JUN -3 PM 3:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: ANDREW K. EPTING, JR., ESQUIRE, AND MICHELLE N. ENDEMANN, ESQUIRE, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, will move before the presiding Judge or Master in Equity of the Ninth Judicial circuit at a time and place to be arranged by the Court and counsel involved for an Order setting aside the Entry of Default for good cause, pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure.

This Motion is made on the following grounds:

(1): The Defendant have promptly and timely filed their Motion seeking relief from the Entry of Default;

(2): The Defendants delay in responding to the Plaintiff's lawsuit was not culpable;

(3): The Defendants have a meritorious defense to the Plaintiff's lawsuit; and

(4): The Plaintiff will not suffer prejudice if Entry of Default is set aside.

This Motion is based on upon Defendants' Memorandum of Law in Support of Motion to Set Aside Entry of Default which will be submitted to the Court prior to the hearing of this motion, the complete files and records in this action, such oral and documentary evidence as may be allowed at the hearing of this motion and upon all applicable law pertaining thereto.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

June 3, 2016
Charleston, SC 29412

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Palmetto Construction Group Plaintiff, vs. Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward Defendants.	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT Civil Action No. 2016-CP-10-1143 **CERTIFICATE OF SERVICE**

FILED
2016 JUN -3 PM 3:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The undersigned hereby certifies, that on this 3rd day of June, 2016, a true and correct copy of the foregoing: **DEFENDANTS' NOTICE OF MOTION AND MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT TO SCRCP 55(c)** has been served on the below counsel of record via hand delivery, email, facsimile and/or United States Mail with sufficient first class postage affixed thereto and addressed as follows:

Andrew K. Epting, Jr., Esquire
Michelle N. Endemann, Esquire
ANDREW K. EPTING, JR., LLC
46A State Street
Charleston, SC 29401
ATTORNEYS FOR PLAINTIFF

A. Bright Ariail, Esquire
Law Office of A. Bright Ariail, LLC
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, S.C. 29412
ATTORNEY FOR DEFENDANTS

Law Office of A. Bright Ariail, LLC

June 3, 2016

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258
Dillon, SC 29536

RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*
C/A No. 2016-CP-10-1143

Dear Julie;

Enclosed, please find the original and one copy of the *Defendants' Notice of Motion and Motion to Set Aside Entry of Default Pursuant to SCRCP 55(c)* with the appropriate Motion Cover Sheet and Filing Fee for filing in the above captioned case.

By copy of this letter, I am serving this Motion on all Counsel of Record.

With kindest regards, I am

Sincerely yours,

A. Bright Ariail

Enclosures

cc: All Counsel (via email)

bright@brightariaillaw.com
125E Wappoo Creek Drive
Suite 202
Charleston, SC 29412
843/814-8805

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Palmetto Construction Group, Plaintiff, vs. Restoration Specialists, LLC., et al., Defendant.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2016-CP-10-1143 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney: Andrew K. Epting and MIchelle N. Endemann, Bar No. 01908 & 79894, respectively Address: Andrew K. Epting, Jr., LLC 3 State Street Charleston, SC 29401 Phone: (843) 377-1871Fax (843) 377-1310 E-mail: ake@epting-law.comOther: mne@epting-law.com	Defendant's Attorney: A. Bright Ariail, Bar No. 69570 Address: Law Office of A. Bright Ariail, LLC 125E Wappoo Creek Dr., Suite 202 Charleston, SC 29412 Phone: (843) 814-8805 Fax(843) 266-0538 E-mail: bright@brightariaillaw.comOther: _____

☒ **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: Motion to Stay and to Compel
Estimated Time Needed: 30 min. Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

A Bright Ariail — 07/11/16

Signature of Attorney for ☐ Plaintiff /☒ Defendant — Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ _____
☐ 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, SCRCP)
- ☐ 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

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Palmetto Construction Group Plaintiff, vs. Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward Defendants.	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2016-CP-10-1143 **DEFENDANTS' NOTICE OF MOTION AND MOTION TO STAY AND TO COMPEL PURSUANT TO SCRCP 12(b)(1) AND APPLICABLE CASE LAW**

FILED
2016 JUL 11 AM 11:52
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: ANDREW K. EPTING, JR., ESQUIRE, AND MICHELLE N. ENDEMANN, ESQUIRE, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, will move before the presiding Judge or Master in Equity of the Ninth Judicial circuit at a time and place to be arranged by the Court and counsel involved for an Order staying this matter and compelling mediation and, if necessary, arbitration by the parties, pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure and all applicable case law.

This Motion is made on the following grounds:

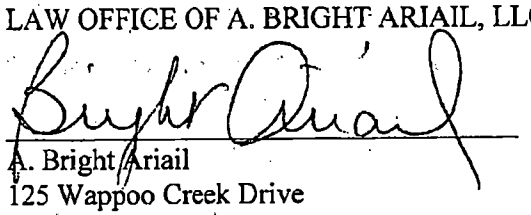
(1): The Plaintiff's Complaint, and the causes of action asserted therein, arise out of or are related to a contract containing mandatory mediation/arbitration provisions. These provisions require all claims arising out of or related to the contract to be mediated, and if not resolved by mediation, to be resolved by binding arbitration. As such, the Court lacks subject matter jurisdiction of this matter and should stay this action and submit the matter to mediation, and if necessary, binding arbitration. S.C.R.C.P. 12(b)(1); *Steinmetz v American Media Services, LLC*, 393 S.C. 72, 709 S.E. 2d 708 (S.C. Ct. App. 2011); *Widner v. Fort Mill Ford*, 381 S.C. 522, 674 S. E. 2d 172 (S.C. Ct. App. 2009); *U.S. ex rel. Coastal Roofing Co., Inc. v. P.Browne & Associates, Inc.*, 585 F.Supp. 2d 708 (D.S.C. 2007).

(2): The Plaintiff has moved the Court to stay this action and compel mediation, and if necessary, arbitration by the parties to proceed as contractually required by the mandatory mediation/arbitration provisions contained in Article 6 of the contract. The Defendants hereby join in and consent to Plaintiff's motion and the relief requested therein, including the stay of this matter and submission of

Plaintiff's claims to mediation and, and if necessary, binding arbitration.

This Motion is based on upon Defendants' Memorandum of Law in Support of Motion to Stay and to Compel which will be submitted to the Court prior to the hearing of this motion, the complete files and records in this action, such oral and documentary evidence as may be allowed at the hearing of this motion and upon all applicable law pertaining thereto.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC



A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

July 11, 2016
Charleston, SC 29412

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Palmetto Construction Group	)	Civil Action No. 2016-CP-10-1143
	)	
Plaintiff,	)	
	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward	)	
	)	
Defendants.	)	

FILED
2016 JUL 11 AM 11:59
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The undersigned hereby certifies, that on this 11th day of July, 2016, a true and correct copy of the foregoing: **DEFENDANTS' NOTICE OF MOTION AND MOTION TO STAY AND TO COMPEL PURSUANT TO SCRCP 12(b)(1) AND APPLICABLE LAW** has been served on the below counsel of record via hand delivery, email, facsimile and/or United States Mail with sufficient first class postage affixed thereto and addressed as follows:

Andrew K Epting, Jr., Esquire
Michelle N. Endemann, Esquire
ANDREW K. EPTING, JR., LLC
46A State Street
Charleston, SC 29401
ATTORNEYS FOR PLAINTIFF

A. Bright Ariail, Esquire
Law Office of A. Bright Ariail, LLC
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, S.C. 29412
ATTORNEY FOR DEFENDANTS

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

125E WAPPOO CREEK DRIVE, SUITE 202
CHARLESTON, SC 29412
bright@brightariaillaaw.com

A. Bright Ariail, Esquire

Telephone: (843) 814-8805
Facsimile: (843) 266-0538

July 11, 2016

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

RE: ***Palmetto Construction Group v. Restoration Specialists, LLC et al. C/A No. 2016-CP-10-1143***

Dear Julie:

Enclosed, please find the original and one copy of the *Defendants' Notice of Motion and Motion to Stay and to Compel Pursuant to SCRCP12(b)(1) and Applicable Law* with the appropriate Motion Cover Sheet and Filing Fee for filing in the above captioned case.

By copy of this letter, I am providing a copy of the Motion to the Honorable Mikell R. Scarborough, and I am serving this Motion on all Counsel of Record.

With kindest regards, I am

Sincerely,

A. Bright Ariail

ABA/wd
Enclosures
cc: The Honorable Mikell R. Scarborough (Via Hand Delivery)
All Counsel of Record (via email & US Mail)

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Palmetto Construction Group Plaintiff, vs. Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward Defendants.	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2016-CP-10-1143 **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT TO SCRCP 55(c)**

FILED
2016 JUL 14 AM 11:21
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Pursuant to Rule 55(c), SCRCP, the Defendants, Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward (hereinafter collectively "Defendants"), by and through their undersigned counsel, submit this Memorandum in Support of their Motion to Set Aside Entry of Default.

STATEMENT OF FACTS

This action arises out of a construction project in Augusta, Georgia. On March 29, 2012, the Defendant, Restoration Specialists ("Restoration") was awarded a contract (the "Contract") to construct the Charlie Norwood VAMC Parking Garage in Augusta ("the Project") by the Department of Veteran's Affairs. The Plaintiff entered into a Teaming Agreement with Restoration in December 2011 The Plaintiff entered into a Subcontract Agreement with Restoration on September 10, 2014 in connection with the Project in the amount of One Million, Eighty Two Thousand, Three Hundred Forty Two and 10/100 Dollars ($1,082,342.10). *(Exhibit A)*. Payment has been made to Plaintiff in the amount of One Million, Ninety Six Thousand, Five Hundred Sixty Nine and 19/100 Dollars ($1,096,569.19), an overpayment of Fourteen Thousand, Two Hundred Twenty Seven and 09/100 Dollars ($14,227.09). Currently, the Department of Veteran's Affairs is retaining Ninety Thousand, Eight Hundred Eighty Seven and 08/100 Dollars ($90.887.08) of contract funds due Restoration under the Contract.

Plaintiff's Complaint alleges that Restoration has failed to pay the contract balances due under the Subcontract Agreement and asserts additional claims against the Defendants, Reuben Mark Ward

and Lynnette Pennington Ward arising out of and involving said Subcontract Agreement.

Plaintiff filed this lawsuit on March 7, 2016. Simultaneously with filing the lawsuit, Plaintiff filed a Motion to Stay and to Compel on March 7, 2016. The basis of Plaintiff's Motion to Stay and to Compel was that the Subcontract Agreement contained mandatory mediation/arbitration provisions requiring the Court to stay the litigation and the parties to mediate and, if necessary, arbitrate all claims contained in Plaintiff's lawsuit.

Plaintiff simultaneously served Defendants with both the Complaint and Motion to Stay and to Compel on March 14, 2016.

Plaintiff filed a Motion to Refer to the Master in Equity and for Entry of Default on April 18, 2016. The Court entered default against the Defendants on April 21, 2016. The Defendants have no record and no recollection of receiving: (1) the Motion to Refer to the Master in Equity and for Entry of Default or (2) the Order for Entry of Default and Referral to the Master in Equity.

On June 2, 2016 at 6:30 pm, the Defendants were served with a Notice of default damages hearing. The Defendants were unaware of the default status of the case and the scheduling of the damages hearing until they received this hearing Notice on June 2, 2016. Upon receipt of this Notice, the Defendants immediately retained legal counsel on June 3, 2016 and, through said counsel, filed their Motion to Set Aside Entry of Default.

LEGAL AUTHORITIES

A. Rule 55 (c), SCRCP

The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 753 S.E. 2d 537 (2014). "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E. 2d 885, 888 (2009). "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted." *White Oak Manor*, 407 S.C. at ___, 753 S.E.2d at 542. In applying this standard, Rule 55(c) "is liberally construed to promote justice and dispose of cases on the merits." *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 463 S.E. 2d 636, 638

(Ct. App. 1995).

LEGAL ANALYSIS

A. There is good cause for Defendants' brief delay in appearing in this action and vacation of the default entry will serve the interests of justice.

In the present case, the Defendants did not file a timely response to the Complaint for the reasons stated in the Affidavit of Reuben Mark Ward, dated June 3, 2016. The Defendants' omission was unintentional and the result of a good faith misunderstanding of the status of Defendants' arrangements with The Hanover Insurance Company ("Hanover") and the relation of Plaintiff's lawsuit thereto.

The Defendants are not attorneys and did not understand that Plaintiff's lawsuit was separate and apart from the bond claims that they have been working directly with Hanover to address. The Defendants' misunderstanding in this regard was innocent and carried no intention of gaining an unfair advantage over the Plaintiff or delaying legal proceedings. Upon learning of their error, Plaintiffs immediately retained legal counsel to appear and respond on their behalf in this matter.

Furthermore, the law does not favor defaults. As such, Rule 55(c) is liberally construed to promote justice and dispose of cases on the merits. *Dixon*, 320 S.C. at ___, 463 S.E. 2d at 638. The Defendants' short delay in appearing in and responding to Plaintiff's lawsuit constitutes no prejudice to the Plaintiff. The Defendants have asserted various defenses to Plaintiff's lawsuit, which if prevailed upon, would render a verdict contrary to the result reached by the entry of default.

For these reasons, and in light of the Defendants' good faith explanation for the default, vacating the entry of default would serve the interests of justice and promote disposition of the case on the merits.

B. The Defendants promptly and timely filed their motion seeking relief from the Entry of Default.

The Plaintiff filed a Motion to Refer to the Master In Equity and for Entry of Default on April 18, 2016. Thereafter, the Court entered default against the Defendants on April 21, 2016. The Defendants have no record and no recollection of receiving: (1) the Motion to Refer to the Master in Equity and for Entry of Default or (2) the Order for Entry of Default and Referral to the Master in

Equity. *Affidavit of Reuben Mark Ward, dated June 3, 2016.*

On June 2, 2016 at 6:30 pm, the Defendants were served with the Notice of the default damages hearing. *Affidavit of Reuben Mark Ward, dated June 3, 2016.* The Notice scheduled the default damages hearing for the morning of June 6, 2016. The Defendants retained legal counsel on June 3, 2016, the very next day after being served with the default damages hearing Notice the night before. The Defendants' counsel immediately appeared on behalf of Defendants and filed the instant Motion to Set Aside Entry of Default on the afternoon of June 3, 2016.

As established by the above timeline, the Defendants took immediate action upon learning of the default status and receipt of notice of the damages hearing. This action included the retention of defense counsel within 24 hours of becoming aware of the default status and damages hearing followed by the immediate filing of the Motion to Set Aside Entry of Default. Thus, the Defendants satisfied the good cause timely motion filing requirement under Rule 55(c), SCRCP.

C. The Defendants have a meritorious defense to the Plaintiff's lawsuit.

The Defendants' defenses to the Plaintiff's lawsuit, include, but are not limited to the following:

(1): The contract giving rise to Plaintiff's Complaint contains mandatory mediation/arbitration provisions. These provisions require all claims arising out of or related to the contract to be mediated, and if not resolved by mediation, to be resolved by binding arbitration. As such, the Court lacks subject matter jurisdiction of this matter and must stay this action and submit the matter to mediation, and if necessary, binding arbitration. Rule 55(c), SCRCP; *See also, Defendants' Motion to Stay and to Compel (and authorities cited therein); Plaintiff's Motion to Stay and to Compel.*

(2): Plaintiff has been paid in full under the Subcontract Agreement; in fact, Plaintiff has been overpaid by Fourteen Thousand, Two Hundred Twenty Seven and 09/110 Dollars ($14,227.09).

(3) There is no agreement for profit sharing between the parties. Per the Teaming Agreement, entered into between Restoration and Plaintiff in connection with the Project, "[n]othing herein shall be construed as providing for the sharing of profits or losses arising out of the efforts of either or both of the Parties; except as may be provided for in any resultant contractual arrangement agreed to between the Parties." *(Exhibit B).* There is no provision for profit sharing contained within the Subcontract Agreement.

(4) The Payment Bond delineates the obligation for payment of Project subcontractors and vendors as that of Restoration, as Principal, and The Hanover Insurance Company, as Surety. *(Exhibit C).* Restoration disputes the claims made by many of the subcontractors which have made claims against the Payment Bond.

(5) Restoration has not paid all subcontractors and vendors in full as the Department of Veterans' Affairs is retaining funds due under the Contract.

(6) The Teaming Agreement includes a waiver of damages, specifically: "ARTICLE 9 DAMAGES – Neither Party shall be liable to the other for any indirect, special or consequential losses, whether arising in contract, tort (including negligence), or otherwise."

If Defendants prevail on any of these defenses, the outcome would be contrary to the result rendered by the entry of default. Therefore, the Defendants have set forth a meritorious defense sufficient to satisfy the good cause standard of Rule 55(c), SCRCP.

D. The Plaintiff will not suffer prejudice if Entry of Default is set aside.

The Defendants responded to Plaintiff's lawsuit with the retention of counsel and filing of the instant Motion to Set Aside Entry of Default on June 3, 2016. The Defendants took these actions within 51 days of the date on which Defendants' Answer to Plaintiff's Complaint was originally due, within 43 days of the entry of default, and within 24 hours of first learning of the default status and damages hearing. The Defendants' delay was short and creates no prejudice to the Plaintiff's ability to litigate the case. This brief delay has caused no tangible harm to Plaintiff such as a loss of evidence, increased difficulties of discovery, opportunity for fraud or collusion, undue expense or damage to the Plaintiff's legal position.

In fact, the corollary to the lack of prejudice to the Plaintiff is the extreme prejudice the Defendants will suffer if the default is not lifted and the court proceeds with a default damages hearing. In this scenario, the Plaintiff will have received significant undue advantage in that a litigated result will have been achieved by the Plaintiff in a case which Plaintiff acknowledges is governed by mandatory alternative dispute resolution and in which the court has no subject matter jurisdiction. *See, Defendants' Motion to Stay and to Compel (and authorities cited therein); Plaintiff's Motion to Stay and to Compel.*

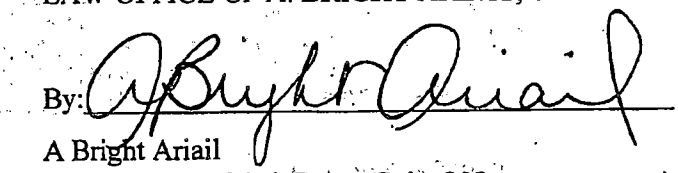
As no prejudice will result to Plaintiff in setting aside the entry of default, this good cause factor under Rule 55(c), SCRCP is satisfied.

CONCLUSION

Based on the foregoing, the Defendants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward are entitled to an Order Setting Aside the Entry of Default pursuant to Rule 55(c), SCRCP.

For these reasons, the Defendants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward hereby respectfully request that their Motion to Set Aside Entry of Default be granted.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

By: 

A Bright Ariail
125E Wappoo Creek Drive, Suite 202
Charleston, SC 29412

ATTORNEY FOR RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD and LYNNETTE PENNINGTON WARD

July 14, 2016
Charleston, SC 29412

AIA® Document A401™ – 2007

Standard Form of Agreement Between Contractor and Subcontractor

AGREEMENT made as of the 10 day of September in the year 2014
(In words, indicate day, month and year.)

BETWEEN the Contractor:
(Name, legal status, address and other information)

Restoration Specialists LLC a South Carolina Corporation
1042-A East Montague Ave.
Charleston, SC 29405

and the Subcontractor:
(Name, legal status, address and other information)

Palmetto Construction Group, LLC
2265 Clements Ferry Road, Suite 204
Charleston, SC 29492

The Contractor has made a contract for construction (hereinafter, the Prime Contract) dated: March 29, 2012

with the Owner:
(Name, legal status, address and other information)

Department of Veterans Affairs / Charlie Norwood VAMC
950 15th Street
Augusta, GA 30901

for the following Project:
(Name, location and detailed description)

CHARLIE NORWOOD VAMC PARKING GARAGE
950 15th Street
August, GA 30901
Phase I – Uptown Temporary Parking Lot
Phase II – Downtown Parking Garage Sitework

The Prime Contract provides for the furnishing of labor, materials, equipment and services in connection with the construction of the Project. A copy of the Prime Contract, consisting of the Agreement Between Owner and Contractor (from which compensation amounts may be deleted) and the other Contract Documents enumerated therein, has been made available to the Subcontractor.

The Architect for the Project:
(Name, legal status, address and other information)

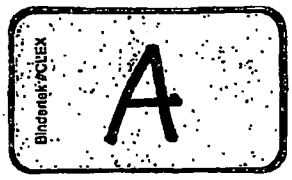
Structured Parking Solutions
21 South Tarragona Street, Suite 101

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

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

AIA Document A201™–2007, General Conditions of the Contract for Construction, is adopted in this document by reference.

This document has been approved and endorsed by the Associated Specialty Contractors, Inc.



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Pensacola, FL 32502

The Contractor and the Subcontractor agree as follows.

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ARTICLE 1 THE SUBCONTRACT DOCUMENTS

§ 1.1 The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement; (4) other documents listed in Article 16 of this Agreement; and (5) Modifications to this Subcontract issued after execution of this Agreement. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein. The Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Subcontract Documents, other than Modifications issued subsequent to the execution of this Agreement, appears in Article 16.

§ 1.2 Except to the extent of a conflict with a specific term or condition contained in the Subcontract Documents, the General Conditions governing this Subcontract shall be the AIA Document A201™–2007, General Conditions of the Contract for Construction.

§ 1.3 The Subcontract may be amended or modified only by a Modification. The Subcontract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and the Subcontractor, (2) between the Owner and the Subcontractor, or (3) between any persons or entities other than the Contractor and Subcontractor.

§ 1.4 The Contractor shall make available the Subcontract Documents to the Subcontractor prior to execution of this Agreement, and thereafter, upon request, but the Contractor may charge the Subcontractor for the reasonable cost of reproduction.

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ARTICLE 2 MUTUAL RIGHTS AND RESPONSIBILITIES

The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201–2007 apply to this Agreement pursuant to Section 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

ARTICLE 3 CONTRACTOR

§ 3.1 SERVICES PROVIDED BY THE CONTRACTOR

§ 3.1.1 The Contractor shall cooperate with the Subcontractor in scheduling and performing the Contractor's Work to avoid conflicts or interference in the Subcontractor's Work and shall expedite written responses to submittals made by the Subcontractor in accordance with Section 4.1 and Article 5. Promptly after execution of this Agreement, the Contractor shall provide the Subcontractor copies of the Contractor's construction schedule and schedule of submittals, together with such additional scheduling details as will enable the Subcontractor to plan and perform the Subcontractor's Work properly. The Contractor shall promptly notify the Subcontractor of subsequent changes in the construction and submittal schedules and additional scheduling details.

§ 3.1.2 The Contractor shall provide suitable areas for storage of the Subcontractor's materials and equipment during the course of the Work. Additional costs to the Subcontractor resulting from relocation of such storage areas at the direction of the Contractor, except as previously agreed upon, shall be reimbursed by the Contractor.

§ 3.1.3 Except as provided in Article 14, the Contractor's equipment will be available to the Subcontractor only at the Contractor's discretion and on mutually satisfactory terms.

§ 3.2 COMMUNICATIONS

§ 3.2.1 The Contractor shall promptly make available to the Subcontractor information, including information received from the Owner, that affects this Subcontract and that becomes available to the Contractor subsequent to execution of this Subcontract.

§ 3.2.2 The Contractor shall not give instructions or orders directly to the Subcontractor's employees or to the Subcontractor's Sub-subcontractors or material suppliers unless such persons are designated as authorized representatives of the Subcontractor.

§ 3.2.3 The Contractor shall permit the Subcontractor to request directly from the Architect information regarding the percentages of completion and the amount certified on account of Work done by the Subcontractor.

§ 3.2.4 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Contractor, a subcontractor or anyone directly or indirectly employed by them (other than the Subcontractor), the Contractor shall, prior to harmful exposure of the Subcontractor's employees to such substance, give written notice of the chemical composition thereof to the Subcontractor in sufficient detail and time to permit the Subcontractor's compliance with such laws.

§ 3.2.5 The Contractor shall furnish to the Subcontractor within 30 days after receipt of a written request, or earlier if so required by law, information necessary and relevant for the Subcontractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property, usually referred to as the site, on which the Project is located and the Owner's interest therein.

§ 3.2.6 If the Contractor asserts or defends a claim against the Owner that relates to the Work of the Subcontractor, the Contractor shall promptly make available to the Subcontractor all information relating to the portion of the claim that relates to the Work of the Subcontractor.

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§ 3.3 CLAIMS BY THE CONTRACTOR

§ 3.3.1 Liquidated damages for delay, if provided for in Section 9.3 of this Agreement, shall be assessed against the Subcontractor only to the extent caused by the Subcontractor or any person or entity for whose acts the Subcontractor may be liable, and in no case for delays or causes arising outside the scope of this Subcontract.

§ 3.3.2 The Contractor's claims for the costs of services or materials provided due to the Subcontractor's failure to execute the Work shall require

.1 seven days' written notice prior to the Contractor's providing services or materials, except in an emergency; and

.2 written compilations to the Subcontractor of services and materials provided by the Contractor and charges for such services and materials no later than the fifteenth day of the month following the Contractor's providing such services or materials.

.3 Liquidated Damages will be assessed at $ N/A per calendar day past the established completion date.

§ 3.4 CONTRACTOR'S REMEDIES

If the Subcontractor defaults or neglects to carry out the Work in accordance with this Agreement and fails within five working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by appropriate Modification, and without prejudice to any other remedy the Contractor may have, make good such deficiencies and may deduct the reasonable cost thereof from the payments then or thereafter due the Subcontractor.

ARTICLE 4 SUBCONTRACTOR

§ 4.1 EXECUTION AND PROGRESS OF THE WORK

§ 4.1.1 For all Work the Subcontractor intends to subcontract, the Subcontractor shall enter into written agreements with Sub-subcontractors performing portions of the Work of this Subcontract by which the Subcontractor and the Sub-subcontractor are mutually bound, to the extent of the Work to be performed by the Sub-subcontractor, assuming toward each other all obligations and responsibilities that the Contractor and Subcontractor assume toward each other and having the benefit of all rights, remedies and redress each against the other that the Contractor and Subcontractor have by virtue of the provisions of this Agreement.

§ 4.1.2 The Subcontractor shall supervise and direct the Subcontractor's Work, and shall cooperate with the Contractor in scheduling and performing the Subcontractor's Work to avoid conflict, delay in or interference with the Work of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.1.3 The Subcontractor shall promptly submit Shop Drawings, Product Data, Samples and similar submittals required by the Subcontract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Contractor or other subcontractors.

§ 4.1.4 The Subcontractor shall furnish to the Contractor periodic progress reports on the Work of this Subcontract as mutually agreed, including information on the status of materials and equipment that may be in the course of preparation, manufacture, or transit.

§ 4.1.5 The Subcontractor agrees that the Contractor and the Architect each have the authority to reject Work of the Subcontractor that does not conform to the Prime Contract. The Architect's decisions on matters relating to aesthetic effect shall be final and binding on the Subcontractor if consistent with the intent expressed in the Prime Contract.

§ 4.1.6 The Subcontractor shall pay for all materials, equipment and labor used in connection with the performance of this Subcontract through the period covered by previous payments received from the Contractor, and shall furnish satisfactory evidence, when requested by the Contractor, to verify compliance with the above requirements.

§ 4.1.7 The Subcontractor shall take necessary precautions to protect properly the work of other subcontractors from damage caused by operations under this Subcontract.

§ 4.1.8 The Subcontractor shall cooperate with the Contractor, other subcontractors, the Owner, and separate contractors whose work might interfere with the Subcontractor's Work. The Subcontractor shall participate in the preparation of coordinated drawings in areas of congestion, if required by the Prime Contract, specifically noting and

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advising the Contractor of potential conflicts between the Work of the Subcontractor and that of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.2 PERMITS, FEES, NOTICES, AND COMPLIANCE WITH LAWS

§ 4.2.1 The Subcontractor shall give notices and comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on performance of the Work of this Subcontract. The Subcontractor shall secure and pay for permits, fees, licenses and inspections by government agencies necessary for proper execution and completion of the Subcontractor's Work, the furnishing of which is required of the Contractor by the Prime Contract.

§ 4.2.2 The Subcontractor shall comply with Federal, state and local tax laws, social security acts, unemployment compensation acts and workers' compensation acts insofar as applicable to the performance of this Subcontract.

§ 4.3 SAFETY PRECAUTIONS AND PROCEDURES

§ 4.3.1 The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime Contract. The Subcontractor shall report to the Contractor within three days an injury to an employee or agent of the Subcontractor which occurred at the site.

§ 4.3.2 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Subcontractor, the Subcontractor's Sub-subcontractors or anyone directly or indirectly employed by them, the Subcontractor shall, prior to harmful exposure of any employees on the site to such substance, give written notice of the chemical composition thereof to the Contractor in sufficient detail and time to permit compliance with such laws by the Contractor, other subcontractors and other employers on the site.

§ 4.3.3 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a hazardous material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Subcontractor, the Subcontractor shall, upon recognizing the condition, immediately stop Work in the affected area and promptly report the condition to the Contractor in writing. When the material or substance has been rendered harmless, the Subcontractor's Work in the affected area shall resume upon written agreement of the Contractor and Subcontractor. The Subcontract Time shall be extended appropriately and the Subcontract Sum shall be increased in the amount of the Subcontractor's reasonable additional costs of demobilization, delay and remobilization, which adjustments shall be accomplished as provided in Article 5 of this Agreement.

§ 4.3.4 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Subcontractor, the Subcontractor's Sub-subcontractors, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 4.3.3 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

§ 4.3.5 The Subcontractor shall indemnify the Contractor for the cost and expense the Contractor incurs (1) for remediation of a material or substance brought to the site and negligently handled by the Subcontractor or (2) where the Subcontractor fails to perform its obligations under Section 4.3.3, except to the extent that the cost and expense are due to the Contractor's fault or negligence.

§ 4.4 CLEANING UP

§ 4.4.1 The Subcontractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations performed under this Subcontract. The Subcontractor shall not be held responsible for conditions caused by other contractors or subcontractors.

§ 4.4.2 As provided under Section 3.3.2, if the Subcontractor fails to clean up as provided in the Subcontract Documents, the Contractor may charge the Subcontractor for the Subcontractor's appropriate share of cleanup costs.

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§ 4.5 WARRANTY

The Subcontractor warrants to the Owner, Architect, and Contractor that materials and equipment furnished under this Subcontract will be of good quality and new unless the Subcontract Documents require or permit otherwise. The Subcontractor further warrants that the Work will conform to the requirements of the Subcontract Documents and will be free from defects, except for those inherent in the quality of the Work the Subcontract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Subcontractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Subcontractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect and Contractor, the Subcontractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 4.6 INDEMNIFICATION

§ 4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6.

§ 4.6.2 In claims against any person or entity indemnified under this Section 4.6 by an employee of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 4.6.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor or the Subcontractor's Sub-subcontractors under workers' compensation acts, disability benefit acts or other employee benefit acts.

§ 4.7 REMEDIES FOR NONPAYMENT

If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate Modification, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization.

ARTICLE 5 CHANGES IN THE WORK

§ 5.1 The Owner may make changes in the Work by issuing Modifications to the Prime Contract. Upon receipt of such a Modification issued subsequent to the execution of the Subcontract Agreement, the Contractor shall promptly notify the Subcontractor of the Modification. Unless otherwise directed by the Contractor, the Subcontractor shall not thereafter order materials or perform Work that would be inconsistent with the changes made by the Modification to the Prime Contract.

§ 5.2 The Subcontractor may be ordered in writing by the Contractor, without invalidating this Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions, deletions or other revisions, including those required by Modifications to the Prime Contract issued subsequent to the execution of this Agreement, the Subcontract Sum and the Subcontract Time being adjusted accordingly. The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for adjustment to the Subcontract Sum and Subcontract Time for such revised Work in a manner consistent with requirements of the Subcontract Documents.

§ 5.3 The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time

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by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

ARTICLE 6 MEDIATION AND BINDING DISPUTE RESOLUTION

§ 6.1 MEDIATION

§ 6.1.1 Any claim arising out of or related to this Subcontract, except those waived in this Subcontract, shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 6.1.2 The parties shall endeavor to resolve their claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to this Subcontract and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section, the parties may nonetheless proceed to the selection of the arbitrators(s) and agree upon a schedule for later proceedings.

§ 6.1.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 6.2 BINDING DISPUTE RESOLUTION

For any claim subject to, but not resolved by mediation pursuant to Section 6.1, the method of binding dispute resolution shall be as follows:

(Check the appropriate box. If the Contractor and Subcontractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, claims will be resolved by litigation in a court of competent jurisdiction.)

[X] Arbitration pursuant to Section 6.3 of this Agreement

[ ] Litigation in a court of competent jurisdiction

[ ] Other: *(Specify)*

§ 6.3 ARBITRATION

§ 6.3.1 If the Contractor and Subcontractor have selected arbitration as the method of binding dispute resolution in Section 6.2, any claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Subcontract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded.

§ 6.3.2 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim.

§ 6.3.3 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

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§ 6.3.4 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a claim not described in the written consent.

§ 6.3.5 The Contractor and Subcontractor grant to any person or entity made a party to an arbitration conducted under this Section 6.3, whether by joinder or consolidation, the same rights of joinder and consolidation as the Contractor and Subcontractor under this Agreement.

§ 6.3.6 This agreement to arbitrate and any other written agreement to arbitrate with an additional person or persons referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 7 TERMINATION, SUSPENSION OR ASSIGNMENT OF THE SUBCONTRACT

§ 7.1 TERMINATION BY THE SUBCONTRACTOR

The Subcontractor may terminate the Subcontract for the same reasons and under the same circumstances and procedures with respect to the Contractor as the Contractor may terminate with respect to the Owner under the Prime Contract, or for nonpayment of amounts due under this Subcontract for 60 days or longer. In the event of such termination by the Subcontractor for any reason which is not the fault of the Subcontractor, Sub-subcontractors or their agents or employees or other persons performing portions of the Work under contract with the Subcontractor, the Subcontractor shall be entitled to recover from the Contractor payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

§ 7.2 TERMINATION BY THE CONTRACTOR

§ 7.2.1 If the Subcontractor repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Subcontract and fails within a ten-day period after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by written notice to the Subcontractor and without prejudice to any other remedy the Contractor may have, terminate the Subcontract and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

§ 7.2.2 If the Owner terminates the Prime Contract for the Owner's convenience, the Contractor shall promptly deliver written notice to the Subcontractor.

§ 7.2.3 Upon receipt of written notice of termination, the Subcontractor shall

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

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

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

§ 7.2.4 In case of such termination for the Owner's convenience, the Subcontractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

§ 7.3 SUSPENSION BY THE CONTRACTOR FOR CONVENIENCE

§ 7.3.1 The Contractor may, without cause, order the Subcontractor in writing to suspend, delay or interrupt the Work of this Subcontract in whole or in part for such period of time as the Contractor may determine. In the event of suspension ordered by the Contractor, the Subcontractor shall be entitled to an equitable adjustment of the Subcontract Time and Subcontract Sum.

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§ 7.3.2 An adjustment shall be made for increases in the Subcontract Time and Subcontract Sum, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent that

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

.2 an equitable adjustment is made or denied under another provision of this Subcontract.

§ 7.4 ASSIGNMENT OF THE SUBCONTRACT

§ 7.4.1 In the event the Owner terminates the Prime Contract for cause, this Subcontract is assigned to the Owner pursuant to Section 5.4 of AIA Document A201–2007 provided the Owner accepts the assignment.

§ 7.4.2 Without the Contractor's written consent, the Subcontractor shall not assign the Work of this Subcontract, subcontract the whole of this Subcontract, or subcontract portions of this Subcontract.

ARTICLE 8 THE WORK OF THIS SUBCONTRACT

The Subcontractor shall execute the following portion of the Work described in the Subcontract Documents, including all labor, materials, equipment, services and other items required to complete such portion of the Work, except to the extent specifically indicated in the Subcontract Documents to be the responsibility of others.
(Insert a precise description of the Work of this Subcontract, referring where appropriate to numbers of Drawings, sections of Specifications and pages of Addenda, Modifications and accepted alternates.)

ARTICLE 9 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 9.1 Subcontract Time is the period of time, including authorized adjustments, allotted in the Subcontract Documents for Substantial Completion of the Work described in the Subcontract Documents. The Subcontractor's date of commencement is the date from which the Subcontract Time of Section 9.3 is measured; it shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Contractor.
(Insert the date of commencement, if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)

§ 9.2 Unless the date of commencement is established by a notice to proceed issued by the Contractor, or the Contractor has commenced visible Work at the site under the Prime Contract, the Subcontractor shall notify the Contractor in writing not less than five days before commencing the Subcontractor's Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

§ 9.3 The Work of this Subcontract shall be substantially completed not later than .
(Insert the calendar date or number of calendar days after the Subcontractor's date of commencement. Also insert any requirements for earlier substantial completion of certain portions of the Subcontractor's Work, if not stated elsewhere in the Subcontract Documents.)

Portion of Work	Substantial Completion Date
Provide supervision and management of concrete subcontractor (Atlantic Concrete Contractors). See PCG Subcontract Breakdown spreadsheet dated 9/5/14 provided, attached. Note: It is the subcontractor's responsibility to visit Submittal Exchange (www.submittalexchange.com) to access and verify they are using the latest revisions of all contract documents. An email invitation will be sent to each subcontractor's point of contact to initiate	Commence Work: Mobilize 9/22/14 Completion Date: Final Completion 7/7/15

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access to the site. ALL SUBMITTALS FROM SUBCONTRACTORS ARE TO BE SUBMITTED TO RESTORATION SPECIALISTS BY UPLOADING PDF DOCUMENTS TO THE SUBMITTAL EXHANGE SITE.
Schedule: As follows
Submittals: Submittals are due no later than 9/23/14 (submitted electronically via. Submittal Exchange)

, subject to adjustments of this Subcontract Time as provided in the Subcontract Documents.
(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)

§ 9.4 With respect to the obligations of both the Contractor and the Subcontractor, time is of the essence of this Subcontract.

§ 9.5 No extension of time will be valid without the Contractor's written consent after claim made by the Subcontractor in accordance with Section 5.3.

ARTICLE 10 SUBCONTRACT SUM

§ 10.1 The Contractor shall pay the Subcontractor in current funds for performance of the Subcontract the Subcontract Sum of One million eighty two thousand three hundred forty two dollars and 10/100, ($ 1,082,342.10), subject to additions and deductions as provided in the Subcontract Documents.

§ 10.2 The Subcontract Sum is based upon the following alternates, if any, which are described in the Subcontract Documents and have been accepted by the Owner and the Contractor:
(Insert the numbers or other identification of accepted alternates.)

§ 10.3 Unit prices, if any:
(Identify and state the unit price, and state the quantity limitations, if any, to which the unit price will be applicable.)

Item	Units and Limitations	Price Per Unit ($0.00)
N/A		

§ 10.4 Allowances included in the Subcontract Sum, if any:
(Identify allowance and state exclusions, if any, from the allowance price.)

Item	Price
N/A	

ARTICLE 11 PROGRESS PAYMENTS

§ 11.1 Based upon applications for payment submitted to the Contractor by the Subcontractor, corresponding to applications for payment submitted by the Contractor to the Government, and certificates for payment issued by the Government, the Contractor shall make progress payments on account of the Subcontract Sum to the Subcontractor as provided below and elsewhere in the Subcontract Documents. Unless the Contractor provides the Government with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor and Subcontractor for Work properly performed by their contractors and suppliers shall be held by the Contractor and Subcontractor for those contractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor or Subcontractor for which payment was made to the Contractor by the Owner or to the Subcontractor by the Contractor, as applicable. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor or Subcontractor, shall create any fiduciary liability or tort liability on the

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part of the Contractor or Subcontractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor or Subcontractor for breach of the requirements of this provision.

§ 11.2 The period covered by each application for payment shall be one calendar month ending on the last day of the month, or as follows:

§ 11.3 Provided an application for payment is received by the Contractor not later than the 25th day of a month, the Contractor shall include the Subcontractor's Work covered by that application in the next application for payment which the Contractor is entitled to submit to the Government. The Contractor shall pay the Subcontractor each progress payment no later than seven working days after the Contractor receives payment from the Government.

§ 11.4 If the Subcontractor's application for payment is received by the Contractor after the application date fixed above, the Subcontractor's Work covered by it shall be included by the Contractor in the next application for payment submitted to the Architect.

§ 11.5 The Subcontractor shall submit to the Contractor a schedule of values prior to submitting the Subcontractor's first Application for Payment. Each subsequent application for payment shall be based upon the most recent schedule of values submitted by the Subcontractor in accordance with the Subcontract Documents. The schedule of values shall allocate the entire Subcontract Sum among the various portions of the Subcontractor's Work and be prepared in such form and supported by such data to substantiate its accuracy as the Contractor may require. This schedule, unless objected to by the Contractor, shall be used as a basis for reviewing the Subcontractor's applications for payment.

§ 11.6 Applications for payment submitted by the Subcontractor shall indicate the percentage of completion of each portion of the Subcontractor's Work as of the end of the period covered by the application for payment.

§ 11.7 Subject to the provisions of the Subcontract Documents, the amount of each progress payment shall be computed as set forth in the sections below.

§ 11.7.1 Take that portion of the Subcontract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Subcontractor's Work by the share of the total Subcontract Sum allocated to that portion of the Subcontractor's Work in the schedule of values, less that percentage actually retained, if any, from payments to the Contractor on account of the Work of the Subcontractor. Pending final determination of cost to the Contractor of changes in the Work that have been properly authorized by the Contractor, amounts not in dispute shall be included to the same extent provided in the Prime Contract, even though the Subcontract Sum has not yet been adjusted;

§ 11.7.2 Add that portion of the Subcontract Sum properly allocable to materials and equipment delivered and suitably stored at the site by the Subcontractor for subsequent incorporation in the Subcontractor's Work or, if approved by the Contractor, suitably stored off the site at a location agreed upon in writing, less the same percentage retainage required by the Prime Contract to be applied to such materials and equipment in the Contractor's application for payment;

§ 11.7.3 Subtract the aggregate of previous payments made by the Contractor; and

§ 11.7.4 Subtract amounts, if any, calculated under Section 11.7.1 or 11.7.2 that are related to Work of the Subcontractor for which the Architect has withheld or nullified, in whole or in part, a certificate of payment for a cause that is the fault of the Subcontractor.

§ 11.8 Upon the partial or entire disapproval by the Contractor of the Subcontractor's application for payment, the Contractor shall provide written notice to the Subcontractor. When the basis for the disapproval has been remedied, the Subcontractor shall be paid the amounts withheld.

§ 11.9 SUBSTANTIAL COMPLETION

When the Subcontractor's Work or a designated portion thereof is substantially complete and in accordance with the requirements of the Prime Contract, the Contractor shall, upon application by the Subcontractor, make prompt application for payment for such Work. Within 30 days following issuance by the Architect of the certificate for

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payment covering such substantially completed Work, the Contractor shall, to the full extent allowed in the Prime Contract, make payment to the Subcontractor, deducting any portion of the funds for the Subcontractor's Work withheld in accordance with the certificate to cover costs of items to be completed or corrected by the Subcontractor. Such payment to the Subcontractor shall be the entire unpaid balance of the Subcontract Sum if a full release of retainage is allowed under the Prime Contract for the Subcontractor's Work prior to the completion of the entire Project. If the Prime Contract does not allow for a full release of retainage, then such payment shall be an amount which, when added to previous payments to the Subcontractor, will reduce the retainage on the Subcontractor's substantially completed Work to the same percentage of retainage as that on the Contractor's Work covered by the certificate.

ARTICLE 12 FINAL PAYMENT

§ 12.1 Final payment, constituting the entire unpaid balance of the Subcontract Sum, shall be made by the Contractor to the Subcontractor when the Subcontractor's Work is fully performed in accordance with the requirements of the Subcontract Documents, the Architect has issued a certificate for payment covering the Subcontractor's completed Work and the Contractor has received payment from the Owner. If, for any cause which is not the fault of the Subcontractor, a certificate for payment is not issued or the Contractor does not receive timely payment or does not pay the Subcontractor within seven days after receipt of payment from the Owner, final payment to the Subcontractor shall be made upon demand.
(Insert provisions for earlier final payment to the Subcontractor, if applicable.)

§ 12.2 Before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied. Acceptance of final payment by the Subcontractor shall constitute a waiver of claims by the Subcontractor, except those previously made in writing and identified by the Subcontractor as unsettled at the time of final application for payment.

ARTICLE 13 INSURANCE AND BONDS

§ 13.1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability as will protect the Subcontractor from claims that may arise out of, or result from, the Subcontractor's operations and completed operations under the Subcontract:

Type of insurance or bond	Limit of liability or bond amount ($1,000,000.00 per incident)
Commercial General Liability Insurance	$ 1,000,000.00 (per incident)
Business Automobile Liability Insurance	$ 1,000,000.00 (per incident)
Commercial Umbrella Coverage	$ 1,000,000.00 (limits must include as insureds all entities that are additional insureds on the CGL)
Worker's Compensation and Employer's Liability Insurance	$ 1,000,000.00 (per incident & per employee)

§ 13.2 Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Subcontractor's Work until the date of final payment and termination of any coverage required to be maintained after final payment to the Subcontractor, and, with respect to the Subcontractor's completed operations coverage, until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Prime Contract.

§ 13.3 Certificates of insurance acceptable to the Contractor shall be filed with the Contractor prior to commencement of the Subcontractor's Work. These certificates and the insurance policies required by this Article 13 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final application for payment as required in Article 12. If any information concerning reduction of coverage is not furnished by the insurer, it shall be furnished by the Subcontractor with reasonable promptness according to the Subcontractor's information and belief.

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§ 13.4 The Subcontractor shall cause the commercial liability coverage required by the Subcontract Documents to include: (1) the Contractor, the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's operations; and (2) the Contractor as an additional insured for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's completed operations.

§ 13.5 The Contractor shall furnish to the Subcontractor satisfactory evidence of insurance required of the Contractor under the Prime Contract.

§ 13.6 The Contractor shall promptly, upon request of the Subcontractor, furnish a copy or permit a copy to be made of any bond covering payment of obligations arising under the Subcontract.

§ 13.7 Performance Bond and Payment Bond:
(If the Subcontractor is to furnish bonds, insert the specific requirements here.)

Bond type	Bond amount ($0.00)	Bond delivery date	Bond form
N/A			

§ 13.8 PROPERTY INSURANCE
§ 13.8.1 When requested in writing, the Contractor shall provide the Subcontractor with copies of the property and equipment policies in effect for the Project. The Contractor shall notify the Subcontractor if the required property insurance policies are not in effect.

§ 13.8.2 If the required property insurance is not in effect for the full value of the Subcontractor's Work, then the Subcontractor shall purchase insurance for the value of the Subcontractor's Work, and the Subcontractor shall be reimbursed for the cost of the insurance by an adjustment in the Subcontract Sum.

§ 13.8.3 Property insurance for the Subcontractor's materials and equipment required for the Subcontractor's Work, stored off site or in transit and not covered by the Project property insurance, shall be paid for through the application for payment process.

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

ARTICLE 14 TEMPORARY FACILITIES AND WORKING CONDITIONS
§ 14.1 The Contractor shall furnish and make available at no cost to the Subcontractor the Contractor's temporary facilities, equipment and services, except as noted below:

Temporary Facility, Equipment or Service	Cost, if any ($0.00)

§ 14.2 Specific working conditions:
(Insert any applicable arrangements concerning working conditions and labor matters for the Project.)

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User Notes:
(1114130519)

ARTICLE 15 MISCELLANEOUS PROVISIONS

§ 15.1 Where reference is made in this Subcontract to a provision of another Subcontract Document, the reference refers to that provision as amended or supplemented by other provisions of the Subcontract Documents.

(Insert rate of interest agreed upon, if any.)

%

(Paragraphs deleted)

§ 15.3 Retainage and any reduction thereto are as follows:

0% (zero)

(Paragraph deleted)

ARTICLE 16 ENUMERATION OF SUBCONTRACT DOCUMENTS

§ 16.1 The Subcontract Documents, except for Modifications issued after execution of this Subcontract, are enumerated in the sections below.

§ 16.1.1 This executed AIA Document A401–2007, Standard Form of Agreement Between Contractor and Subcontractor.

§ 16.1.2 The Prime Contract, consisting of the Agreement between the Owner and Contractor dated as first entered above and the other Contract Documents enumerated in the Owner-Contractor Agreement.

§ 16.1.3 The following Modifications to the Prime Contract, if any, issued subsequent to the execution of the Owner-Contractor Agreement but prior to the execution of this Agreement:

Modification	Date

§ 16.1.4 Additional Documents, if any, forming part of the Subcontract Documents:

.1 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed by the parties, or the following:

.2 Other documents:
(List here any additional documents that are intended to form part of the Subcontract Documents. Requests for proposal and the Subcontractor's bid or proposal should be listed here only if intended to be made part of the Subcontract Documents.)

1. PCG Subcontract Breakdown
2. Atlantic Concrete Subcontract

This Contract / P.O. Number will be: 1401-010000-005
This Contract / P.O. # is to be referenced on all billings / invoices / submittals, etc.

This Agreement entered into as of the day and year first written above.

RESTORATION SPECIALISTS, LLC	PALMETTO CONSTRUCTION GROUP, LLC
CONTRACTOR *(Signature)*	SUBCONTRACTOR *(Signature)*
Mark Ward – Managing Member	Jay Hancock - Vice President
(Printed name and title)	*(Printed name and title)*

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User Notes: (1114130519)

TEAMING AGREEMENT

This Agreement is made and entered into as of the 28th day of November, 2011, by and between Restoration Specialists, LLC, a Georgia limited liability company (hereinafter called "RS"), and Palmetto Construction Group, LLC, a South Carolina limited liability company (hereinafter called "PCG"), each a "Party" and together the "Parties", for the purpose of submitting a proposal for Solicitation Number VA-247-11-RP-0211 (hereinafter the "Services") to Department of Veteran Affairs (the "Customer") for the New SCIU Hospital Parking Deck Minor Project: 509-325 project (the "Project"). ***RS, cage code 5GXE1, is a "Verified" Service Disabled Veteran Owned Small Business and PCG, cage code 3P1G3, is a "Certified" Small Business. RS and PCG have a successful teaming record on previous contracts such as: FA4418-11-R-0017-0004***

ARTICLE 1 SUBMISSION OF PROPOSAL

RS and PCG shall each undertake to accomplish certain tasks in connection with the preparation of a proposal to be submitted to the Customer for the Project (the "Proposal"). The Proposal will identify RS as the prime contractor and PCG as the subcontractor that will perform the Services. The Proposal will be developed in conformance with the delineation of respective areas of responsibility and contract share set forth in Exhibit A. Both Parties have the right to determine the contents of the Proposal to the Customer as it relates to that Party. RS will be responsible for preparing the final copies of all Proposal documents and submitting the Proposal to the Customer.

ARTICLE 2 PERFORMANCE OF CONTRACTS

If RS is selected as the prime contractor as a result of the Proposal, RS and PCG will provide assistance and support to each other in the joint negotiation of the terms and conditions of the prime contract with Customer so as to obtain terms and conditions which are mutually agreeable to RS and PCG. Additionally, RS and PCG shall enter into a contractual arrangement between themselves on mutually acceptable terms and conditions. The Parties will endeavor to incorporate terms consistent with the Scope of Work substantially in accord with the provisions of Exhibit A and Exhibit B, Standard Subcontract Terms and Conditions, as may be modified subject to the terms and conditions described in the prime contract.

ARTICLE 3 EXCLUSIVE AGREEMENT

When mutually agreed to for a specific Project, to preserve the interests of the Parties hereto in the competition for such Project only, RS and PCG shall work exclusively with each other with respect to its area of responsibility and share of the contract in a proposal for the Project. RS and PCG acknowledge that it may be necessary to utilize other subcontractors on the team as may be mutually agreed.

ARTICLE 4 SCOPE OF AGREEMENT

This Agreement shall relate only to the solicitation specified herein, and nothing herein shall be deemed to:

B

Blindertek #CLEX

(a) Confer any right or impose any obligation or restriction on either Party with respect to any other efforts or marketing activity at any time undertaken by either Party hereto, jointly or separately; or

(b) Preclude either Party hereto from soliciting or accepting any prime contract or subcontract from any third Party (or subcontractor of any tier) under any other solicitation during or after termination of this Agreement; or

(c) Limit the rights of either Party to promote, market, sell, lease, license or otherwise dispose of its standard products or services, except where such would conflict with the obligations of the Party under this Agreement.

ARTICLE 5 RELATIONSHIP

Nothing in this Agreement shall be deemed to constitute, create, give effect to, or otherwise recognize a joint venture, partnership, or formal business entity of any kind, and the rights and obligations of the Parties shall be limited to those expressly set forth herein. Nothing herein shall be construed as providing for the sharing of profits or losses arising out of the efforts of either or both of the Parties; except as may be provided for in any resultant contractual arrangement agreed to between the Parties. The cooperation of the Parties is for the purpose of complementing their respective capabilities in pursuit and execution of the subject solicitation.

ARTICLE 6 EXCHANGE OF CONFIDENTIAL INFORMATION

During the term of this Agreement, each Party agrees to receive from the other, cost, pricing and technical information and data, hereinafter referred to as "Data", for the purpose of responding to the request for proposal for the Project from the Customer. Such Data shall consist of that needed to satisfy the requirements of Exhibit "A" and Customer's request for proposal.

For a term of five (5) years from the date of this Agreement, each Party agrees to keep in confidence and to use its best efforts to prevent the disclosure to any person or persons outside its own organization all Data (i) which is designated in writing, by appropriate stamp (or legend) by the disclosing Party, to be of a proprietary or confidential nature, (ii) which is received from the disclosing Party under this Agreement, and (iii) which pertains to proprietary or confidential data regarding the disclosing Party's costs, pricing and technological techniques, processes, inventions, and research and development; provided, however, that neither Party shall be liable for use or disclosure of any such Data if the same:

(a) Is in the public domain at the time it is disclosed; or

(b) Is known, as demonstrated by written documentation, to the Party receiving it at the time of disclosure; or

(c) Is used or disclosed with the prior written approval of the other Party; or

(d) Becomes known to the receiving Party from a source other than the disclosing Party; or

(e) Is independently developed, separate from the activities undertaken pursuant to this Agreement; or

(f) Is disclosed under legal compulsion provided that the disclosing Party is given a reasonable opportunity to pursue injunctive relief.

ARTICLE 7 TERMINATION

All rights and obligations of the Parties under this Agreement shall terminate on the earliest of the following:

(a) Notice from Customer that the Project has been cancelled, or that the prime contract will not be awarded to RS or PCG;

(b) Award to other contractors to the exclusion of RS or PCG of contracts for all or substantially all of the Project work contemplated by the proposal;

(c) Notice from the Customer that RS or PCG is unacceptable in the role and function set forth in the proposal; however, if the Customer requests a change in the role and/or function of RS or PCG, this Agreement shall not be deemed terminated unless RS and PCG fail to agree to effect appropriate changes within the time period permitted by the Customer;

(d) Either Party hereto may exercise an option to terminate this Agreement for its convenience. A condition enabling this right is that the Party which withdraws shall not compete for this Project either as an individual firm or in combination with any other firm;

(e) Execution by both Parties hereto of the contractual arrangement between themselves contemplated by this Agreement, or failure of the Parties hereto to agree on the terms of the contemplated arrangement;

(f) The failure of the Parties hereto and the Customer to reach agreement on the terms of the contemplated prime contract;

(g) The expiration of 24 months from the effective date hereof; provided, however, if the proposal has been submitted and is under consideration by the Customer upon the expiration of such 24 month period, this Agreement shall continue to be in force until terminated pursuant to one of the foregoing conditions; and provided further that if an award is made by the Customer on the proposal at any time after the 24 month period is over, this Agreement shall be deemed to have continued in full force and effect.

(h) Mutual agreement of the Parties.

ARTICLE 8 COSTS

Each Party shall perform its obligations hereunder at its own cost unless the Parties agree in writing to other cost sharing arrangements.

ARTICLE 9 DAMAGES

Neither Party shall be liable to the other for any indirect, special or consequential losses, whether arising in contract, tort (including negligence), or otherwise.

ARTICLE 10 ASSIGNMENT

This Agreement shall not be assigned by either Party without the prior written approval of the other Party.

ARTICLE 11 NOTICE

All notices hereunder shall be given by letter addressed, except as each may change its address pursuant hereto, as follows:

Attention: Mark Ward
Restoration Specialists, LLC
PO Box 5352
Savannah, Ga. 31414
(912) 659-4355

Attention: Jay Handegan
Palmetto Construction Group, LLC
2265 Clements Ferry Rd. Suite 204
Charleston, SC 29492
(843) 971-7156

ARTICLE 12 ENTIRE AGREEMENT

This document contains the entire agreement between the Parties and supersedes any previous understandings, commitments or agreements, oral or written, with respect to the subject matter hereof. It shall not be varied, except by an instrument in writing of subsequent date, duly executed by an authorized representative of each Party. The validity, construction, scope, and performance of this Agreement shall be governed by the laws of the State of Georgia.

RESTORATION SPECIALISTS LLC

By: _____
(Authorized Signature)
Title: Managing Member
Date: 12-01-11

PALMETTO CONSTRUCTION GROUP

By: _____
(Authorized Signature)
Title: Vice President
Date: 12/7/11

EXHIBIT A

AREAS OF PROJECT PARTICIPATION

This Exhibit is based on Customer's stated plans to pursue the Project. It is currently contemplated that as the Project develops from the bid phase through the final contract award phase, one or more special purpose entities may be established to bid and execute the Project. The following represents a general distribution of Project participation. As the Project develops, this Exhibit will be modified as required as detailed scope of work responsibilities and specific contractual arrangements are determined.

AREAS OF RESPONSIBILITY

RS

Restoration Specialists, LLC, a Verified SDVOSB, will serve as the Prime Contractor on this project. The role of the prime will include contract administration, subcontractor administration, material procurement, project management, scheduling, site supervision, quality control and health and safety management.

PCG

Palmetto Construction Group, LLC, a Certified Small Business, shall provide field Project Managers and Superintendents and a qualified labor force to perform the construction of the New SCIU Parking Deck.

SPS

Structured Parking Solutions, a Certified Small Business, will provide all design services including architectural, mechanical, electrical, plumbing, structural and civil engineering and environmental consulting. If requested, SPS will provide contract administration, inspection and testing services during the construction phase of the projects.

Other Sub Contractors

Pre Casters

EXHIBIT B

Standard Subcontract Terms and Conditions

Bond No. 1944091

PAYMENT BOND *(See Instructions on reverse)*	DATE BOND EXECUTED *(Must be same or later than date of contract)*	OMB No.:9000-0045 Expires: 11/30/2012
	April 23, 2012	

Public reporting burden for this collection of information is estimate to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, DC 20405.

PRINCIPAL *(Legal name and business address)*	TYPE OF ORGANIZATION *("X" one)*
Restoration Specialists, LLC P. O. Box 5352 Savannah, GA 31414	☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☒ CORPORATION STATE OF INCORPORATION: GA
SURETY(IES) *(Name(s) and business address(es))*	PENAL SUM OF BOND
The Hanover Insurance Company 440 Lincoln Street Worcester, MA 01653	MILLION(S): 5 · THOUSAND(S): 999 · HUNDRED(S): 860 · CENTS: 00 CONTRACT DATE: March 13, 2012 · CONTRACT NO.: VA247-C-0035

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. for payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The above obligation is void if the Principal promptly makes payment to all persons having a direct relationship with the Principal or a subcontractor of the Principal for furnishing labor, material or both in the prosecution of the work provided for in the contract identified above, and any authorized modifications of the contract that subsequently are made. Notice of those modifications to the Surety(ies) are waived.

WITNESS:

The Principal and Surety(ies) executed this payment bond and affixed their seals on the above date.

Binderlok #CLEX

Restoration Specialists, LLC — PRINCIPAL

	1.	2.	3.	
SIGNATURE(S)	(Seal)	(Seal)	(Seal)	Corporate Seal
NAME(S) & TITLE(S) *(Typed)*	1.	2.	3.	

INDIVIDUAL SURETY(IES)

	1.	2.
SIGNATURE(S)	(Seal)	(Seal)
NAME(S) *(Typed)*	1.	2.

The Hanover Insurance Company — CORPORATE SURETY(IES)

SURETY A — NAME & ADDRESS	440 Lincoln Street, Worcester, MA 01653	STATE OF INC.: NH	LIABILITY LIMIT: $896,082,000	
SURETY A — SIGNATURE(S)	1.	2.		Corporate Seal
SURETY A — NAME(S) & TITLE(S) *(Typed)*	1. Laura W. Dennison Attorney-in-Fact	2.		

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STANDARD FORM 25A (REV. 10-98)
Prescribed by GSA-FAR (48 CFR) 53.2228(c)

CORPORATE SURETY(IES) *(Continued)*

SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		

INSTRUCTIONS

. This form, for the protection of persons supplying labor and material, is sed when a payment bond is required under the Act of August 24, 1935, 49 tat. 793 (40 U.S.C. 270a-270a). Any deviation from this form will require the ritten approval of the Administrator of General Services.

. Insert the full legal name and business address of the Principal in the pace designated "Principal" on the face of the form. An authorized person hall sign the bond. Any person signing in a representative capacity (e.g., an ttorney-in-fact) must furnish evidence of authority if that representative is not member of the firm, partnership, or joint venture, or an officer of the orporation involved.

. (a) Corporations executing the bond as sureties must appear on the epartment of the Treasury's list of approved sureties and must act within the mitation listed therein. Where more than one corporate surety is involved, eir names and addresses shall appear in the spaces (Surety A, Surety B, tc.) headed "CORPORATE SURETY(IES)."

In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28) for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

STANDARD FORM 25A (REV. 10-98) BACK

Bond No. 1944091

PERFORMANCE BOND (See instructions on reverse)	DATE BOND EXECUTED (Must be same or later than date of contract)	OMB No.: 9000-0045
	April 23, 2012	

Public reporting burden for this collection of information is estimated to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, D.C. 20405

PRINCIPAL (Legal name and business address)	TYPE OF ORGANIZATION ("X" one)
Restoration Specialists, LLC P. O. Box 5352. Savannah, GA 31414	☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☒ CORPORATION STATE OF INCORPORATION: GA
SURETY(IES) (Name(s) and business address(es))	PENAL SUM OF BOND
The Hanover Insurance Company 440 Lincoln Street Worcester, MA 01653	MILLION(S): 5 — THOUSAND(S): 999 — HUNDRED(S): 860 — CENTS: 00 CONTRACT DATE: March 13, 2012 — CONTRACT NO.: VA247-C-0035

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The Principal has entered into the contract identified above.

THEREFORE:

The above obligation is void if the Principal –

(a)(1) Performs and fulfills all the undertakings, covenants, terms, conditions, and agreements of the contract during the original term of the contract and any extensions thereof that are granted by the Government, with or without notice to the Surety(ies), and during the life of any guaranty required under the contract, and (2) performs and fulfills all the undertakings, covenants, terms conditions, and agreements of any and all duly authorized modifications of the contract that hereafter are made. Notice of those modifications to the Surety(ies) are waived.

(b) Pays to the Government the full amount of the taxes imposed by the Government, if the said contract is subject to the Mil[illegible] Act, (40 U.S.C. 270a-270e), which are collected, deducted, or withheld from wages paid by the Principal in carrying out the construction contra[illegible] with respect to which this bond is furnished.

WITNESS:

The Principal and Surety(ies) executed this performance bond and affixed their seals on the above date.

Restoration Specialists, LLC — PRINCIPAL				
SIGNATURE(S)	1. (Seal)	2. (Seal)	3. (Seal)	Corporate Seal
NAME(S) & TITLE(S) (Typed)	1.	2.	3.	

INDIVIDUAL SURETY(IES)			
SIGNATURE(S)	1. (Seal)	2. (Seal)	
NAME(S) (Typed)	1.	2.	

The Hanover Insurance Company — CORPORATE SURETY(IES)				
SURETY A — NAME & ADDRESS	440 Lincoln Street Worcester, MA 01653	STATE OF INC.: NH	LIABILITY LIMIT: $96,082,000.00	Corporate Seal
SURETY A — SIGNATURE(S)	1.	2.		
SURETY A — NAME(S) & TITLE(S) (Typed)	1. Laura W. Dennison Attorney-in-Fact	2.		

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STANDARD FORM 25 (REV. 5-96)
Prescribed by GSA-FAR (48 CFR) 53.228(b)

CORPORATE SURETY(IES) *(Continued)*

SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		

BOND PREMIUM	RATE PER THOUSAND $ $15 1st 500M; $12 next $2 mil; $9 next $2.5mil; $8 next $2.5 mil	TOTAL $61,999.00 $0.00

INSTRUCTIONS

1. This form is authorized for use in connection with Government contracts. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of the approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the paces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28) for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Palmetto Construction Group Plaintiff, vs. Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward Defendants.	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2016-CP-10-1143 **DEFENDANTS' NOTICE OF MOTION AND MOTION TO RECONSIDER AND TO ALTER OR AMEND PURSUANT TO SCRCP 59(e) AND APPLICABLE CASE LAW**

FILED
2016 JUL 27 PM 12:3
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: ANDREW K. EPTING, JR., ESQUIRE, AND MICHELLE N. ENDEMANN, ESQUIRE, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, will move before the presiding Judge or Master in Equity of the Ninth Judicial Circuit at a time and place to be arranged by the Court and counsel involved for the Court to reconsider and amend its Order dated July 14, 2016 ("Order"). The Defendants will move the Court to amend its Order so as to make a final ruling on the merits of all motions filed in this matter and to lift the entry of default, stay this action and compel mandatory mediation/arbitration of this matter. The Defendants' Motion to Reconsider and to Alter or Amend ("Defendant's Motion) is made pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure and all applicable case law.

The Defendants' Motion is made on the following grounds:

(1): The Defendants showed good cause such that the entry of default should be lifted in this matter. *See, Defendants' Motion to Lift Entry of Default, dated June 3, 2016 and supporting legal memorandum (including, all referenced legal authorities and exhibits); Memorandum of Law in Support of Defendants' Motion to Reconsider and to Alter or Amend (to be submitted to the Court prior to the hearing of Defendants' Motion).*

(2): The Court lacks subject matter jurisdiction due to the mandatory and binding mediation/arbitration provisions contained in the contract giving rise to this action. *See, Defendants'*

Motion to Stay and to Compel, dated July 11, 2016 and supporting legal memorandum (including, all referenced legal authorities and exhibits); Memorandum of Law in Support of Defendant's Motion to Reconsider and to Alter or Amend (to be submitted to the Court prior to the hearing of Defendants' Motion).

(3): The contract giving rise to this action requires all claims arising out of or related to the contract to be mediated, and if not resolved by mediation, to be resolved by binding arbitration. Accordingly, the Court is required to stay this action and submit the matter to mediation, and if necessary, binding arbitration. *See, Plaintiff's Motion to Stay and Compel, dated March 7, 2016 (including, all referenced legal authorities and exhibits); Defendants' Motion to Stay and to Compel, dated July 11, 2016 and supporting legal memorandum (including, all referenced legal authorities and exhibits); Memorandum of Law in Support of Defendants' Motion to Reconsider and to Alter or Amend (to be submitted to the Court prior to the hearing of Defendants' Motion).*

(3): The Plaintiff made a demand for mandatory mediation/arbitration contemporaneously with the commencement of this action pursuant to its Motion to Stay and Compel ("Plaintiff's Motion"). The Defendants joined in and consented to Plaintiff's Motion, which motion should be properly adjudicated before the court and the relief requested therein granted. *See, Plaintiff's Motion to Stay and Compel, dated March 7, 2016 (including, all referenced legal authorities and exhibits); Defendants' Motion to Stay and Compel, dated July 11, 2016 (including, all referenced legal authorities and exhibits); Memorandum of Law in Support of Defendants' Motion to Reconsider and to Alter or Amend (to be submitted to the Court prior to the hearing of Defendants' Motion)*;

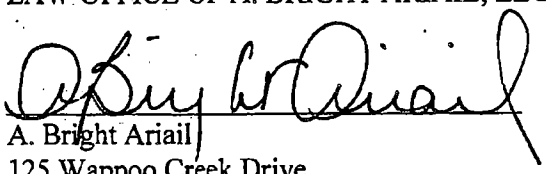
(4): The Defendants have not defaulted upon nor waived their right to mediation/arbitration under the mandatory alternative dispute resolution provisions of the contract and applicable law. *See, Defendants' Motion to Lift Entry of Default, dated June 3, 2016 and supporting legal memorandum (including, all referenced legal authorities and exhibits); Defendants' Motion to Stay and Compel, dated July 11, 2016 (including, all referenced legal authorities and exhibits); Memorandum of Law in Support of Defendant's Motion to Reconsider and to Alter or Amend (to be submitted to the Court prior to the hearing of Defendants' Motion to Reconsider and to Alter or Amend).*

This Motion is based upon Defendants' Memorandum of Law in Support of Motion to Reconsider and to Alter or Amend which will be submitted to the Court prior to the hearing of

Defendants' Motion, the parties' prior motions and supporting memorandums of law referenced above, the complete files, exhibits, and records in this action, such oral and documentary evidence as may be allowed at the hearing of this motion and upon all applicable law pertaining thereto.

Respectfully submitted,

LAW OFFICE OF A. BRIGHT ARIAIL, LLC



A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

July 27, 2016
Charleston, SC 29412

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

Palmetto Construction Group)

Plaintiff,)

vs.)

Restoration Specialists, LLC,)
Reuben Mark Ward, and Lynnette)
Pennington Ward)

Defendants.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-10-1143

FILED
2016 JUL 27 PM 12:39
JULIE J. ARMSTRONG
CLERK OF COURT

CERTIFICATE OF SERVICE

The undersigned hereby certifies, that on this 27th day of July, 2016, a true and correct copy of the foregoing: **DEFENDANTS' NOTICE OF MOTION AND MOTION TO RECONSIDER AND TO ALTER OR AMEND PURSUANT TO SCRCP 59(e) AND APPLICABLE LAW** has been served on the below counsel of record via hand delivery, email, facsimile and/or United States Mail with sufficient first class postage affixed thereto and addressed as follows:

Andrew K Epting, Jr., Esquire
Michelle N. Endemann, Esquire
ANDREW K. EPTING, JR., LLC
46A State Street
Charleston, SC 29401
ATTORNEYS FOR PLAINTIFF

A. Bright Ariail, Esquire
Law Office of A. Bright Ariail, LLC
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, S.C. 29412
ATTORNEY FOR DEFENDANTS

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

125E WAPPOO CREEK DRIVE, SUITE 202
CHARLESTON, SC 29412
bright@brightariaillaw.com

A. Bright Ariail, Esquire

Telephone: (843) 814-8805
Facsimile: (843) 266-0538

July 27, 2016

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

RE: ***Palmetto Construction Group v. Restoration Specialists, LLC et al.***
C/A No. 2016-CP-10-1143

Dear Julie:

Enclosed, please find the original and one copy of the *Defendants' Notice of Motion and Motion to Reconsider and to Alter or Amend Pursuant to SCRCP59(e) and Applicable Law* with the appropriate Motion Cover Sheet and Filing Fee for filing in the above captioned case.

By copy of this letter, I am providing a copy of the Motion to the Honorable Mikell R. Scarborough, and I am serving this Motion on all Counsel of Record.

With kindest regards, I am

Sincerely,

A. Bright Ariail

ABA/wd
Enclosures
cc: The Honorable Mikell R. Scarborough (Via Hand Delivery)
All Counsel of Record (via email & US Mail)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group	)	
	)	
Plaintiff,	)	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO RECONSIDER AND TO ALTER OR AMEND PURSUANT TO SCRCP 59(e) AND APPLICABLE CASE LAW**
	)	
vs.	)	
	)	
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward	)	
	)	
Defendants.	)	

FILED
2016 OCT 14 PM 1:53
JULIE J. ARMSTRONG
CLERK OF COURT

TO: ANDREW K. EPTING, JR., ESQUIRE, AND MICHELLE N. ENDEMANN, ESQUIRE, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP

Pursuant to Rule 59(e), SCRCP, the Defendants, Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward (hereinafter collectively "Defendants"), by and through their undersigned counsel, submit this Memorandum in Support of their Motion to Reconsider and Alter or Amend.

LEGAL AUTHORITIES

(1): **The Defendants showed good cause such that the entry of default should be lifted in this matter.**

The Defendants showed good cause such that the entry of default should be lifted. As a part of the good cause shown, the Defendants asserted their rights to mandatory mediation/arbitration under the mandatory alternative dispute resolution provisions under the contract. The Defendants' rights to mandatory mediation/arbitration are substantial rights which cannot be vitiated and foreclosed to the Defendants by the simple entry of default. *See, legal authorities cited below.*

Furthermore, these mandatory rights to mediation/arbitration are the same rights asserted and demanded by the Plaintiff in its Motion to Stay and Compel filed contemporaneously with the commencement of this action. For this reason, as well as the additional reasons cited in Defendants' Memorandum in Support of Defendants' Motion to Set Aside Entry of Default Pursuant to SCRCP

55(c), the Plaintiff cannot claim prejudice if the Entry of Default is lifted.

In fact, the corollary to the lack of prejudice to the Plaintiff is the extreme prejudice the Defendants will suffer if the default is not lifted and the court proceeds with a default damages hearing. In this circumstance, the Plaintiff will have received significant undue advantage in achieving a litigated result in a case subject to contractually agreed upon mandatory mediation/arbitration. This extreme prejudice will be further magnified by the significant limitations and restrictions imposed upon Defendants' rights to defend against Plaintiff's claims in the damages hearing forum.

On the basis of good cause shown, inclusive of the Defendants' rights to mediation/arbitration and the mandatory requirement of the Court to stay and compel mediation/arbitration, the interests of justice and the policy favoring disposition of cases on the merits dictate the vacation of the entry of default. Upon vacating the entry of default, the Court should stay the case and compel the case to mediation/arbitration consistent with the mandatory contract provisions and demands for mediation/arbitration made by all parties to this litigation.

(2): The Court lacks subject matter jurisdiction due to the mandatory and binding mediation/arbitration provisions contained in the contract giving rise to this action.

By virtue of the mandatory mediation/arbitration provisions in the contract, the Court is required to stay this litigation and submit the matter to mediation/arbitration. Under both federal and state law, when a case is sent to arbitration, the court is divested of jurisdiction over the case. *U.S. ex rel. Coastal Roofing Co., Inc. v. P. Browne & Associates, Inc.*, 585 F. Supp. 2d 708 (2007); *Main Corp. v. Black*, 357 S.C. 179, 592 S.E. 2d 300 (2004). By virtue of the requirements of a mandatory stay and submission to mandatory mediation/arbitration, the Court shall be divested of jurisdiction over the matter.

(3): The contract giving rise to this action requires all claims arising out of or related to the contract to be mediated, and if not resolved by mediation, to be resolved by binding arbitration. Accordingly, the court is required to stay this action and submit the matter to mediation, and if necessary, binding arbitration.

The contract giving rise to this action requires mandatory mediation, and if necessary binding arbitration. The Plaintiff acknowledged this fact and the mandatory nature of the alternative dispute resolution provisions at the inception of this litigation in its Motion to Stay and Compel. In fact, the Plaintiff made a formal demand for mandatory mediation/arbitration in its Motion to Stay and Compel filed with the Court.

By virtue of the mandatory mediation/arbitration provisions in the contract, the Court is required to stay this litigation and submit the matter to mediation/arbitration. This stay of litigation requirement is mandatory under both federal and state law. *U.S. ex rel. Coastal Roofing Co., Inc. v. P. Browne & Associates, Inc.*, 585 F. Supp. 2d 708 (DSC 2007); *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.C. 172 (Ct. App. 2009).

(4): The Plaintiff made a demand for mandatory mediation/arbitration contemporaneously with the commencement of this action pursuant to its Motion to Stay and Compel. The Defendants joined in and consented to this motion, which motion should be properly adjudicated before the court and the relief requested therein granted.

The Defendants joined in and consented to the Motion to Stay and Compel originally filed by the Plaintiff, thus rendering the motion a joint motion of all parties to the case.

The Clerk of Court "closed out" the Motion to Stay and Compel due to the referral of the case to the Master in Equity. *See, Transcript of Hearing before the Honorable Mikell R. Scarborough on July 14, 2016.* The summary closure of this motion as an administrative matter without the Court's consideration and ruling upon the motion for all parties concerned was not a proper and valid adjudication of this motion.

The motion should be properly adjudicated before the Court and the relief requested therein granted. *See, all cases and legal authorities cited herein.*

(5): The Defendants have not defaulted upon nor waived their right to mediation/arbitration under the mandatory alternative dispute resolution provisions of the contract and applicable law.

The policy of the United States and South Carolina is to favor arbitration of disputes. *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E. 2d 864 (Ct. App. 2000). In the present case, the Defendants have not defaulted upon nor waived their right to mediation/arbitration under either state or federal law.

The Defendants have not defaulted upon nor waived their right to mediation/arbitration under state law because: (a): a substantial length of time did not transpire between the commencement of the action and the commencement of the motion to compel arbitration; (b): the Defendants did not engage in extensive discovery before moving to compel arbitration; and (3): the Plaintiff has not been prejudiced through an undue burden caused by any delay in seeking arbitration. *Toler's Cover Homeowners Ass'n v. Trident Const. Co., Inc.*, 355 S.C. 605, 586 S.E. 2d 581; *Carlson v. South State Plastering, LLC*, 404 S.C. 250, 743 S.E. 2d 860 (Ct. App. 2013); *General Equip & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 544 S.E. 2d 643 (Ct. App 2001); and related cases.

The Defendants have not defaulted upon nor waived their right to mediation/arbitration under federal law because they have not so substantially utilized the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay. *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F. 3d 200 (4th Cir. 2004); *Brown v. Green Tree Services, LLC*, 585 F. Supp. 2d 770 (DSC 2008); *Rich v. Walsh*, 590 S.E. 2d 506, 357 S.C. 64 (Ct. App. 2003); and related cases.

The Court's Entry of Default against the Defendants, dated April 21, 2016 does not constitute a default upon or waiver of the Defendants' right to mediation/arbitration. *Id., see also, Cedar Surgery Center v. Bonelli*, 96 P.3d 911, 2004 UT 58 (Utah, 2004).

CONCLUSION

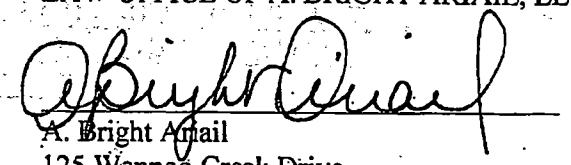
Based on the foregoing, the Defendants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward are entitled to an order lifting the entry of default, staying this action and compelling mandatory mediation/arbitration of this matter.

For these reasons, the Defendants Restoration Specialists, LLC, Reuben Mark Ward and

Lynnette Pennington Ward hereby respectfully request that their Motion to Set Aside Entry of Default be granted.

Respectfully submitted,

LAW OFFICE OF A. BRIGHT ARIAIL, LLC



A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

October 4, 2016
Charleston, SC 29412

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group	)	
	)	
Plaintiff,	)	**CERTIFICATE OF SERVICE**
	)	
vs.	)	
	)	
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward	)	
	)	
Defendants.	)	

FILED
2016 OCT 14 PM 1:53
JULIE J. ARMSTRONG
CLERK OF COURT

The undersigned hereby certifies that on the 4th day of October, 2016, a true and correct copy of the Memorandum in Support of Defendants' Motion to Reconsider and to Alter or Amend Pursuant to SCRCP59(e) and Applicable Case Law was hand delivered to the following:

Andrew K. Epting, Esquire
Michelle N. Endemann, Esquire
46A State Street
Charleston, SC 29401

A. Bright Arrail

Charleston, South Carolina
October 4, 2016

Law Office of A. Bright Ariail, LLC

October 11, 2016

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*
C/A No. 2016-CP-10-1143

Dear Julie;

Enclosed, please find the original and one copy of Memorandum in Support of Defendants' Motion to Reconsider and to Alter or Amend Pursuant to SCRCP 59(e) and Applicable Case Law with Certificate of Service for filing in the above captioned case which was handed delivered to the Court and opposing counsel during the hearing held in this case on October 4, 2016. A SASE is also enclosed for return of the clocked copy.

With kindest regards, I am

Sincerely yours,

A. Bright Ariail

Enclosures

cc: All Counsel

bright@brightariaillaw.com
125E Wappoo Creek Drive
Suite 202
Charleston, SC 29412
843/814-8805

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	COUNTY OF CHARLESTON
	)	FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION, GROUP LLC.,	)	CASE NO. 2016-CP-10-1143
Plaintiff,	)	
vs.	)	
RESTORATION SPECIALISTS, LLC REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD,	)	**PALMETTO CONSTRUCTION'S OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER ALTER OR AMEND**
Defendants.	)	

FILED
2016 OCT 26 PM 1:13
JULIE J. ARMSTRONG
CLERK OF COURT

A. BACKGROUND

This matter arises out of Palmetto's suit against Defendants alleging, *inter alia*, that the Defendants misappropriated funds from a government construction project, failed to pay the subcontractors and suppliers, defaulted on its agreements with Palmetto and the indemnity agreement with the surety, leaving Palmetto responsible for over $1,400,000.00 to the surety in claims on the payment bond issued for the project.

Palmetto personally served its complaint on the Defendants on March 14, 2016, but the Defendants failed to answer. An affidavit of default was filed on April 18, 2016 and on April 21, 2016, The Honorable Roger M. Young entered an order referring the matter to this Court.

A damages hearing was scheduled on June 6, 2016. The day before the hearing, counsel appeared on behalf of Defendants and filed a motion to lift the default and compel arbitration. The motions were denied by Order dated July 14, 2016. The Order set a default damages hearing for October 4, 2016 at 2:00pm and was served on all parties by the Court on July 18, 2016.

Defendants filed a motion to reconsider pursuant to Rule 59 SCRCP on July 27, 2016. The motion to reconsider was scheduled to be heard by the Court on October 11, 2016. Defendants wrote the Court on September 7, asking that the motions be heard in advance of the damages hearing. The Court elected to keep the hearing as originally scheduled with the damages hearing on October 4 and the motion to reconsider be heard on October 11.

On September 30, 2016, Palmetto was served with a notice of appeal, and immediately filed a motion to dismiss. The parties appeared before this Court on October 4, and a record of the parties' positions was made as the procedural posture of the case was unusual considering there was no timely appeal of the interlocutory order denying the motion to lift the default and the Rule 59 motions remained pending.

On October 5, Palmetto's counsel received a letter from the Court of Appeals returning its motion to dismiss on the grounds that the Court had no record of such an appeal. Also on October 5, Palmetto was served by facsimile with a copy of another notice of appeal, different than the one previously served, which attached the July 14, 2016 Order and portions of the transcript of hearing. On October 6, 2016, Palmetto's counsel was served by facsimile with yet another version of the notice of appeal. On October 17, 2016, Palmetto's counsel received a letter from the Court of Appeals stating that one of the notices of appeal was being returned to Ms. Arial together with the transcript as the transcript is not an order and is not properly included with a notice of appeal **(EXHIBIT A)**.

Palmetto submits the following in opposition to Defendants' Rule 59 motion.

B. THE COURT PROPERLY DENIED DEFENDANTS' MOTION TO BE RELIEVED FROM DEFAULT

The South Carolina Rules of Civil Procedure provide: "For good cause shown the court may set aside an entry of default . . ." Rule 55(c), SCRCP. "The decision of whether to grant relief from an entry of default is solely within the sound discretion of the trial court." *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989). In the present case, the Court correctly concluded that the Defendants failed to show good cause for why the default should be lifted. Defendants submitted an affidavit by Mr. Ward, acknowledging service of the complaint but stating that he failed to answer because he believed this litigation was part and parcel of that filed by Hanover, the surety. However, the surety has not instituted legal proceedings. Further, the Defendants do not have a meritorious defense to Plaintiff's claims as Mr. Ward acknowledges that he has failed to pay his subcontractors and suppliers, despite being paid over $8 Million dollars by the Department of Veterans Affairs. Further, Palmetto would be severely prejudiced if the default were lifted as the passage of time pushes Palmetto closer to closing their doors, and further, Palmetto has taken actions, like the withdrawal of its motion to compel arbitration and referral of the action to the Master in Equity, as a result of Defendants failure to timely answer.

C. PARTIES IN DEFAULT CANNOT ASSERT AFFIRMATIVE DEFENSES

As an initial matter, there are multiple Defendants named in this action and all are in default. Defendants have moved to compel arbitration, but arbitration is not a defense available to Mark Ward or Lynette Ward as they are not parties to the construction contract that contains the arbitration provision. *Vestry & Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co.*, 356 S.C. 202, 207, 588 S.E.2d 136, 138 (Ct. App. 2003) (Arbitration is a matter of contract, and only parties to the agreement can be compelled to arbitrate).

1. **Arbitration is an Affirmative Defense as Specifically Defined by the South Carolina of Civil Procedure**

Rule 8(c) SCRCP states in relevant part:

> Affirmative Defenses; Reply. In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality...and any other matter constituting an avoidance or affirmative defense.

Further, South Carolina courts have consistently held that arbitration is an affirmative defense. See, e.g., *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 452, 730 S.E.2d 312, 314 (2012) (where plaintiff "opposed the motion to compel arbitration on the ground Brentwood Homes waived the right to assert the affirmative defense due to its delay in responding"; *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 490, 689 S.E.2d 602, 603 (2010) ("Upstate Auto asserted three affirmative defenses in its Answer, including an arbitration agreement with Partain.").

2. **An Affirmative Defense is Waived if Not Plead**

An affirmative defense is waived if not pled. *Delta Apparel, Inc. v. Farina*, 406 S.C. 257, 272, 750 S.E.2d 615, 623 (Ct. App. 2013) (internal citations omitted), *Howard v. S. C. Dep't of Highways*, 343 S.C. 149, 152, 538 S.E.2d 291, 294 (Ct. App. 2000); see also *RIM Assocs. v. Blackwell*, 359 S.C. 170, 182-83, 597 S.E.2d 152, 159 (Ct. App. 2004)(claims or defenses not presented in the pleadings are waived).

Specifically in the context of a party in default seeking to compel arbitration, courts in the fourth circuit have held that unless the movant is able to show good cause for its default, the defaulting party has waived its right to assert arbitration as an affirmative defense against continued litigation in the circuit court. *See State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 168-69, 539 S.E.2d 106, 111-12 (2000) *citing American*

Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 96 (4th Cir. 1996) (affirmative defense of arbitration must be pled in answer); *McDonnell v. Dean Witter Reynolds*, Inc., 620 F. Supp. 152, 155-56 (D. Conn. 1985) ("the affirmative defense of arbitration must appear in the answer, and 'a party's failure to plead an affirmative defense bars its invocation at later stages of the litigation.'") (internal citation omitted). *In State ex rel. Barden,* the West Virginia Supreme Court held that "[u]nexcused conduct that results in the entry of a default judgment is no less of an implicit waiver of a right to arbitration than any other procedural forfeiture".[1]

Defendants have cited one case in the context of a defaulting party moving for arbitration, the Supreme Court of Utah's opinion in *Cedar Surgery Center, LLC v. Bonelli*, 96 P. 3d 911, 2004 UT 58 (2004). In Cedar Surgery, the Court suggests that the failure of the Bonellis to participate in the litigation evidenced their intent to enforce the parties' arbitration provision.[2] However, in this case, the Defendants failure to respond to the complaint and the accompanying motion to stay the litigation and compel arbitration evidences the opposite. Here, Palmetto served its own motion for arbitration with its complaint. If Restoration Specialists intended to enforce the arbitration provision, it could have simply answered and consented to arbitration. When the defendants chose to ignore

---

[1] Facts in further support of the argument that Restoration Specialists waived its right to arbitration include the filing of an affidavit and motions with the Court unrelated to the arbitration issue as well as participating in discovery. The defendants answered written discovery on July 6, 2016 and then made three separate document productions on July 6, 11, and 13, 2016. It was only after their motion to lift the default was denied by this Court that Defendants moved to compel arbitration in search of a more favorable forum.

[2] "By declining to answer Cedar Surgery's complaint or otherwise respond to the litigation, the Bonellis were, in effect, refusing to acknowledge Cedar Surgery's efforts to circumvent the arbitration process with which it had contractually agreed to abide." *Cedar Surgery Ctr., LLC*, 96 P.3d 911, 915

the pleadings, Palmetto took steps in reliance on that inaction, including asking the circuit court to refer the case and withdrawing its own motion to compel arbitration. As the *Cedar Surgery Center* Court stated, Defendants should have "raised the contractual arbitration clause in an answer...and then brought a motion to compel arbitration, rather than simply ignoring" the litigation. *Id.* at 915. Defendants only sought to compel arbitration after they were unsuccessful before this Court in lifting the default. Defendants' motion to compel arbitration is more akin to forum shopping than preserving any contractual rights.

3. **The Federal Arbitration Act**

Where the contract documents "evidence transactions in commerce," the Federal Arbitration Act ("FAA"), enacted pursuant to the commerce clause, supersedes South Carolina law. *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977).

Ms. Arial represented that Restoration Specialists is a Georgia corporation, and the project was in fact constructed in Augusta Georgia. Therefore, there is interstate commerce and the FAA applies. The analysis under the FAA is the same as arbitration is an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure. *See, e.g., McDonnell v. Dean Witter Reynolds, Inc.*, 620 F. Supp. 152, 155-56 (D. Conn. 1985) (Holding that under Fed. R. Civ. P. 8(c), the affirmative defense of arbitration must appear in the answer, and "a party's failure to plead an affirmative defense bars its invocation at later stages of the litigation." *citing Doubleday & Company, Inc. v. Curtis*, 763 F.2d 495, 503 (2 Cir. 1985)). See also *Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002) (finding waiver where a movant waited until after the entry of default judgment to compel arbitration).

D. CONCLUSION

Defendants' motion to reconsider should be denied as the Court properly found Defendants had not shown good cause to lift the default, and a party in default cannot assert the affirmative defense of arbitration.

ANDREW K. EPTING, JR., LLC

BY: _____

Andrew K. Epting, Jr.
Michelle N. Endemann
46aState Street, Charleston, SC 29401
P: 843-377-1871
F: 843-377-1310
ake@epting-law.com; mne@epting-law.com

ATTORNEYS FOR PLAINTIFF

On this 18th day of October, 2016
Charleston, South Carolina

CERTIFICATE OF SERVICE

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

Signed this 18 day of OCTOBER 2016 at
Charleston, South Carolina

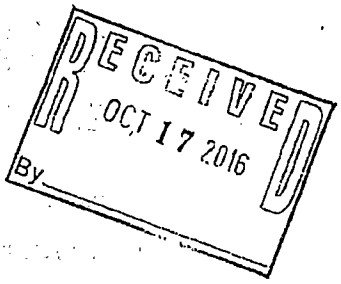
The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 13, 2016



Ms. A. Bright Ariail, Esquire
125E Wappoo Creek Drive
Suite 202
Charleston SC 29412

Re: Palmetto Construction Group, LLC v. Restoration Specialists, LLC
Appellate Case No. 2016-002096

Dear Counsel:

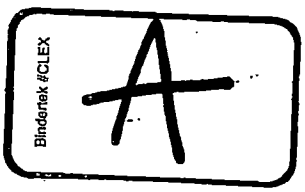
We are returning the second notice of appeal filed with this Court regarding circuit court case no. 2016CP1001143, that includes a cover letter dated October 6, 2016, as it appears to be a duplicate of the notice of appeal filed with this Court with a cover letter dated October 5, 2016. The second notice of appeal filing fee (paid by your check no. 1386) will also be returned to you.

We are also returning copies of the transcript filed with both notices of appeal as they are not a part of a notice of appeal. As the transcript has already been received, the appellants' initial brief and designation of matter are due October 31, 2016.

Very truly yours,

V. Claire Allen, Deputy

CLERK



cc: Andrew K. Epting, Jr., Esquire
Michelle Nicole Endemann, Esquire

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 13, 2016

RECEIVED
OCT 17 2016
By

Carolyn Taylor
1220 Senate St., Suite 101
Columbia, S.C. 29201

Re: Palmetto Construction Group, LLC v. Restoration Specialists, LLC
Appellate Case No. 2016-002096

Dear Ms. Taylor:

We received a duplicative notice of appeal in the above appeal. A. Bright Ariail, Esquire provided this office with a $100.00 notice of appeal filing fee in the form of a check (no. 1386) which was deposited on October 11, 2016, (receipt no. 81210). This second notice of appeal is being returned to Ms. Ariail.

Please refund the $100.00 filing fee to Ms. Ariail at the mailing address furnished below:

Ms. A. Bright Ariail, Esquire
125E Wappoo Creek Drive, Suite 202
Charleston SC 29412

Thank you for your assistance in this matter.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Andrew K. Epting, Jr., Esquire
Michelle Nicole Endemann, Esquire

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

July 25, 2016

The Honorable Julie Armstrong
Clerk of Court, Charleston County
100 Broad Street
Charleston, SC 29401

Re: *Palmetto Construction Group, LLC v. Restoration Specialist, LLC et al*
Case No.: 2016-CP-10-1143

Dear Ms. Armstrong:

Enclosed for filing please find the original and one copy of Palmetto Construction Group's Memorandum in Opposition to Defendants' Motion to Reconsider, Alter or Amend in the above-referenced matter.

I would greatly appreciate your filing the original Motion and returning the file-stamped copy to me in the self-addressed, stamped envelope provided. Thank you.

With kindest regards,

ANDREW K. EPTING, JR., LLC

s/*Angela*

Angela Gross
Legal Assistant to Andrew K. Epting, Jr.
and

/agg

Enclosures

cc: The Honorable Mikell R. Scarborough (w/enc.)
Bright Ariail, Esquire (w/enc.)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group	)	
	)	
Plaintiff,	)	**REPLY TO PALMETTO CONSTRUCTION'S OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER ALTER OR AMEND**
	)	
vs.	)	
	)	
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward	)	
	)	
Defendants.	)	

FILED
2016 OCT 25 AM 10:44
JULIE J. ARMSTRONG
CLERK OF COURT

The Defendants, Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward (hereinafter collectively "Defendants"), by and through their undersigned counsel, submit this Reply to Palmetto Construction's Opposition to Defendants' Motion to Reconsider Alter or Amend.

FACTS/PROCEDURAL HISTORY

This action arises out of a construction project in Augusta, Georgia. On March 29, 2012, the Defendant, Restoration Specialists ("Restoration") was awarded a contract to construct the Charlie Norwood VAMC Parking Garage in Augusta, Georgia. ("the Norwood Parking Garage Project" or the "Project"). Prior to the contract award, the Plaintiff entered into a Teaming Agreement with Restoration in December 2011. The Plaintiff entered into a Subcontract Agreement with Restoration on September 10, 2014 in connection with the Project. *(Exhibit A)*.

Plaintiff's Complaint alleges that Restoration has failed to pay the contract balance due under the Subcontract Agreement and asserts additional claims against the Defendants, Reuben Mark Ward and Lynnette Pennington Ward ("Ward Defendants").

Plaintiff filed this lawsuit on March 7, 2016. *(Exhibit B)*. Simultaneously with filing the lawsuit, Plaintiff filed a Motion to Stay and to Compel on March 7, 2016. *(Exhibit C)*. The basis of Plaintiff's Motion to Stay and to Compel was that the Subcontract Agreement contained mandatory mediation/arbitration provisions requiring the Court to stay the litigation and the parties to mediate and, if necessary, arbitrate all claims contained in Plaintiff's lawsuit.

Plaintiff simultaneously served all Defendants with both the Complaint and Motion to Stay and to Compel on March 14, 2016. *(Exhibit D).*

Plaintiff filed a Motion to Refer to the Master in Equity and for Entry of Default on April 18, 2016. *(Id.).* The Court entered default against the Defendants on April 21, 2016. *(Exhibit E).*

On the evening of June 2, 2016, the Defendants were served with a Notice of Hearing scheduling the default damages hearing for June 6, 2016. *(Exhibits F & G).* The Defendants were unaware of the default status of the case and the scheduling of the damages hearing until they received this hearing Notice on June 2, 2016. *(Exhibit H).* Upon receipt of this Notice of Hearing, the Defendants immediately retained legal counsel on June 3, 2016. *(Id.).* Defendants' counsel immediately filed a Motion for Continuance of the damages hearing and a Motion to Set Aside Entry of Default on June 3, 2016. *(Exhibits I & J).*

At the hearing on June 6, 2016, the Master in Equity ("Master") granted Defendants' Motion for Continuance of the damages hearing and held the Motion to Set Aside Entry of Default in abeyance. *(Exhibit K).* The Master then directed the Defendants to provide the Plaintiff with financial information relative to the Project to see what could be resolved between the parties prior to reconvening the matter for a status conference on July 14, 2016. *(Id.).* Per the Master's direction, the Defendants provided certain documents and basic written discovery responses to Plaintiff.

On July 11, 206, the Defendants filed their own Motion to Stay and to Compel on the basis of the mandatory contractual mediation/arbitration provisions. *(Exhibit L).* In addition, the Defendants joined and consented to Plaintiff's Motion to Stay and to Compel, rendering that motion a joint Motion to Stay and to Compel mandatory mediation/arbitration ("Joint Motion"). *(Id.).* As such, Defendants' Motion to Stay and Compel and the Joint Motion to Stay and Compel were pending before the Master at this time.[1]

The parties reconvened before the Master on July 14, 2016. *(Exhibit M).* The Defendants also filed their Memorandum in Support of their Motion to Lift Entry of Default on July 14, 2016, including the continued assertion of their right to arbitration. *(Exhibit N).* During the reconvened hearing the Master stated that the Clerk of Court "closed out" the Plaintiff's Motion to Stay and Compel. *(Exhibit M.).* The Clerk's closure of the motion occurred despite Defendant's joinder in the motion. The Master issued a bench ruling finding that the Clerk's action constituted an adjudication of this motion. *(Id.).*

[1] While Plaintiff asserts that it withdrew its Motion to Stay and Compel, Defendants have not been provided a copy of

The Master further ruled from the bench finding Defendants in default, denying Defendants' Motion to Lift Entry of Default and scheduling a default damages hearing for October 4, 2016. *(Id.)*.

Upon completion of the reconvened hearing, the Master issued a formal order dated July 14, 2016. *(Exhibit O)*. The Master's formal order: (a): Denied Defendants' Motion to Lift Entry of Default for lack of good cause; (b): Denied Defendants' Motion to Stay and Compel on the basis of default; and (c): Set a damages hearing for October 4, 2016. *(Id.)*. Defendants received written notice of entry of these orders on July 18, 2016. *(Exhibit P)*.

The Defendants filed a timely Motion to Reconsider and to Alter and Amend the Master's orders pursuant to SCRCP 59(e) and applicable case law on July 27, 2016. *(Exhibit Q)*. The Master scheduled the hearing on Defendants' Rule 59(e) motion to be held on October 11, 2016, seven days after the scheduled damages hearing on October 4, 2016. *(Exhibit R.)*.

On September 7, 2016 standing on their rights to mandatory mediation/arbitration, the Defendants requested in writing that the Master schedule the hearing on Defendants' Rule 59(e) motion prior to the October 4, 2016 damages hearing. *(Exhibit S)*.

On September 7, 2106, the Master replied to Defendants' request and made the decision to switch the hearing dates, with the motions hearing to be held on October 4, 2016 and, if necessary, the damages hearing to be held on October 11, 2016. *(Exhibit T)*. The Master asked the parties to advise if this plan was acceptable. *(Id.)* The Appellants informed the Master that this plan was acceptable. *(Id.)*. The Respondent notified the Master that it would defer to the Master, but preferred the damages hearing to proceed on October 4, 2016 and the motions hearing to be held thereafter on October 11, 2016. *(Id.)*.

After further consideration, the Master then rendered a decision not to switch the hearing dates and informed the parties that the damages hearing would proceed on October 4, 2016 and the motions hearing would be held on October 11, 2016. *(Id.)*. The Defendants received written notice of the Master's decision on September 12, 2016. *(Id.)*.

The Master's decision to proceed with the damages hearing and not hear the Defendants' Rule 59(e) motion prior thereto effectively denied this motion as proceeding with the damages hearing under these circumstances would have severely prejudiced and potentially forced a waiver of Defendants' rights to arbitration and foreclosure of any appeal therefrom. Therefore, subject to, without waiving and in fully reserving their rights to arbitration, the Defendants commenced an appeal in this matter on

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documentation reflecting such withdrawal, and, there is likewise nothing in the record to Defendants' knowledge.

September 30, 2016.

LAW/ANALYSIS

A. Good Cause exists such that the entry of default should be lifted in this matter.

In the present case, the contract giving rise to this action requires all claims arising out of or related to the contract to be mediated, and if not resolved by mediation, to be resolved by binding arbitration. Pursuant to these provisions, and contemporaneously with the commencement of this action, the Plaintiff made and served upon Defendants a demand for mandatory mediation/arbitration in its Motion to Stay and Compel ("Plaintiff's motion"). The Defendants joined in Plaintiff's motion and filed its own Motion to Stay and Compel mandatory mediation/arbitration less than four (4) months after Plaintiff's commencement of suit.

Applying the proper legal standard regarding the waiver/ default of arbitration rights to the evidence on record establishes that the Defendants have neither waived nor defaulted upon their rights to arbitration. *Toler's Cove Homeowners Ass'n v. Trident Const. Co., Inc.*, 355 S.E. 250, 586 S.E. 2d 581 (2003); *Carlson v. South State Plastering,* LLC, 404 S.C. 250, 743 S.E. 2d 860 (Ct. App. 2013); *General Equip & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001) (; *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F. 3d 200 (4th Cir. 2004); *Brown v. Green Tree Services, LLC*, 585 F. Supp. 2d 770 (D.S.C. 2008); *Rich v. Walsh*, 590 S.E. 2d 506, 357 S.C. 64 (Ct. App. 2003); *see also, Cedar Surgery Center v. Bonelli*, 96 P. 3d 911, 2004 UT 58 (Utah, 2004) (applying default/waiver standard similar to South Carolina and federal law (Federal Arbitration Act) standard, finding defendant's failure to answer and assert arbitration defense in answer as not waiving right to arbitration, and setting aside default judgment and compelling arbitration).

Since there has been no waiver/default upon Defendants' rights to mandatory mediation/arbitration, the Court is required to stay this litigation and submit the matter to mediation/arbitration. *U.S. ex rel. Coastal Roofing Co., v. P. Browne & Associates, Inc.*, 585 F. Supp. 2d 708 (DSC 2007); *Widener v. Fort Mill* Ford, 381 S.C. 522, 674 S.C. 172 (Ct. App. 2009). Furthermore, by virtue of this requirement to stay the litigation and compel arbitration, the Court is divested of subject matter jurisdiction. *U.S. ex rel. Coastal Roofing Co., v. P. Browne & Associates, Inc.*, 585 F. Supp. 2d 708 (D.S.C. 2007); *Main Corp. v. Black*, 357 S.C. 179, 592 S.E. 2d 300 (2004).

Standing alone, these facts and the legal conclusions arising therefrom constitute good cause for lifting the entry of default, staying this action and compelling mandatory mediation/arbitration. *Id., see also, Cedar Surgery Center v. Bonelli*, 96 P. 3d 911, 2004 UT 58 (Utah, 2004).

In addition, numerous other factors in this case further establish good cause and the propriety of granting relief from the entry of default. These factors include:

(1): Defendants' reasonable and good faith explanation for the default;

(2): The brief delay in Defendants appearance in this action;

(3): The Defendants prompt and timely filing of their motion seeking relief from the entry of default;

(4): The existence of significant meritorious defenses to Plaintiff's claims;

(5): The lack of prejudice to the Plaintiff if the entry of default is set aside[2];

(6): The extreme prejudice to the Defendants if the entry of default is not lifted;

(7): The promotion of justice and disposition of the case on the merits which will both be served by vacation of the entry of default.

SCRCP 55(c); see also, Memorandum in Support of Defendants' Motion to Set Aside Entry of Default Pursuant to SCRCP 55(c); Memorandum in Support of Defendants' Motion to Reconsider and to Alter or Amend Pursuant to SCRCP 59(e) and Applicable Case Law.

For these reasons, good cause exits to vacate the entry of default in this matter.

B. All Defendants, including the Ward Defendants, are entitled to mandatory mediation/arbitration in this matter.

The Plaintiff asserts that the Ward Defendants are not entitled to mediation/arbitration in this matter because they are not signatories to the contract that contains the arbitration provisions. The Plaintiff's argument lacks merit for a number of reasons.

First, the Plaintiff's Complaint, and the causes of action asserted against all Defendants, including the Ward Defendants, allegedly arise out of or are related to the contract containing the arbitration provisions. These provisions require all claims arising out of or related to the contract to be

[2] Plaintiff asserts that it would be severely prejudiced if the default were lifted "as the passage of time pushes [Plaintiff] closer to closing their doors and further, [Plaintiff] has taken actions, like withdrawal of its motion to compel arbitration and referral of the action to the Master in Equity, as a result of Defendants failure to timely answer." However, the claim of potentially having to close its doors is a bare assertion not supported by evidence in the record. Proof of prejudice must be concrete, not merely speculative. Furthermore, the remaining claims of "prejudice" refer to activities which are either not supported by the record or are nominal at best. Such claims are not sufficient to establish prejudice in this matter.

mediated, and if not resolved by mediation, to be resolved by binding arbitration.

Second, the arbitration provisions of the contract expressly allow for the joinder of non-signatories to the arbitration. Specifically, § 6.3.4 of the contract states in relevant part:

> "Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law of fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder."

The Ward Defendants consented in writing to their joinder in the arbitration in their Motion to Stay and to Compel Pursuant to SCRCP 12(b)91) and Applicable Case Law. Specifically, the Ward Defendants stated in their motion:

> "The Plaintiff has moved the Court to stay this action and compel mediation, and if necessary, arbitration by the parties to proceed as contractually required by the mandatory mediation/arbitration provisions contained in Article 6 of the contract. *The Defendants hereby join in and consent to Plaintiff's motion and the relief requested therein, including the stay of this matter and submission of Plaintiff's claims to mediation and, if necessary, binding arbitration.*" (emphasis added).

Third, the Plaintiff is equitably estopped from denying the Ward Defendants' standing to enforce the arbitration provisions on the following grounds: (1): The Plaintiff's Motion to Stay and Compel demanded that all claims in this action, including Plaintiff's claims against the Ward Defendants, be stayed and compelled to arbitration; (2): The application of the principles of equitable estoppel espoused and enforced in *U.S. ex rel. Coast. Roofing v. P. Browne & Assoc.*, 585 F. Supp. 2d 708 (D.S.C. 2007).

C. The Plaintiff's Arguments That The Right To Arbitrate Is An Affirmative Defense Which Has Been Waived By Defendants Lack Merit.

The Plaintiff first claims that "arbitration" is an affirmative defense as specifically defined by Rule 8(c) SCRCP. However, the only arbitration related affirmative defense specified in Rule 8(c) is the defense of "arbitration and award." The defense of "arbitration and award" is an affirmative defense asserting that the subject matter of the action has already been settled in arbitration. *Black's Law Dictionary* 120 (9th ed. 2009). Thus, Rule 8(c) is limited to the situation where a dispute already has been arbitrated and an award has been obtained. *Id.*; *Lee v. Grandcor Medical Systems, Inc.*, 702 S.

Supp. 252 (D. Colo., 1988). Neither has occurred in this case and Plaintiff's reliance on Rule 8(c) is erroneous.

The Plaintiff next asserts that South Carolina courts have consistently held that arbitration is an affirmative defense. Plaintiff cites two South Carolina cases for this proposition; namely, *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E. 2d 312 (2012) and *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 689 S.E. 2d 602 (2010).

The Plaintiff's reliance on these cases for this proposition is misplaced. In *Bradley*, 730 S.E. 2d at 314, the Court, in reviewing the procedural history of the case, stated:

"At the hearing before the circuit court, [Plaintiff] initially opposed the motion to compel arbitration on the ground [Defendant] waived the right to assert the affirmative defense due to its delay in responding to discovery requests."

The court's reference to Plaintiff's objection to an affirmative defense in Defendant's motion to compel arbitration was a recitation of a portion of the case procedural history and the Plaintiff's characterization of the grounds for objection.

The actual legal issue before the *Bradley* Court was whether the transaction involved interstate commerce thus rendering the arbitration agreement enforceable under the Federal Arbitration Act. The Court ultimately held that the motion to stay the proceedings and compel arbitration must be denied due to a lack of sufficient evidence of interstate commerce. The Court did not hold or otherwise rule that the right to compel arbitration is an affirmative defense in South Carolina.

Likewise, in *Partain*; 689 S.E. 2d at 603, the Court was again reviewing the procedural history of the case and Defendant's characterization of its defenses when referencing that the Defendant had "asserted three affirmative defenses in it Answer, including an arbitration agreement with [Plaintiff]." The legal issue before the *Partain* Court was whether the Plaintiff's claims were within the scope of the arbitration agreement. Once again, the Court did not hold or otherwise rule that the right to compel arbitration is an affirmative defense in South Carolina.

The remainder of Plaintiff's Opposition to Defendants' Motion to Reconsider Alter or Amend asserts that the right to compel arbitration is an affirmative defense that is waived if not plead and that a party in default cannot assert this defense. A review of the remaining cases cited by Plaintiff establish that they are distinguishable and inapposite to the present case:

(1): *Delta Apparel, Inc. v. Farina*, 406 S.C. 257, 750 S.E. 2d 615 (Ct. App. 2013) – This case does not involve an arbitration agreement and concerns the defenses of res judicata and collateral estoppel);

(2): *Howard v. S.C. Dep't of Highways*, 343 S.C. 149, 538 S.E. 2d 291 (Ct. App. 2000) – This case does not involve an arbitration agreement and concerns the defense of assumption of the risk;

(3): *RIM Assocs. V. Blackwell*, 359 S.C. 170, 597 S.E. 2d 152 (Ct. App. 2004) – This case does not involve an arbitration agreement and concerns the defense of res judicata;

(4): *State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 539 S.E. 2d 106 (2000) – This case is not a South Carolina case, does not apply South Carolina law and is not binding precedent in South Carolina. This is a West Virginia case with the opinion issued by the Supreme Court of Appeals of West Virginia. While acknowledging that other courts find the arbitration defense in Rule 8(c) pertains exclusively to completed arbitration proceedings, the Court specifically holds that arbitration is an affirmative defense under West Virginia law. While holding arbitration to be an affirmative defense, the court does not find that failure to assert the defense in an answer constitutes waiver of the defense as a matter of law. The court states that as an affirmative defense it must be asserted in the answer or *it may, under appropriate circumstances, be deemed waived* pursuant to W. Va. R. Civ. P. 8(c) (emphasis added). Finally, the court's review of West Virginia waiver law does not indicate a standard similar to South Carolina's arbitration waiver law.

(5): *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F. 3d (4th Cir. 1996) – This is a federal case with the opinion issued by the United States Court of Appeals, Fourth Circuit on appeal from the United States District Court for the Eastern District of Virginia. The court applies federal civil procedure law finding that arbitration is required to be raised as an affirmative defense in the answer under the Federal Rules of Civil Procedure. Obviously, the Federal Rules of Civil Procedure do not apply in the present case. Moreover, the court made it clear in citing *Maxum Foundations, Inc., v. Salus Corp.* 779 F.2d 974 (4th Cir. 1985) in support of its finding of no waiver, that failure to assert the right to arbitrate as an affirmative defense does not waive the defense as a matter of law. Instead, it takes additional delay, significant utilization of the litigation machinery and prejudice to the party opposing the stay to before waiver/default can be found. *See Maxum Foundations, Inc.*, 779 F.2d at 982-83 (holding that defendant had not waived its right to arbitrate when it did not raise arbitration as an affirmative defense in its answer, it delayed three months after the complaint to file a motion to dismiss because of arbitrability, and it filed the motion to dismiss after discovery had been initiated in the action).

(6): *McDonnell v. Dean Witter Reynolds, Inc.*, 620 F. Supp. 152 (D. Conn. 1985) - This is a federal

court case with the opinion issued by the United States District Court for the District of Connecticut. Likewise, the court applies federal civil procedure and makes it clear that any failure to assert arbitration as an affirmative defense must be accompanied by significant delay, substantial involvement in litigation and sufficient prejudice to the opposing party to find waiver.

(6): *Doubleday & Company, Inc. v. Curtis*, 763 F.2d 495 (2 Cir. 1985) – This is a federal case with the opinion issued by the United States Court of Appeals, Second Circuit on appeal from the United States District Court for the Southern District of New York. The case arises out of a book publishing dispute, applies federal procedural law and New York substantive law and involves the affirmative defense of waiver. The case does not in any way involve issues of arbitration.

(7): *General Star Nat'l Ins. Cp. V. Administratia Asigurarilor de Stat*, 289 F.3d 434 (6th Cir. 2002) – This case is a federal case with the opinion issued by the United States Court of Appeals, Sixth Circuit on appeal from the United States District Court for the Southern District of Ohio. The court applied federal law in finding that the Defendant waived its right to arbitrate due to its extreme delay in asserting the right to arbitrate and the prejudice incurred by the Plaintiff. Specifically, the Defendant did not assert its right to arbitration until 17 months after receiving notice of the lawsuit and 1 year after the entry of default judgment, during which time the Plaintiff incurred the costs of the action.

D. The Defendants Have Not Defaulted Upon Nor Waived Their Right To Mediation/Arbitration Under The Mandatory Alternative Dispute Resolution Provisions Of The Contract And Applicable Law.

The policy of the United States and South Carolina is to favor arbitration of disputes. *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E. 2d 864 (Ct. App. 2000).

In South Carolina, "[i]n order to establish waiver of the right to enforce an arbitration clause, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E. 2d 749, 753 (Ct. App. 1999). "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Id.* (internal quotation marks omitted).

The Court of Appeals has recognized three factors to consider when determining whether a party has waived its right to compel arbitration:

(1) whether a substantial length of time transpired between the commencement of the action and the

commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

Davis v. KB Home of S.C., Inc., 394 S.C. 116, 131, 713 S.E. 2d 799, 807 (Ct. App. 2011) (internal quotation marks omitted).

"To establish prejudice, the non-moving party must show something more than mere inconvenience." *Id.* (internal quotation marks omitted). In addition to the above factors, the Court of Appeals has also considered the extent to which the parties have availed themselves of the circuit court's assistance. *See id.* at 133, 713 S.E. 2d at 808.

Similarly, under federal law governing arbitration agreements subject to the Federal Arbitration Act, the party opposing arbitration bears a heavy burden of proving default or waiver. *Brown v. Green Tree Services, LLC*, 585 F. Supp. 2d 770 (D.S.C. 2008). Default or waiver only arises when the party seeking arbitration "so substantially utilize[ed] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F. 3d 200 (4th Cir. 2004); *see also, Brown v. Green Tree Services, LLC*, 585 F.Supp. 2d 770 (D.S.C.); *Rich v. Walsh*, 357 S.C. 64, 590 S.E. 2d 506, 357 S.C. 64 (Ct. App. 2003). Because of the strong federal policy favoring arbitration the federal courts do not lightly infer the circumstances constituting waiver. *Patten Grading*, 380 F. 3d 200.

In the present case, the Defendants moved to set aside the entry of default, one of the grounds for which included Defendants' right to arbitration, within 2 ½ months after commencement of this action and 1 ½ months after the entry of default. In addition, they formally moved to compel arbitration less than four (4) months after commencement of the action, within 2 ½ months after the entry of default and within 5 weeks of learning of the entry of default. No depositions have been taken in this action. The Defendants have not served and the Plaintiff has not responded to any interrogatories, requests for production or other written discovery. In fact, the only discovery engaged in is the Defendants answering of Plaintiff's basic First Set of Interrogatories and First Request for Production. Defendants answered Plaintiff's limited written discovery pursuant to the direction of the Court. The Court's assistance has been limited to two (2) brief motions hearings and one (1) brief proffering conference. Finally, the Plaintiff has not been prejudiced through an undue burden caused by any delay in the Defendants' demand for arbitration.

Applying the above standards to the facts in this case, it is clear that the Defendants have not defaulted upon nor waived their right to mandatory mediation/arbitration under either state or federal law. *See, Toler's Cover Homeowners Ass'n v. Trident Const. Co., Inc.*, 355 S.C. 605, 586 S.E. 2d 581; *Carlson v. South State Plastering, LLC*, 404 S.C. 250, 743 S.E. 2d 860 (Ct. App. 2013); *General Equip & Supply Co., Inc. v. Keller Rigging & Constr.*, 344 S.C. 533, 544 S.E. 2d 643 (Ct. App. 2001); *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F. 3d 200 (4th Cir. 2004); *Brown v. Green Tree Services, LLC*, 585 F. Supp. 2d 770 (D.S.C. 2008); *Rich v. Walsh*, 590 S.E. 2d 506, 357 S.C. 64 (Ct. App. 2003); *see also, Cedar Surgery Center v. Bonelli*, 96 P. 3d 911, 2004 UT 58 (Utah, 2004) (applying default/waiver standard similar to South Carolina and federal law (Federal Arbitration Act) standard, finding defendant's failure to answer and assert arbitration defense in answer as not waiving right to arbitration, and setting aside default judgment and compelling arbitration).

CONCLUSION

Based on the foregoing, the Defendants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward are entitled to an order lifting the entry of default, staying this action and compelling mandatory mediation/arbitration of this matter.

For these reasons, the Defendants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward hereby respectfully request that their Motion to Reconsider and to Alter or Amend Pursuant to Rule 59(e) and Applicable Law be granted..

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

By: _____

A Bright Ariail
125E Wappoo Creek Drive, Suite 202
Charleston, SC 29412

October 24, 2016
Charleston, SC

ATTORNEY FOR RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD and LYNNETTE PENNINGTON WARD

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group,	)	
	)	
Plaintiff,	)	**CERTIFICATE OF SERVICE**
	)	
vs.	)	
	)	
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward	)	
	)	
Defendants.	)	

FILED
2016 OCT 25 AM 10:44
JULIE J. ARMSTRONG
CLERK OF COURT

The undersigned hereby certifies that on the 24th day of October, 2016, a true and correct copy of the Reply to Palmetto Construction's Opposition to Defendants' Motion to Reconsider, Alter or Amend was delivered via US Mail and/or electronic transmission to the following:

Andrew K. Epting, Esquire
Michelle N. Endemann, Esquire
46A State Street
Charleston, SC 29401

A. Bright Ariail

Charleston, South Carolina
October 24, 2016

AIA® Document A401™ – 2007

Standard Form of Agreement Between Contractor and Subcontractor

AGREEMENT made as of the 10 day of September in the year 2014
(In words, indicate day, month and year.)

BETWEEN the Contractor:
(Name, legal status, address and other information)

Restoration Specialists LLC a South Carolina Corporation
1042-A East Montague Ave.
Charleston, SC 29405

and the Subcontractor:
(Name, legal status, address and other information)

Palmetto Construction Group, LLC
2265 Clements Ferry Road, Suite 204
Charleston, SC 29492

The Contractor has made a contract for construction (hereinafter, the Prime Contract) dated: March 29, 2012

with the Owner:
(Name, legal status, address and other information)

Department of Veterans Affairs / Charlie Norwood VAMC
950 15th Street
Augusta, GA 30901

for the following Project:
(Name, location and detailed description)

CHARLIE NORWOOD VAMC PARKING GARAGE
950 15th Street
August, GA 30901
Phase I – Uptown Temporary Parking Lot
Phase II – Downtown Parking Garage Sitework

The Prime Contract provides for the furnishing of labor, materials, equipment and services in connection with the construction of the Project. A copy of the Prime Contract, consisting of the Agreement Between Owner and Contractor (from which compensation amounts may be deleted) and the other Contract Documents enumerated therein, has been made available to the Subcontractor.

The Architect for the Project:
(Name, legal status, address and other information)

Structured Parking Solutions
21 South Tarragona Street, Suite 101

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

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

AIA Document A201™–2007, General Conditions of the Contract for Construction, is adopted in this document by reference.

This document has been approved and endorsed by the Associated Specialty Contractors, Inc.

EXHIBIT A

AIA Document A401™ – 2007. Copyright © 1915, 1925, 1937, 1951, 1958, 1961, 1963, 1966, 1967, 1972, 1978, 1987, 1997 and 2007 by The American Institute of Architects. All rights reserved. WARNING: This AIA® Document is protected by U.S. Copyright Law and International Treaties. Unauthorized reproduction or distribution of this AIA® Document, or any portion of it, may result in severe civil and criminal penalties, and will be prosecuted to the maximum extent possible under the law. This document was produced by AIA software at 12:04:41 on 09/17/2015 under Order No.8014699599_1 which expires on 08/03/2015, and is not for resale.
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Pensacola, FL 32502

The Contractor and the Subcontractor agree as follows.

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ARTICLE 1 THE SUBCONTRACT DOCUMENTS

§ 1.1 The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement; (4) other documents listed in Article 16 of this Agreement; and (5) Modifications to this Subcontract issued after execution of this Agreement. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein. The Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Subcontract Documents, other than Modifications issued subsequent to the execution of this Agreement, appears in Article 16.

§ 1.2 Except to the extent of a conflict with a specific term or condition contained in the Subcontract Documents, the General Conditions governing this Subcontract shall be the AIA Document A201™–2007, General Conditions of the Contract for Construction.

§ 1.3 The Subcontract may be amended or modified only by a Modification. The Subcontract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and the Subcontractor, (2) between the Owner and the Subcontractor, or (3) between any persons or entities other than the Contractor and Subcontractor.

§ 1.4 The Contractor shall make available the Subcontract Documents to the Subcontractor prior to execution of this Agreement, and thereafter, upon request, but the Contractor may charge the Subcontractor for the reasonable cost of reproduction.

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ARTICLE 2 MUTUAL RIGHTS AND RESPONSIBILITIES

The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201–2007 apply to this Agreement pursuant to Section 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

ARTICLE 3 CONTRACTOR

§ 3.1 SERVICES PROVIDED BY THE CONTRACTOR

§ 3.1.1 The Contractor shall cooperate with the Subcontractor in scheduling and performing the Contractor's Work to avoid conflicts or interference in the Subcontractor's Work and shall expedite written responses to submittals made by the Subcontractor in accordance with Section 4.1 and Article 5. Promptly after execution of this Agreement, the Contractor shall provide the Subcontractor copies of the Contractor's construction schedule and schedule of submittals, together with such additional scheduling details as will enable the Subcontractor to plan and perform the Subcontractor's Work properly. The Contractor shall promptly notify the Subcontractor of subsequent changes in the construction and submittal schedules and additional scheduling details.

§ 3.1.2 The Contractor shall provide suitable areas for storage of the Subcontractor's materials and equipment during the course of the Work. Additional costs to the Subcontractor resulting from relocation of such storage areas at the direction of the Contractor, except as previously agreed upon, shall be reimbursed by the Contractor.

§ 3.1.3 Except as provided in Article 14, the Contractor's equipment will be available to the Subcontractor only at the Contractor's discretion and on mutually satisfactory terms.

§ 3.2 COMMUNICATIONS

§ 3.2.1 The Contractor shall promptly make available to the Subcontractor information, including information received from the Owner, that affects this Subcontract and that becomes available to the Contractor subsequent to execution of this Subcontract.

§ 3.2.2 The Contractor shall not give instructions or orders directly to the Subcontractor's employees or to the Subcontractor's Sub-subcontractors or material suppliers unless such persons are designated as authorized representatives of the Subcontractor.

§ 3.2.3 The Contractor shall permit the Subcontractor to request directly from the Architect information regarding the percentages of completion and the amount certified on account of Work done by the Subcontractor.

§ 3.2.4 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Contractor, a subcontractor or anyone directly or indirectly employed by them (other than the Subcontractor), the Contractor shall, prior to harmful exposure of the Subcontractor's employees to such substance, give written notice of the chemical composition thereof to the Subcontractor in sufficient detail and time to permit the Subcontractor's compliance with such laws.

§ 3.2.5 The Contractor shall furnish to the Subcontractor within 30 days after receipt of a written request, or earlier if so required by law, information necessary and relevant for the Subcontractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property, usually referred to as the site, on which the Project is located and the Owner's interest therein.

§ 3.2.6 If the Contractor asserts or defends a claim against the Owner that relates to the Work of the Subcontractor, the Contractor shall promptly make available to the Subcontractor all information relating to the portion of the claim that relates to the Work of the Subcontractor.

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§ 3.3 CLAIMS BY THE CONTRACTOR

§ 3.3.1 Liquidated damages for delay, if provided for in Section 9.3 of this Agreement, shall be assessed against the Subcontractor only to the extent caused by the Subcontractor or any person or entity for whose acts the Subcontractor may be liable, and in no case for delays or causes arising outside the scope of this Subcontract.

§ 3.3.2 The Contractor's claims for the costs of services or materials provided due to the Subcontractor's failure to execute the Work shall require

.1 seven days' written notice prior to the Contractor's providing services or materials, except in an emergency; and

.2 written compilations to the Subcontractor of services and materials provided by the Contractor and charges for such services and materials no later than the fifteenth day of the month following the Contractor's providing such services or materials.

.3 Liquidated Damages will be assessed at $ N/A per calendar day past the established completion date.

§ 3.4 CONTRACTOR'S REMEDIES

If the Subcontractor defaults or neglects to carry out the Work in accordance with this Agreement and fails within five working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by appropriate Modification, and without prejudice to any other remedy the Contractor may have, make good such deficiencies and may deduct the reasonable cost thereof from the payments then or thereafter due the Subcontractor.

ARTICLE 4 SUBCONTRACTOR

§ 4.1 EXECUTION AND PROGRESS OF THE WORK

§ 4.1.1 For all Work the Subcontractor intends to subcontract, the Subcontractor shall enter into written agreements with Sub-subcontractors performing portions of the Work of this Subcontract by which the Subcontractor and the Sub-subcontractor are mutually bound, to the extent of the Work to be performed by the Sub-subcontractor, assuming toward each other all obligations and responsibilities that the Contractor and Subcontractor assume toward each other and having the benefit of all rights, remedies and redress each against the other that the Contractor and Subcontractor have by virtue of the provisions of this Agreement.

§ 4.1.2 The Subcontractor shall supervise and direct the Subcontractor's Work, and shall cooperate with the Contractor in scheduling and performing the Subcontractor's Work to avoid conflict, delay in or interference with the Work of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.1.3 The Subcontractor shall promptly submit Shop Drawings, Product Data, Samples and similar submittals required by the Subcontract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Contractor or other subcontractors.

§ 4.1.4 The Subcontractor shall furnish to the Contractor periodic progress reports on the Work of this Subcontract as mutually agreed, including information on the status of materials and equipment that may be in the course of preparation, manufacture, or transit.

§ 4.1.5 The Subcontractor agrees that the Contractor and the Architect each have the authority to reject Work of the Subcontractor that does not conform to the Prime Contract. The Architect's decisions on matters relating to aesthetic effect shall be final and binding on the Subcontractor if consistent with the intent expressed in the Prime Contract.

§ 4.1.6 The Subcontractor shall pay for all materials, equipment and labor used in connection with the performance of this Subcontract through the period covered by previous payments received from the Contractor, and shall furnish satisfactory evidence, when requested by the Contractor, to verify compliance with the above requirements.

§ 4.1.7 The Subcontractor shall take necessary precautions to protect properly the work of other subcontractors from damage caused by operations under this Subcontract.

§ 4.1.8 The Subcontractor shall cooperate with the Contractor, other subcontractors, the Owner, and separate contractors whose work might interfere with the Subcontractor's Work. The Subcontractor shall participate in the preparation of coordinated drawings in areas of congestion, if required by the Prime Contract, specifically noting and

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advising the Contractor of potential conflicts between the Work of the Subcontractor and that of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.2 PERMITS, FEES, NOTICES, AND COMPLIANCE WITH LAWS

§ 4.2.1 The Subcontractor shall give notices and comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on performance of the Work of this Subcontract. The Subcontractor shall secure and pay for permits, fees, licenses and inspections by government agencies necessary for proper execution and completion of the Subcontractor's Work, the furnishing of which is required of the Contractor by the Prime Contract.

§ 4.2.2 The Subcontractor shall comply with Federal, state and local tax laws, social security acts, unemployment compensation acts and workers' compensation acts insofar as applicable to the performance of this Subcontract.

§ 4.3 SAFETY PRECAUTIONS AND PROCEDURES

§ 4.3.1 The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime Contract. The Subcontractor shall report to the Contractor within three days an injury to an employee or agent of the Subcontractor which occurred at the site.

§ 4.3.2 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Subcontractor, the Subcontractor's Sub-subcontractors or anyone directly or indirectly employed by them, the Subcontractor shall, prior to harmful exposure of any employees on the site to such substance, give written notice of the chemical composition thereof to the Contractor in sufficient detail and time to permit compliance with such laws by the Contractor, other subcontractors and other employers on the site.

§ 4.3.3 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a hazardous material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Subcontractor, the Subcontractor shall, upon recognizing the condition, immediately stop Work in the affected area and promptly report the condition to the Contractor in writing. When the material or substance has been rendered harmless, the Subcontractor's Work in the affected area shall resume upon written agreement of the Contractor and Subcontractor. The Subcontract Time shall be extended appropriately and the Subcontract Sum shall be increased in the amount of the Subcontractor's reasonable additional costs of demobilization, delay and remobilization, which adjustments shall be accomplished as provided in Article 5 of this Agreement.

§ 4.3.4 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Subcontractor, the Subcontractor's Sub-subcontractors, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 4.3.3 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

§ 4.3.5 The Subcontractor shall indemnify the Contractor for the cost and expense the Contractor incurs (1) for remediation of a material or substance brought to the site and negligently handled by the Subcontractor or (2) where the Subcontractor fails to perform its obligations under Section 4.3.3, except to the extent that the cost and expense are due to the Contractor's fault or negligence.

§ 4.4 CLEANING UP

§ 4.4.1 The Subcontractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations performed under this Subcontract. The Subcontractor shall not be held responsible for conditions caused by other contractors or subcontractors.

§ 4.4.2 As provided under Section 3.3.2, if the Subcontractor fails to clean up as provided in the Subcontract Documents, the Contractor may charge the Subcontractor for the Subcontractor's appropriate share of cleanup costs.

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§ 4.5 WARRANTY

The Subcontractor warrants to the Owner, Architect, and Contractor that materials and equipment furnished under this Subcontract will be of good quality and new unless the Subcontract Documents require or permit otherwise. The Subcontractor further warrants that the Work will conform to the requirements of the Subcontract Documents and will be free from defects, except for those inherent in the quality of the Work the Subcontract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Subcontractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Subcontractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect and Contractor, the Subcontractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 4.6 INDEMNIFICATION

§ 4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6.

§ 4.6.2 In claims against any person or entity indemnified under this Section 4.6 by an employee of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 4.6.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor or the Subcontractor's Sub-subcontractors under workers' compensation acts, disability benefit acts or other employee benefit acts.

§ 4.7 REMEDIES FOR NONPAYMENT

If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate Modification, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization.

ARTICLE 5 CHANGES IN THE WORK

§ 5.1 The Owner may make changes in the Work by issuing Modifications to the Prime Contract. Upon receipt of such a Modification issued subsequent to the execution of the Subcontract Agreement, the Contractor shall promptly notify the Subcontractor of the Modification. Unless otherwise directed by the Contractor, the Subcontractor shall not thereafter order materials or perform Work that would be inconsistent with the changes made by the Modification to the Prime Contract.

§ 5.2 The Subcontractor may be ordered in writing by the Contractor, without invalidating this Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions, deletions or other revisions, including those required by Modifications to the Prime Contract issued subsequent to the execution of this Agreement, the Subcontract Sum and the Subcontract Time being adjusted accordingly. The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for adjustment to the Subcontract Sum and Subcontract Time for such revised Work in a manner consistent with requirements of the Subcontract Documents.

§ 5.3 The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time

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by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

ARTICLE 6 MEDIATION AND BINDING DISPUTE RESOLUTION

§ 6.1 MEDIATION

§ 6.1.1 Any claim arising out of or related to this Subcontract, except those waived in this Subcontract, shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 6.1.2 The parties shall endeavor to resolve their claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to this Subcontract and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section, the parties may nonetheless proceed to the selection of the arbitrators(s) and agree upon a schedule for later proceedings.

§ 6.1.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 6.2 BINDING DISPUTE RESOLUTION

For any claim subject to, but not resolved by mediation pursuant to Section 6.1, the method of binding dispute resolution shall be as follows:
(Check the appropriate box. If the Contractor and Subcontractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, claims will be resolved by litigation in a court of competent jurisdiction.)

[X] Arbitration pursuant to Section 6.3 of this Agreement

[ ] Litigation in a court of competent jurisdiction

[ ] Other: *(Specify)*

§ 6.3 ARBITRATION

§ 6.3.1 If the Contractor and Subcontractor have selected arbitration as the method of binding dispute resolution in Section 6.2, any claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Subcontract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded.

§ 6.3.2 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim.

§ 6.3.3 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

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§ 6.3.4 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a claim not described in the written consent.

§ 6.3.5 The Contractor and Subcontractor grant to any person or entity made a party to an arbitration conducted under this Section 6.3, whether by joinder or consolidation, the same rights of joinder and consolidation as the Contractor and Subcontractor under this Agreement.

§ 6.3.6 This agreement to arbitrate and any other written agreement to arbitrate with an additional person or persons referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 7 TERMINATION, SUSPENSION OR ASSIGNMENT OF THE SUBCONTRACT

§ 7.1 TERMINATION BY THE SUBCONTRACTOR

The Subcontractor may terminate the Subcontract for the same reasons and under the same circumstances and procedures with respect to the Contractor as the Contractor may terminate with respect to the Owner under the Prime Contract, or for nonpayment of amounts due under this Subcontract for 60 days or longer. In the event of such termination by the Subcontractor for any reason which is not the fault of the Subcontractor, Sub-subcontractors or their agents or employees or other persons performing portions of the Work under contract with the Subcontractor, the Subcontractor shall be entitled to recover from the Contractor payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

§ 7.2 TERMINATION BY THE CONTRACTOR

§ 7.2.1 If the Subcontractor repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Subcontract and fails within a ten-day period after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by written notice to the Subcontractor and without prejudice to any other remedy the Contractor may have, terminate the Subcontract and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

§ 7.2.2 If the Owner terminates the Prime Contract for the Owner's convenience, the Contractor shall promptly deliver written notice to the Subcontractor.

§ 7.2.3 Upon receipt of written notice of termination, the Subcontractor shall

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

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

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

§ 7.2.4 In case of such termination for the Owner's convenience, the Subcontractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

§ 7.3 SUSPENSION BY THE CONTRACTOR FOR CONVENIENCE

§ 7.3.1 The Contractor may, without cause, order the Subcontractor in writing to suspend, delay or interrupt the Work of this Subcontract in whole or in part for such period of time as the Contractor may determine. In the event of suspension ordered by the Contractor, the Subcontractor shall be entitled to an equitable adjustment of the Subcontract Time and Subcontract Sum.

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§ 7.3.2 An adjustment shall be made for increases in the Subcontract Time and Subcontract Sum, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent that

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

.2 an equitable adjustment is made or denied under another provision of this Subcontract.

§ 7.4 ASSIGNMENT OF THE SUBCONTRACT

§ 7.4.1 In the event the Owner terminates the Prime Contract for cause, this Subcontract is assigned to the Owner pursuant to Section 5.4 of AIA Document A201–2007 provided the Owner accepts the assignment.

§ 7.4.2 Without the Contractor's written consent, the Subcontractor shall not assign the Work of this Subcontract, subcontract the whole of this Subcontract, or subcontract portions of this Subcontract.

ARTICLE 8 THE WORK OF THIS SUBCONTRACT

The Subcontractor shall execute the following portion of the Work described in the Subcontract Documents, including all labor, materials, equipment, services and other items required to complete such portion of the Work, except to the extent specifically indicated in the Subcontract Documents to be the responsibility of others.

(Insert a precise description of the Work of this Subcontract, referring where appropriate to numbers of Drawings, sections of Specifications and pages of Addenda, Modifications and accepted alternates.)

ARTICLE 9 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 9.1 Subcontract Time is the period of time, including authorized adjustments, allotted in the Subcontract Documents for Substantial Completion of the Work described in the Subcontract Documents. The Subcontractor's date of commencement is the date from which the Subcontract Time of Section 9.3 is measured; it shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Contractor.

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

§ 9.2 Unless the date of commencement is established by a notice to proceed issued by the Contractor, or the Contractor has commenced visible Work at the site under the Prime Contract, the Subcontractor shall notify the Contractor in writing not less than five days before commencing the Subcontractor's Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

§ 9.3 The Work of this Subcontract shall be substantially completed not later than .

(Insert the calendar date or number of calendar days after the Subcontractor's date of commencement. Also insert any requirements for earlier substantial completion of certain portions of the Subcontractor's Work, if not stated elsewhere in the Subcontract Documents.)

Portion of Work	Substantial Completion Date
Provide supervision and management of concrete subcontractor (Atlantic Concrete Contractors). See PCG Subcontract Breakdown spreadsheet dated 9/5/14 provided, attached. Note: It is the subcontractor's responsibility to visit Submittal Exchange (www.submittalexchange.com) to access and verify they are using the latest revisions of all contract documents. An email invitation will be sent to each subcontractor's point of contact to initiate	Commence Work: Mobilize 9/22/14 Completion Date: Final Completion 7/7/15

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access to the site. ALL SUBMITTALS FROM SUBCONTRACTORS ARE TO BE SUBMITTED TO RESTORATION SPECIALISTS BY UPLOADING PDF DOCUMENTS TO THE SUBMITTAL EXHANGE SITE.
Schedule: As follows
Submittals: Submittals are due no later than 9/23/14 (submitted electronically via Submittal Exchange)

, subject to adjustments of this Subcontract Time as provided in the Subcontract Documents.
(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)

§ 9.4 With respect to the obligations of both the Contractor and the Subcontractor, time is of the essence of this Subcontract.

§ 9.5 No extension of time will be valid without the Contractor's written consent after claim made by the Subcontractor in accordance with Section 5.3.

ARTICLE 10 SUBCONTRACT SUM

§ 10.1 The Contractor shall pay the Subcontractor in current funds for performance of the Subcontract the Subcontract Sum of One million eighty two thousand three hundred forty two dollars and 10/100, ($ 1,082,342.10), subject to additions and deductions as provided in the Subcontract Documents.

§ 10.2 The Subcontract Sum is based upon the following alternates, if any, which are described in the Subcontract Documents and have been accepted by the Owner and the Contractor:
(Insert the numbers or other identification of accepted alternates.)

§ 10.3 Unit prices, if any:
(Identify and state the unit price, and state the quantity limitations, if any, to which the unit price will be applicable.)

Item	Units and Limitations	Price Per Unit ($0.00)
N/A		

§ 10.4 Allowances included in the Subcontract Sum, if any:
(Identify allowance and state exclusions, if any, from the allowance price.)

Item	Price
N/A	

ARTICLE 11 PROGRESS PAYMENTS

§ 11.1 Based upon applications for payment submitted to the Contractor by the Subcontractor, corresponding to applications for payment submitted by the Contractor to the Government, and certificates for payment issued by the Government, the Contractor shall make progress payments on account of the Subcontract Sum to the Subcontractor as provided below and elsewhere in the Subcontract Documents. Unless the Contractor provides the Government with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor and Subcontractor for Work properly performed by their contractors and suppliers shall be held by the Contractor and Subcontractor for those contractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor or Subcontractor for which payment was made to the Contractor by the Owner or to the Subcontractor by the Contractor, as applicable. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor or Subcontractor, shall create any fiduciary liability or tort liability on the

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part of the Contractor or Subcontractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor or Subcontractor for breach of the requirements of this provision.

§ 11.2 The period covered by each application for payment shall be one calendar month ending on the last day of the month, or as follows:

§ 11.3 Provided an application for payment is received by the Contractor not later than the 25th day of a month, the Contractor shall include the Subcontractor's Work covered by that application in the next application for payment which the Contractor is entitled to submit to the Government. The Contractor shall pay the Subcontractor each progress payment no later than seven working days after the Contractor receives payment from the Government.

§ 11.4 If the Subcontractor's application for payment is received by the Contractor after the application date fixed above, the Subcontractor's Work covered by it shall be included by the Contractor in the next application for payment submitted to the Architect.

§ 11.5 The Subcontractor shall submit to the Contractor a schedule of values prior to submitting the Subcontractor's first Application for Payment. Each subsequent application for payment shall be based upon the most recent schedule of values submitted by the Subcontractor in accordance with the Subcontract Documents. The schedule of values shall allocate the entire Subcontract Sum among the various portions of the Subcontractor's Work and be prepared in such form and supported by such data to substantiate its accuracy as the Contractor may require. This schedule, unless objected to by the Contractor, shall be used as a basis for reviewing the Subcontractor's applications for payment.

§ 11.6 Applications for payment submitted by the Subcontractor shall indicate the percentage of completion of each portion of the Subcontractor's Work as of the end of the period covered by the application for payment.

§ 11.7 Subject to the provisions of the Subcontract Documents, the amount of each progress payment shall be computed as set forth in the sections below.

§ 11.7.1 Take that portion of the Subcontract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Subcontractor's Work by the share of the total Subcontract Sum allocated to that portion of the Subcontractor's Work in the schedule of values, less that percentage actually retained, if any, from payments to the Contractor on account of the Work of the Subcontractor. Pending final determination of cost to the Contractor of changes in the Work that have been properly authorized by the Contractor, amounts not in dispute shall be included to the same extent provided in the Prime Contract, even though the Subcontract Sum has not yet been adjusted;

§ 11.7.2 Add that portion of the Subcontract Sum properly allocable to materials and equipment delivered and suitably stored at the site by the Subcontractor for subsequent incorporation in the Subcontractor's Work or, if approved by the Contractor, suitably stored off the site at a location agreed upon in writing, less the same percentage retainage required by the Prime Contract to be applied to such materials and equipment in the Contractor's application for payment;

§ 11.7.3 Subtract the aggregate of previous payments made by the Contractor; and

§ 11.7.4 Subtract amounts, if any, calculated under Section 11.7.1 or 11.7.2 that are related to Work of the Subcontractor for which the Architect has withheld or nullified, in whole or in part, a certificate of payment for a cause that is the fault of the Subcontractor.

§ 11.8 Upon the partial or entire disapproval by the Contractor of the Subcontractor's application for payment, the Contractor shall provide written notice to the Subcontractor. When the basis for the disapproval has been remedied, the Subcontractor shall be paid the amounts withheld.

§ 11.9 SUBSTANTIAL COMPLETION

When the Subcontractor's Work or a designated portion thereof is substantially complete and in accordance with the requirements of the Prime Contract, the Contractor shall, upon application by the Subcontractor, make prompt application for payment for such Work. Within 30 days following issuance by the Architect of the certificate for

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payment covering such substantially completed Work, the Contractor shall, to the full extent allowed in the Prime Contract, make payment to the Subcontractor, deducting any portion of the funds for the Subcontractor's Work withheld in accordance with the certificate to cover costs of items to be completed or corrected by the Subcontractor. Such payment to the Subcontractor shall be the entire unpaid balance of the Subcontract Sum if a full release of retainage is allowed under the Prime Contract for the Subcontractor's Work prior to the completion of the entire Project. If the Prime Contract does not allow for a full release of retainage, then such payment shall be an amount which, when added to previous payments to the Subcontractor, will reduce the retainage on the Subcontractor's substantially completed Work to the same percentage of retainage as that on the Contractor's Work covered by the certificate.

ARTICLE 12 FINAL PAYMENT

§ 12.1 Final payment, constituting the entire unpaid balance of the Subcontract Sum, shall be made by the Contractor to the Subcontractor when the Subcontractor's Work is fully performed in accordance with the requirements of the Subcontract Documents, the Architect has issued a certificate for payment covering the Subcontractor's completed Work and the Contractor has received payment from the Owner. If, for any cause which is not the fault of the Subcontractor, a certificate for payment is not issued or the Contractor does not receive timely payment or does not pay the Subcontractor within seven days after receipt of payment from the Owner, final payment to the Subcontractor shall be made upon demand.
(Insert provisions for earlier final payment to the Subcontractor, if applicable.)

§ 12.2 Before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied. Acceptance of final payment by the Subcontractor shall constitute a waiver of claims by the Subcontractor, except those previously made in writing and identified by the Subcontractor as unsettled at the time of final application for payment.

ARTICLE 13 INSURANCE AND BONDS

§ 13.1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability as will protect the Subcontractor from claims that may arise out of, or result from, the Subcontractor's operations and completed operations under the Subcontract:

Type of Insurance or bond	Limit of liability or bond amount ($1,000,000.00 per incident)
Commercial General Liability Insurance	$ 1,000,000.00 (per incident)
Business Automobile Liability Insurance	$ 1,000,000.00 (per incident)
Commercial Umbrella Coverage	$ 1,000,000.00 (limits must include as insureds all entities that are additional insureds on the CGL)
Worker's Compensation and Employer's Liability Insurance	$ 1,000,000.00 (per incident & per employee)

§ 13.2 Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Subcontractor's Work until the date of final payment and termination of any coverage required to be maintained after final payment to the Subcontractor, and, with respect to the Subcontractor's completed operations coverage, until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Prime Contract.

§ 13.3 Certificates of insurance acceptable to the Contractor shall be filed with the Contractor prior to commencement of the Subcontractor's Work. These certificates and the insurance policies required by this Article 13 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final application for payment as required in Article 12. If any information concerning reduction of coverage is not furnished by the insurer, it shall be furnished by the Subcontractor with reasonable promptness according to the Subcontractor's information and belief.

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§ 13.4 The Subcontractor shall cause the commercial liability coverage required by the Subcontract Documents to include: (1) the Contractor, the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's operations; and (2) the Contractor as an additional insured for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's completed operations.

§ 13.5 The Contractor shall furnish to the Subcontractor satisfactory evidence of insurance required of the Contractor under the Prime Contract.

§ 13.6 The Contractor shall promptly, upon request of the Subcontractor, furnish a copy or permit a copy to be made of any bond covering payment of obligations arising under the Subcontract.

§ 13.7 Performance Bond and Payment Bond:
(If the Subcontractor is to furnish bonds, insert the specific requirements here.)

Bond type	Bond amount ($0.00)	Bond delivery date	Bond form
N/A			

§ 13.8 PROPERTY INSURANCE
§ 13.8.1 When requested in writing, the Contractor shall provide the Subcontractor with copies of the property and equipment policies in effect for the Project. The Contractor shall notify the Subcontractor if the required property insurance policies are not in effect.

§ 13.8.2 If the required property insurance is not in effect for the full value of the Subcontractor's Work, then the Subcontractor shall purchase insurance for the value of the Subcontractor's Work, and the Subcontractor shall be reimbursed for the cost of the insurance by an adjustment in the Subcontract Sum.

§ 13.8.3 Property insurance for the Subcontractor's materials and equipment required for the Subcontractor's Work, stored off site or in transit and not covered by the Project property insurance, shall be paid for through the application for payment process.

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

ARTICLE 14 TEMPORARY FACILITIES AND WORKING CONDITIONS
§ 14.1 The Contractor shall furnish and make available at no cost to the Subcontractor the Contractor's temporary facilities, equipment and services, except as noted below:

Temporary Facility, Equipment or Service	Cost, if any ($0.00)

§ 14.2 Specific working conditions:
(Insert any applicable arrangements concerning working conditions and labor matters for the Project.)

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ARTICLE 15 MISCELLANEOUS PROVISIONS

§ 15.1 Where reference is made in this Subcontract to a provision of another Subcontract Document, the reference refers to that provision as amended or supplemented by other provisions of the Subcontract Documents.

(Insert rate of interest agreed upon, if any.)

%

(Paragraphs deleted)

§ 15.3 Retainage and any reduction thereto are as follows:

0% (zero)

(Paragraph deleted)

ARTICLE 16 ENUMERATION OF SUBCONTRACT DOCUMENTS

§ 16.1 The Subcontract Documents, except for Modifications issued after execution of this Subcontract, are enumerated in the sections below.

§ 16.1.1 This executed AIA Document A401–2007, Standard Form of Agreement Between Contractor and Subcontractor.

§ 16.1.2 The Prime Contract, consisting of the Agreement between the Owner and Contractor dated as first entered above and the other Contract Documents enumerated in the Owner-Contractor Agreement.

§ 16.1.3 The following Modifications to the Prime Contract, if any, issued subsequent to the execution of the Owner-Contractor Agreement but prior to the execution of this Agreement:

Modification **Date**

§ 16.1.4 Additional Documents, if any, forming part of the Subcontract Documents:

.1 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed by the parties, or the following:

.2 Other documents:
(List here any additional documents that are intended to form part of the Subcontract Documents. Requests for proposal and the Subcontractor's bid or proposal should be listed here only if intended to be made part of the Subcontract Documents.)

1. PCG Subcontract Breakdown
2. Atlantic Concrete Subcontract

This Contract / P.O. Number will be: 1401-010000-005
This Contract / P.O. # is to be referenced on all billings / invoices / submittals, etc.

This Agreement entered into as of the day and year first written above.

RESTORATION SPECIALISTS, LLC

CONTRACTOR *(Signature)*

Mark Ward – Managing Member
(Printed name and title)

PALMETTO CONSTRUCTION GROUP, LLC

SUBCONTRACTOR *(Signature)*

JAY HANDEGAN - Vice President
(Printed name and title)

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

PALMETTO CONSTRUCTION GROUP, LLC.,)
Plaintiff(s))
) CIVIL ACTION COVERSHEET
vs.)
) 2016 -CP - 10- 1143
RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD,)
Defendant(s))

Submitted By: ANDREW K. EPTING, JR. ESQUIRE and MICHELLE N. ENDEMANN, ESQUIRE
Address: ANDREW K. EPTING, JR., LLC
46A State Street
Charleston SC 29401

SC Bar #: SC Bar 01908 and 79894
Telephone #: 843-377-1871
Fax #: 843-377-1310
Other: ake@epting-law.com
E-mail: mne@epting-law.com

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

DOCKETING INFORMATION *(Check all that apply)*

**If Action is Judgment/Settlement do not complete*

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

NATURE OF ACTION *(Check One Box Below)*

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

Torts - Professional Malpractice
- [ ] Dental Malpractice (200)
- [ ] Legal Malpractice (210)
- [ ] Medical Malpractice (220)

Previous Notice of Intent Case # 20___-NI-_____-_____
- [ ] Notice/ File Med Mal (230)
- [ ] Other (299) _____

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

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

Inmate Petitions
- [ ] PCR (500)
- [ ] Mandamus (520)
- [ ] Habeas Corpus (530)
- [ ] Other (599) _____

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

Judgments/Settlements
- [ ] Death Settlement (700)
- [ ] Foreign Judgment (710)
- [ ] Magistrate's Judgment (720)
- [ ] Minor Settlement (730)
- [ ] Transcript Judgment (740)
- [ ] Lis Pendens (750)
- [ ] Transfer of Structured Settlement Payment Rights Application (760)
- [ ] Confession of Judgment (770)
- [ ] Petition for Workers Compensation Settlement Approval (780)
- [ ] Other (799) _____

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

Special/Complex /Other
- [ ] Environmental (600)
- [ ] Automobile Arb. (610)
- [ ] Medical (620)
- [ ] Other (699) _____
- [ ] Sexual Predator (510)
- [ ] Pharmaceuticals (630)
- [ ] Unfair Trade Practices (640)
- [ ] Out-of State Depositions (650)
- [ ] Motion to Quash Subpoena in an Out-of-County Action (660)
- [ ] Pre-Suit Discovery (670)

FILED
2016 MAR -7 PM 12:26
JULIE J. ARMSTRONG
CLERK OF COURT

EXHIBIT B

Submitting Party Signature: _____ **Date:** 02/12/2016

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

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

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

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

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

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

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	CASE NO. 2016-CP-10- 1143 SUMMONS

FILED
2016 MAR -7 PM 12:36
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is served upon you, and to serve a copy of your written response to the said Complaint on the subscribers at the law office of Andrew K. Epting, Jr., LLC, 46A State Street, Charleston, South Carolina 29401, within thirty (30) days after the date of service hereof, exclusive of the day of service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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

DATED: February 12, 2016
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	CASE NO. 2016-CP-10-_114 3 **COMPLAINT**

FILED
2016 MAR -7 PM 12:36
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The above-named Plaintiff, subject to its simultaneously filed Motion to Stay and to Compel, states as follows:

1. Plaintiff Palmetto Construction Group, LLC ("Palmetto"), is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Charleston, South Carolina.

2. Defendant Restoration Specialists, LLC ("Restoration"), is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Charleston, South Carolina.

3. Defendant Reuben Mark Ward ("Mr. Ward") is an individual residing in the State of South Carolina at 1042-A East Montague Avenue, Charleston, SC 29405 and doing business in Charleston County, South Carolina as the Managing Member of Restoration.

4. Defendant Lynnette Pennington Ward ("Mrs. Ward") is an individual residing in the State of South Carolina and doing business in Charleston County, South Carolina.

5. Palmetto entered into a contract with Restoration on or about September 10, 2014 for the construction of facilities for the United States government on a project located in Augusta, Georgia.

6. That venue is proper in this court and this court has jurisdiction over the parties.

7. Attached as Exhibit A is the contract between Palmetto and Restoration together with a Teaming Agreement, Exhibit B, dated November 28, 2011.

8. That Palmetto has performed its contract and has completed all of its work on the project aforesaid.

9. Restoration has failed to pay the contract balances due under the contract and furthermore has failed to account for the profit sharing funds. As a consequence, Restoration has defaulted under its agreements with Palmetto.

10. Palmetto, Restoration, and, individually, Mr. Ward and Mrs. Ward, all signed an indemnity agreement with a surety in relation to a Payment Bond for this project (Exhibit C). Accordingly, Restoration, Mr. Ward, and Mrs. Ward must indemnify the surety and Plaintiffs to the extent that they are required to pay.

11. Claims have been made by other subcontractors upon the Payment Bond and as a consequence subcontractors are making claims against Palmetto and its surety.

FOR A FIRST CAUSE OF ACTION
BREACH OF AGREEMENTS

12. Palmetto restates each and every allegation above.

13. Restoration has received funds from the United States of America and has not paid those funds as required by its agreements with Palmetto as well as other subcontractors performing services for Restoration.

14. As a consequence of Restoration's default under its agreements with Palmetto and other subcontractors, Palmetto has been damaged in a sum to be determined.

FOR A SECOND CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION

15. Palmetto restates each and every allegation above.

16. Mr. Ward represented that he would manage this project and that all monies from the project would be used to pay for material and work supplied to or performed on the project.

17. Mr. Ward has a pecuniary interest in the project.

18. The representations of Mr. Ward were material and were relied upon by Palmetto. Mr. Ward is personally liable for his own tortious conduct.

19. Palmetto's justifiable reliance upon Mr. Ward has resulted in damages in a sum to be determined.

FOR A THIRD CAUSE OF ACTION
CONSTRUCTIVE AND ACTUAL FRAUD

20. Palmetto restates each and every allegation above.

21. Mr. Ward knew or should have known that his statements were material and would be relied upon by Palmetto.

22. Mr. Ward intended and induced Palmetto to rely upon his representations.

23. Palmetto's justifiable reliance has damaged Palmetto in a sum to be determined.

24. Palmetto, in addition to requesting actual damages, requests punitive damages.

FOR A FOURTH CAUSE OF ACTION
OTHER LEGAL AND EQUITABLE RELIEF

25. Plaintiff restates each and every allegation above.

26. All Defendants are contractually bound to pay funds if there are claims on the surety bond.

27. There are claims on the surety bond.

28. Plaintiff requests legal and equitable relief against the Defendants.

FOR A FIFTH CAUSE OF ACTION
INJUNCTIVE RELIEF

29. Palmetto restates each and every allegation above.

30. Palmetto requests that this court enter its order mandating that any funds held or to be received by Restoration be utilized to pay Palmetto the sums due.

31. Upon information and belief, given Restoration and Mr. Ward's financial viability, an award of monetary damages would not protect Palmetto from injury.

FOR A SIXTH CAUSE OF ACTION
ACCOUNTING

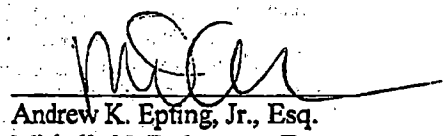
32. Palmetto restates each and every allegation above.

33. Because Palmetto does not know all funds Mr. Ward has received and what has been distributed Palmetto asks for an accounting.

WHEREFORE, Palmetto requests actual and punitive damages, injunctive relief, an accounting, and such other relief as is just and proper.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
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ake@epting-law.com
mne@epting-law.com

ATTORNEYS FOR PLAINTIFFS

DATED: February 12, 2016
Charleston, South Carolina

AIA® Document A401™ – 2007

Standard Form of Agreement Between Contractor and Subcontractor

AGREEMENT made as of the 10 day of September in the year 2014
(In words, indicate day, month and year.)

BETWEEN the Contractor:
(Name, legal status, address and other information)

Restoration Specialists LLC a South Carolina Corporation
1042-A East Montague Ave.
Charleston, SC 29405

and the Subcontractor:
(Name, legal status, address and other information)

Palmetto Construction Group, LLC
2265 Clements Ferry Road, Suite 204
Charleston, SC 29492

The Contractor has made a contract for construction (hereinafter, the Prime Contract) dated: March 29, 2012

with the Owner:
(Name, legal status, address and other information)

Department of Veterans Affairs / Charlie Norwood VAMC
950 15th Street
Augusta, GA 30901

for the following Project:
(Name, location and detailed description)

CHARLIE NORWOOD VAMC PARKING GARAGE
950 15th Street
August, GA 30901
Phase I – Uptown Temporary Parking Lot
Phase II – Downtown Parking Garage Sitework

The Prime Contract provides for the furnishing of labor, materials, equipment and services in connection with the construction of the Project. A copy of the Prime Contract, consisting of the Agreement Between Owner and Contractor (from which compensation amounts may be deleted) and the other Contract Documents enumerated therein, has been made available to the Subcontractor.

The Architect for the Project:
(Name, legal status, address and other information)

Structured Parking Solutions
21 South Tarragona Street, Suite 101

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

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

AIA Document A201™–2007, General Conditions of the Contract for Construction, is adopted in this document by reference.

This document has been approved and endorsed by the Associated Specialty Contractors, Inc.

Binderlok/CLEX

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Pensacola, FL 32502

The Contractor and the Subcontractor agree as follows.

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ARTICLE 1 THE SUBCONTRACT DOCUMENTS

§ 1.1 The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement; (4) other documents listed in Article 16 of this Agreement; and (5) Modifications to this Subcontract issued after execution of this Agreement. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein. The Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Subcontract Documents, other than Modifications issued subsequent to the execution of this Agreement, appears in Article 16.

§ 1.2 Except to the extent of a conflict with a specific term or condition contained in the Subcontract Documents, the General Conditions governing this Subcontract shall be the AIA Document A201™–2007, General Conditions of the Contract for Construction.

§ 1.3 The Subcontract may be amended or modified only by a Modification. The Subcontract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and the Subcontractor, (2) between the Owner and the Subcontractor, or (3) between any persons or entities other than the Contractor and Subcontractor.

§ 1.4 The Contractor shall make available the Subcontract Documents to the Subcontractor prior to execution of this Agreement, and thereafter, upon request, but the Contractor may charge the Subcontractor for the reasonable cost of reproduction.

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ARTICLE 2 MUTUAL RIGHTS AND RESPONSIBILITIES

The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201–2007 apply to this Agreement pursuant to Section 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

ARTICLE 3 CONTRACTOR

§ 3.1 SERVICES PROVIDED BY THE CONTRACTOR

§ 3.1.1 The Contractor shall cooperate with the Subcontractor in scheduling and performing the Contractor's Work to avoid conflicts or interference in the Subcontractor's Work and shall expedite written responses to submittals made by the Subcontractor in accordance with Section 4.1 and Article 5. Promptly after execution of this Agreement, the Contractor shall provide the Subcontractor copies of the Contractor's construction schedule and schedule of submittals, together with such additional scheduling details as will enable the Subcontractor to plan and perform the Subcontractor's Work properly. The Contractor shall promptly notify the Subcontractor of subsequent changes in the construction and submittal schedules and additional scheduling details.

§ 3.1.2 The Contractor shall provide suitable areas for storage of the Subcontractor's materials and equipment during the course of the Work. Additional costs to the Subcontractor resulting from relocation of such storage areas at the direction of the Contractor, except as previously agreed upon, shall be reimbursed by the Contractor.

§ 3.1.3 Except as provided in Article 14, the Contractor's equipment will be available to the Subcontractor only at the Contractor's discretion and on mutually satisfactory terms.

§ 3.2 COMMUNICATIONS

§ 3.2.1 The Contractor shall promptly make available to the Subcontractor information, including information received from the Owner, that affects this Subcontract and that becomes available to the Contractor subsequent to execution of this Subcontract.

§ 3.2.2 The Contractor shall not give instructions or orders directly to the Subcontractor's employees or to the Subcontractor's Sub-subcontractors or material suppliers unless such persons are designated as authorized representatives of the Subcontractor.

§ 3.2.3 The Contractor shall permit the Subcontractor to request directly from the Architect information regarding the percentages of completion and the amount certified on account of Work done by the Subcontractor.

§ 3.2.4 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Contractor, a subcontractor or anyone directly or indirectly employed by them (other than the Subcontractor), the Contractor shall, prior to harmful exposure of the Subcontractor's employees to such substance, give written notice of the chemical composition thereof to the Subcontractor in sufficient detail and time to permit the Subcontractor's compliance with such laws.

§ 3.2.5 The Contractor shall furnish to the Subcontractor within 30 days after receipt of a written request, or earlier if so required by law, information necessary and relevant for the Subcontractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property, usually referred to as the site, on which the Project is located and the Owner's interest therein.

§ 3.2.6 If the Contractor asserts or defends a claim against the Owner that relates to the Work of the Subcontractor, the Contractor shall promptly make available to the Subcontractor all information relating to the portion of the claim that relates to the Work of the Subcontractor.

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§ 3.3 CLAIMS BY THE CONTRACTOR

§ 3.3.1 Liquidated damages for delay, if provided for in Section 9.3 of this Agreement, shall be assessed against the Subcontractor only to the extent caused by the Subcontractor or any person or entity for whose acts the Subcontractor may be liable, and in no case for delays or causes arising outside the scope of this Subcontract.

§ 3.3.2 The Contractor's claims for the costs of services or materials provided due to the Subcontractor's failure to execute the Work shall require

.1 seven days' written notice prior to the Contractor's providing services or materials, except in an emergency; and

.2 written compilations to the Subcontractor of services and materials provided by the Contractor and charges for such services and materials no later than the fifteenth day of the month following the Contractor's providing such services or materials.

.3 Liquidated Damages will be assessed at $ N/A per calendar day past the established completion date.

§ 3.4 CONTRACTOR'S REMEDIES

If the Subcontractor defaults or neglects to carry out the Work in accordance with this Agreement and fails within five working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by appropriate Modification, and without prejudice to any other remedy the Contractor may have, make good such deficiencies and may deduct the reasonable cost thereof from the payments then or thereafter due the Subcontractor.

ARTICLE 4 SUBCONTRACTOR

§ 4.1 EXECUTION AND PROGRESS OF THE WORK

§ 4.1.1 For all Work the Subcontractor intends to subcontract, the Subcontractor shall enter into written agreements with Sub-subcontractors performing portions of the Work of this Subcontract by which the Subcontractor and the Sub-subcontractor are mutually bound, to the extent of the Work to be performed by the Sub-subcontractor, assuming toward each other all obligations and responsibilities that the Contractor and Subcontractor assume toward each other and having the benefit of all rights, remedies and redress each against the other that the Contractor and Subcontractor have by virtue of the provisions of this Agreement.

§ 4.1.2 The Subcontractor shall supervise and direct the Subcontractor's Work, and shall cooperate with the Contractor in scheduling and performing the Subcontractor's Work to avoid conflict, delay in or interference with the Work of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.1.3 The Subcontractor shall promptly submit Shop Drawings, Product Data, Samples and similar submittals required by the Subcontract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Contractor or other subcontractors.

§ 4.1.4 The Subcontractor shall furnish to the Contractor periodic progress reports on the Work of this Subcontract as mutually agreed, including information on the status of materials and equipment that may be in the course of preparation, manufacture, or transit.

§ 4.1.5 The Subcontractor agrees that the Contractor and the Architect each have the authority to reject Work of the Subcontractor that does not conform to the Prime Contract. The Architect's decisions on matters relating to aesthetic effect shall be final and binding on the Subcontractor if consistent with the intent expressed in the Prime Contract.

§ 4.1.6 The Subcontractor shall pay for all materials, equipment and labor used in connection with the performance of this Subcontract through the period covered by previous payments received from the Contractor, and shall furnish satisfactory evidence, when requested by the Contractor, to verify compliance with the above requirements.

§ 4.1.7 The Subcontractor shall take necessary precautions to protect properly the work of other subcontractors from damage caused by operations under this Subcontract.

§ 4.1.8 The Subcontractor shall cooperate with the Contractor, other subcontractors, the Owner, and separate contractors whose work might interfere with the Subcontractor's Work. The Subcontractor shall participate in the preparation of coordinated drawings in areas of congestion, if required by the Prime Contract, specifically noting and

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advising the Contractor of potential conflicts between the Work of the Subcontractor and that of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.2 PERMITS, FEES, NOTICES, AND COMPLIANCE WITH LAWS

§ 4.2.1 The Subcontractor shall give notices and comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on performance of the Work of this Subcontract. The Subcontractor shall secure and pay for permits, fees, licenses and inspections by government agencies necessary for proper execution and completion of the Subcontractor's Work, the furnishing of which is required of the Contractor by the Prime Contract.

§ 4.2.2 The Subcontractor shall comply with Federal, state and local tax laws, social security acts, unemployment compensation acts and workers' compensation acts insofar as applicable to the performance of this Subcontract.

§ 4.3 SAFETY PRECAUTIONS AND PROCEDURES

§ 4.3.1 The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime Contract. The Subcontractor shall report to the Contractor within three days an injury to an employee or agent of the Subcontractor which occurred at the site.

§ 4.3.2 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Subcontractor, the Subcontractor's Sub-subcontractors or anyone directly or indirectly employed by them, the Subcontractor shall, prior to harmful exposure of any employees on the site to such substance, give written notice of the chemical composition thereof to the Contractor in sufficient detail and time to permit compliance with such laws by the Contractor, other subcontractors and other employers on the site.

§ 4.3.3 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a hazardous material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Subcontractor, the Subcontractor shall, upon recognizing the condition, immediately stop Work in the affected area and promptly report the condition to the Contractor in writing. When the material or substance has been rendered harmless, the Subcontractor's Work in the affected area shall resume upon written agreement of the Contractor and Subcontractor. The Subcontract Time shall be extended appropriately and the Subcontract Sum shall be increased in the amount of the Subcontractor's reasonable additional costs of demobilization, delay and remobilization, which adjustments shall be accomplished as provided in Article 5 of this Agreement.

§ 4.3.4 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Subcontractor, the Subcontractor's Sub-subcontractors, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 4.3.3 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

§ 4.3.5 The Subcontractor shall indemnify the Contractor for the cost and expense the Contractor incurs (1) for remediation of a material or substance brought to the site and negligently handled by the Subcontractor or (2) where the Subcontractor fails to perform its obligations under Section 4.3.3, except to the extent that the cost and expense are due to the Contractor's fault or negligence.

§ 4.4 CLEANING UP

§ 4.4.1 The Subcontractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations performed under this Subcontract. The Subcontractor shall not be held responsible for conditions caused by other contractors or subcontractors.

§ 4.4.2 As provided under Section 3.3.2, if the Subcontractor fails to clean up as provided in the Subcontract Documents, the Contractor may charge the Subcontractor for the Subcontractor's appropriate share of cleanup costs.

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§ 4.5 WARRANTY

The Subcontractor warrants to the Owner, Architect, and Contractor that materials and equipment furnished under this Subcontract will be of good quality and new unless the Subcontract Documents require or permit otherwise. The Subcontractor further warrants that the Work will conform to the requirements of the Subcontract Documents and will be free from defects, except for those inherent in the quality of the Work the Subcontract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Subcontractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Subcontractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect and Contractor, the Subcontractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 4.6 INDEMNIFICATION

§ 4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6.

§ 4.6.2 In claims against any person or entity indemnified under this Section 4.6 by an employee of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 4.6.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor or the Subcontractor's Sub-subcontractors under workers' compensation acts, disability benefit acts or other employee benefit acts.

§ 4.7 REMEDIES FOR NONPAYMENT

If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate Modification, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization.

ARTICLE 5 CHANGES IN THE WORK

§ 5.1 The Owner may make changes in the Work by issuing Modifications to the Prime Contract. Upon receipt of such a Modification issued subsequent to the execution of the Subcontract Agreement, the Contractor shall promptly notify the Subcontractor of the Modification. Unless otherwise directed by the Contractor, the Subcontractor shall not thereafter order materials or perform Work that would be inconsistent with the changes made by the Modification to the Prime Contract.

§ 5.2 The Subcontractor may be ordered in writing by the Contractor, without invalidating this Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions, deletions or other revisions, including those required by Modifications to the Prime Contract issued subsequent to the execution of this Agreement, the Subcontract Sum and the Subcontract Time being adjusted accordingly. The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for adjustment to the Subcontract Sum and Subcontract Time for such revised Work in a manner consistent with requirements of the Subcontract Documents.

§ 5.3 The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time

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by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

ARTICLE 6 MEDIATION AND BINDING DISPUTE RESOLUTION

§ 6.1 MEDIATION

§ 6.1.1 Any claim arising out of or related to this Subcontract, except those waived in this Subcontract, shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 6.1.2 The parties shall endeavor to resolve their claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to this Subcontract and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section, the parties may nonetheless proceed to the selection of the arbitrators(s) and agree upon a schedule for later proceedings.

§ 6.1.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 6.2 BINDING DISPUTE RESOLUTION

For any claim subject to, but not resolved by mediation pursuant to Section 6.1, the method of binding dispute resolution shall be as follows:
(Check the appropriate box. If the Contractor and Subcontractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, claims will be resolved by litigation in a court of competent jurisdiction.)

[X] Arbitration pursuant to Section 6.3 of this Agreement

[ ] Litigation in a court of competent jurisdiction

[ ] Other: *(Specify)*

§ 6.3 ARBITRATION

§ 6.3.1 If the Contractor and Subcontractor have selected arbitration as the method of binding dispute resolution in Section 6.2, any claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Subcontract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded.

§ 6.3.2 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim.

§ 6.3.3 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

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§ 6.3.4 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a claim not described in the written consent.

§ 6.3.5 The Contractor and Subcontractor grant to any person or entity made a party to an arbitration conducted under this Section 6.3, whether by joinder or consolidation, the same rights of joinder and consolidation as the Contractor and Subcontractor under this Agreement.

§ 6.3.6 This agreement to arbitrate and any other written agreement to arbitrate with an additional person or persons referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 7 TERMINATION, SUSPENSION OR ASSIGNMENT OF THE SUBCONTRACT

§ 7.1 TERMINATION BY THE SUBCONTRACTOR

The Subcontractor may terminate the Subcontract for the same reasons and under the same circumstances and procedures with respect to the Contractor as the Contractor may terminate with respect to the Owner under the Prime Contract, or for nonpayment of amounts due under this Subcontract for 60 days or longer. In the event of such termination by the Subcontractor for any reason which is not the fault of the Subcontractor, Sub-subcontractors or their agents or employees or other persons performing portions of the Work under contract with the Subcontractor, the Subcontractor shall be entitled to recover from the Contractor payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

§ 7.2 TERMINATION BY THE CONTRACTOR

§ 7.2.1 If the Subcontractor repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Subcontract and fails within a ten-day period after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by written notice to the Subcontractor and without prejudice to any other remedy the Contractor may have, terminate the Subcontract and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

§ 7.2.2 If the Owner terminates the Prime Contract for the Owner's convenience, the Contractor shall promptly deliver written notice to the Subcontractor.

§ 7.2.3 Upon receipt of written notice of termination, the Subcontractor shall

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

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

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

§ 7.2.4 In case of such termination for the Owner's convenience, the Subcontractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

§ 7.3 SUSPENSION BY THE CONTRACTOR FOR CONVENIENCE

§ 7.3.1 The Contractor may, without cause, order the Subcontractor in writing to suspend, delay or interrupt the Work of this Subcontract in whole or in part for such period of time as the Contractor may determine. In the event of suspension ordered by the Contractor, the Subcontractor shall be entitled to an equitable adjustment of the Subcontract Time and Subcontract Sum.

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§ 7.3.2 An adjustment shall be made for increases in the Subcontract Time and Subcontract Sum, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent that

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

.2 an equitable adjustment is made or denied under another provision of this Subcontract.

§ 7.4 ASSIGNMENT OF THE SUBCONTRACT

§ 7.4.1 In the event the Owner terminates the Prime Contract for cause, this Subcontract is assigned to the Owner pursuant to Section 5.4 of AIA Document A201–2007 provided the Owner accepts the assignment.

§ 7.4.2 Without the Contractor's written consent, the Subcontractor shall not assign the Work of this Subcontract, subcontract the whole of this Subcontract, or subcontract portions of this Subcontract.

ARTICLE 8 THE WORK OF THIS SUBCONTRACT

The Subcontractor shall execute the following portion of the Work described in the Subcontract Documents, including all labor, materials, equipment, services and other items required to complete such portion of the Work, except to the extent specifically indicated in the Subcontract Documents to be the responsibility of others.
(Insert a precise description of the Work of this Subcontract, referring where appropriate to numbers of Drawings, sections of Specifications and pages of Addenda, Modifications and accepted alternates.)

ARTICLE 9 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 9.1 Subcontract Time is the period of time, including authorized adjustments, allotted in the Subcontract Documents for Substantial Completion of the Work described in the Subcontract Documents. The Subcontractor's date of commencement is the date from which the Subcontract Time of Section 9.3 is measured; it shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Contractor.
(Insert the date of commencement, if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)

§ 9.2 Unless the date of commencement is established by a notice to proceed issued by the Contractor, or the Contractor has commenced visible Work at the site under the Prime Contract, the Subcontractor shall notify the Contractor in writing not less than five days before commencing the Subcontractor's Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

§ 9.3 The Work of this Subcontract shall be substantially completed not later than .
(Insert the calendar date or number of calendar days after the Subcontractor's date of commencement. Also insert any requirements for earlier substantial completion of certain portions of the Subcontractor's Work, if not stated elsewhere in the Subcontract Documents.)

Portion of Work	Substantial Completion Date
Provide supervision and management of concrete subcontractor (Atlantic Concrete Contractors). See PCG Subcontract Breakdown spreadsheet dated 9/5/14 provided, attached. Note: It is the subcontractor's responsibility to visit Submittal Exchange (www.submittalexchange.com) to access and verify they are using the latest revisions of all contract documents. An email invitation will be sent to each subcontractor's point of contact to initiate	Commence Work: Mobilize 9/22/14 Completion Date: Final Completion 7/7/15

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access to the site. ALL SUBMITTALS FROM SUBCONTRACTORS ARE TO BE SUBMITTED TO RESTORATION SPECIALISTS BY UPLOADING PDF DOCUMENTS TO THE SUBMITTAL EXHANGE SITE.
Schedule: As follows
Submittals: Submittals are due no later than 9/23/14 (submitted electronically via Submittal Exchange)

, subject to adjustments of this Subcontract Time as provided in the Subcontract Documents.
(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)

§ 9.4 With respect to the obligations of both the Contractor and the Subcontractor, time is of the essence of this Subcontract.

§ 9.5 No extension of time will be valid without the Contractor's written consent after claim made by the Subcontractor in accordance with Section 5.3.

ARTICLE 10 SUBCONTRACT SUM

§ 10.1 The Contractor shall pay the Subcontractor in current funds for performance of the Subcontract the Subcontract Sum of One million eighty two thousand three hundred forty two dollars and 10/100, ($ 1,082,342.10), subject to additions and deductions as provided in the Subcontract Documents.

§ 10.2 The Subcontract Sum is based upon the following alternates, if any, which are described in the Subcontract Documents and have been accepted by the Owner and the Contractor:
(Insert the numbers or other identification of accepted alternates.)

§ 10.3 Unit prices, if any:
(Identify and state the unit price, and state the quantity limitations, if any, to which the unit price will be applicable.)

Item	Units and Limitations	Price Per Unit ($0.00)
N/A		

§ 10.4 Allowances included in the Subcontract Sum, if any:
(Identify allowance and state exclusions, if any, from the allowance price.)

Item	Price
N/A	

ARTICLE 11 PROGRESS PAYMENTS

§ 11.1 Based upon applications for payment submitted to the Contractor by the Subcontractor, corresponding to applications for payment submitted by the Contractor to the Government, and certificates for payment issued by the Government, the Contractor shall make progress payments on account of the Subcontract Sum to the Subcontractor as provided below and elsewhere in the Subcontract Documents. Unless the Contractor provides the Government with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor and Subcontractor for Work properly performed by their contractors and suppliers shall be held by the Contractor and Subcontractor for those contractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor or Subcontractor for which payment was made to the Contractor by the Owner or to the Subcontractor by the Contractor, as applicable. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor or Subcontractor, shall create any fiduciary liability or tort liability on the

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part of the Contractor or Subcontractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor or Subcontractor for breach of the requirements of this provision.

§ 11.2 The period covered by each application for payment shall be one calendar month ending on the last day of the month, or as follows:

§ 11.3 Provided an application for payment is received by the Contractor not later than the 25th day of a month, the Contractor shall include the Subcontractor's Work covered by that application in the next application for payment which the Contractor is entitled to submit to the Government. The Contractor shall pay the Subcontractor each progress payment no later than seven working days after the Contractor receives payment from the Government.

§ 11.4 If the Subcontractor's application for payment is received by the Contractor after the application date fixed above, the Subcontractor's Work covered by it shall be included by the Contractor in the next application for payment submitted to the Architect.

§ 11.5 The Subcontractor shall submit to the Contractor a schedule of values prior to submitting the Subcontractor's first Application for Payment. Each subsequent application for payment shall be based upon the most recent schedule of values submitted by the Subcontractor in accordance with the Subcontract Documents. The schedule of values shall allocate the entire Subcontract Sum among the various portions of the Subcontractor's Work and be prepared in such form and supported by such data to substantiate its accuracy as the Contractor may require. This schedule, unless objected to by the Contractor, shall be used as a basis for reviewing the Subcontractor's applications for payment.

§ 11.6 Applications for payment submitted by the Subcontractor shall indicate the percentage of completion of each portion of the Subcontractor's Work as of the end of the period covered by the application for payment.

§ 11.7 Subject to the provisions of the Subcontract Documents, the amount of each progress payment shall be computed as set forth in the sections below.

§ 11.7.1 Take that portion of the Subcontract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Subcontractor's Work by the share of the total Subcontract Sum allocated to that portion of the Subcontractor's Work in the schedule of values, less that percentage actually retained, if any, from payments to the Contractor on account of the Work of the Subcontractor. Pending final determination of cost to the Contractor of changes in the Work that have been properly authorized by the Contractor, amounts not in dispute shall be included to the same extent provided in the Prime Contract, even though the Subcontract Sum has not yet been adjusted;

§ 11.7.2 Add that portion of the Subcontract Sum properly allocable to materials and equipment delivered and suitably stored at the site by the Subcontractor for subsequent incorporation in the Subcontractor's Work or, if approved by the Contractor, suitably stored off the site at a location agreed upon in writing, less the same percentage retainage required by the Prime Contract to be applied to such materials and equipment in the Contractor's application for payment;

§ 11.7.3 Subtract the aggregate of previous payments made by the Contractor; and

§ 11.7.4 Subtract amounts, if any, calculated under Section 11.7.1 or 11.7.2 that are related to Work of the Subcontractor for which the Architect has withheld or nullified, in whole or in part, a certificate of payment for a cause that is the fault of the Subcontractor.

§ 11.8 Upon the partial or entire disapproval by the Contractor of the Subcontractor's application for payment, the Contractor shall provide written notice to the Subcontractor. When the basis for the disapproval has been remedied, the Subcontractor shall be paid the amounts withheld.

§ 11.9 SUBSTANTIAL COMPLETION

When the Subcontractor's Work or a designated portion thereof is substantially complete and in accordance with the requirements of the Prime Contract, the Contractor shall, upon application by the Subcontractor, make prompt application for payment for such Work. Within 30 days following issuance by the Architect of the certificate for

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payment covering such substantially completed Work, the Contractor shall, to the full extent allowed in the Prime Contract, make payment to the Subcontractor, deducting any portion of the funds for the Subcontractor's Work withheld in accordance with the certificate to cover costs of items to be completed or corrected by the Subcontractor. Such payment to the Subcontractor shall be the entire unpaid balance of the Subcontract Sum if a full release of retainage is allowed under the Prime Contract for the Subcontractor's Work prior to the completion of the entire Project. If the Prime Contract does not allow for a full release of retainage, then such payment shall be an amount which, when added to previous payments to the Subcontractor, will reduce the retainage on the Subcontractor's substantially completed Work to the same percentage of retainage as that on the Contractor's Work covered by the certificate.

ARTICLE 12 FINAL PAYMENT

§ 12.1 Final payment, constituting the entire unpaid balance of the Subcontract Sum, shall be made by the Contractor to the Subcontractor when the Subcontractor's Work is fully performed in accordance with the requirements of the Subcontract Documents, the Architect has issued a certificate for payment covering the Subcontractor's completed Work and the Contractor has received payment from the Owner. If, for any cause which is not the fault of the Subcontractor, a certificate for payment is not issued or the Contractor does not receive timely payment or does not pay the Subcontractor within seven days after receipt of payment from the Owner, final payment to the Subcontractor shall be made upon demand.
(Insert provisions for earlier final payment to the Subcontractor, if applicable.)

§ 12.2 Before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied. Acceptance of final payment by the Subcontractor shall constitute a waiver of claims by the Subcontractor, except those previously made in writing and identified by the Subcontractor as unsettled at the time of final application for payment.

ARTICLE 13 INSURANCE AND BONDS

§ 13.1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability as will protect the Subcontractor from claims that may arise out of, or result from, the Subcontractor's operations and completed operations under the Subcontract:

Type of Insurance or bond	Limit of liability or bond amount ($1,000,000.00 per incident)
Commercial General Liability Insurance	$ 1,000,000.00 (per incident)
Business Automobile Liability Insurance	$ 1,000,000.00 (per incident)
Commercial Umbrella Coverage	$ 1,000,000.00 (limits must include as insureds all entities that are additional insureds on the CGL)
Worker's Compensation and Employer's Liability Insurance	$ 1,000,000.00 (per incident & per employee)

§ 13.2 Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Subcontractor's Work until the date of final payment and termination of any coverage required to be maintained after final payment to the Subcontractor, and, with respect to the Subcontractor's completed operations coverage, until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Prime Contract.

§ 13.3 Certificates of insurance acceptable to the Contractor shall be filed with the Contractor prior to commencement of the Subcontractor's Work. These certificates and the insurance policies required by this Article 13 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final application for payment as required in Article 12. If any information concerning reduction of coverage is not furnished by the insurer, it shall be furnished by the Subcontractor with reasonable promptness according to the Subcontractor's information and belief.

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§ 13.4 The Subcontractor shall cause the commercial liability coverage required by the Subcontract Documents to include: (1) the Contractor, the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's operations; and (2) the Contractor as an additional insured for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's completed operations.

§ 13.5 The Contractor shall furnish to the Subcontractor satisfactory evidence of insurance required of the Contractor under the Prime Contract.

§ 13.6 The Contractor shall promptly, upon request of the Subcontractor, furnish a copy or permit a copy to be made of any bond covering payment of obligations arising under the Subcontract.

§ 13.7 Performance Bond and Payment Bond:
(If the Subcontractor is to furnish bonds, insert the specific requirements here.)

Bond type	Bond amount ($0.00)	Bond delivery date	Bond form
N/A			

§ 13.8 PROPERTY INSURANCE
§ 13.8.1 When requested in writing, the Contractor shall provide the Subcontractor with copies of the property and equipment policies in effect for the Project. The Contractor shall notify the Subcontractor if the required property insurance policies are not in effect.

§ 13.8.2 If the required property insurance is not in effect for the full value of the Subcontractor's Work, then the Subcontractor shall purchase insurance for the value of the Subcontractor's Work, and the Subcontractor shall be reimbursed for the cost of the insurance by an adjustment in the Subcontract Sum.

§ 13.8.3 Property insurance for the Subcontractor's materials and equipment required for the Subcontractor's Work, stored off site or in transit and not covered by the Project property insurance, shall be paid for through the application for payment process.

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

ARTICLE 14 TEMPORARY FACILITIES AND WORKING CONDITIONS
§ 14.1 The Contractor shall furnish and make available at no cost to the Subcontractor the Contractor's temporary facilities, equipment and services, except as noted below:

Temporary Facility, Equipment or Service	Cost, if any ($0.00)

§ 14.2 Specific working conditions:
(Insert any applicable arrangements concerning working conditions and labor matters for the Project.)

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ARTICLE 15 MISCELLANEOUS PROVISIONS

§ 15.1 Where reference is made in this Subcontract to a provision of another Subcontract Document, the reference refers to that provision as amended or supplemented by other provisions of the Subcontract Documents.

(Insert rate of interest agreed upon, if any.)

%

(Paragraphs deleted)

§ 15.3 Retainage and any reduction thereto are as follows:

0% (zero)

(Paragraph deleted)

ARTICLE 16 ENUMERATION OF SUBCONTRACT DOCUMENTS

§ 16.1 The Subcontract Documents, except for Modifications issued after execution of this Subcontract, are enumerated in the sections below.

§ 16.1.1 This executed AIA Document A401–2007, Standard Form of Agreement Between Contractor and Subcontractor.

§ 16.1.2 The Prime Contract, consisting of the Agreement between the Owner and Contractor dated as first entered above and the other Contract Documents enumerated in the Owner-Contractor Agreement.

§ 16.1.3 The following Modifications to the Prime Contract, if any, issued subsequent to the execution of the Owner-Contractor Agreement but prior to the execution of this Agreement:

Modification	Date

§ 16.1.4 Additional Documents, if any, forming part of the Subcontract Documents:

.1 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed by the parties, or the following:

.2 Other documents:
(List here any additional documents that are intended to form part of the Subcontract Documents. Requests for proposal and the Subcontractor's bid or proposal should be listed here only if intended to be made part of the Subcontract Documents.)

1. PCG Subcontract Breakdown
2. Atlantic Concrete Subcontract

This Contract / P.O. Number will be: 1401-010000-005
This Contract / P.O. # is to be referenced on all billings / invoices / submittals, etc.

This Agreement entered into as of the day and year first written above.

RESTORATION SPECIALISTS, LLC	PALMETTO CONSTRUCTION GROUP, LLC
CONTRACTOR *(Signature)*	SUBCONTRACTOR *(Signature)*
Mark Ward – Managing Member	Jay Hannegan - Vice President
(Printed name and title)	*(Printed name and title)*

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TEAMING AGREEMENT

This Agreement is made and entered into as of the 28th day of November, 2011, by and between Restoration Specialists, LLC, a Georgia limited liability company (hereinafter called "RS"), and Palmetto Construction Group, LLC, a South Carolina limited liability company (hereinafter called "PCG"), each a "Party" and together the "Parties", for the purpose of submitting a proposal for Solicitation Number VA-247-11-RP-0211 (hereinafter the "Services") to Department of Veteran Affairs (the "Customer") for the New SCIU Hospital Parking Deck Minor Project: 509-325 project (the "Project"). ***RS, cage code 5GXE1, is a "Verified" Service Disabled Veteran Owned Small Business and PCG, cage code 3P1G3, is a "Certified" Small Business. RS and PCG have a successful teaming record on previous contracts such as: FA4418-11-R-0017-0004***

ARTICLE 1 SUBMISSION OF PROPOSAL

RS and PCG shall each undertake to accomplish certain tasks in connection with the preparation of a proposal to be submitted to the Customer for the Project (the "Proposal"). The Proposal will identify RS as the prime contractor and PCG as the subcontractor that will perform the Services. The Proposal will be developed in conformance with the delineation of respective areas of responsibility and contract share set forth in Exhibit A. Both Parties have the right to determine the contents of the Proposal to the Customer as it relates to that Party. RS will be responsible for preparing the final copies of all Proposal documents and submitting the Proposal to the Customer.

ARTICLE 2 PERFORMANCE OF CONTRACTS

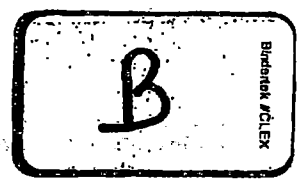
If RS is selected as the prime contractor as a result of the Proposal, RS and PCG will provide assistance and support to each other in the joint negotiation of the terms and conditions of the prime contract with Customer so as to obtain terms and conditions which are mutually agreeable to RS and PCG. Additionally, RS and PCG shall enter into a contractual arrangement between themselves on mutually acceptable terms and conditions. The Parties will endeavor to incorporate terms consistent with the Scope of Work substantially in accord with the provisions of Exhibit A and Exhibit B, Standard Subcontract Terms and Conditions, as may be modified subject to the terms and conditions described in the prime contract.

ARTICLE 3 EXCLUSIVE AGREEMENT

When mutually agreed to for a specific Project, to preserve the interests of the Parties hereto in the competition for such Project only, RS and PCG shall work exclusively with each other with respect to its area of responsibility and share of the contract in a proposal for the Project. RS and PCG acknowledge that it may be necessary to utilize other subcontractors on the team as may be mutually agreed.

ARTICLE 4 SCOPE OF AGREEMENT

This Agreement shall relate only to the solicitation specified herein, and nothing herein shall be deemed to:



(a) Confer any right or impose any obligation or restriction on either Party with respect to any other efforts or marketing activity at any time undertaken by either Party hereto, jointly or separately; or

(b) Preclude either Party hereto from soliciting or accepting any prime contract or subcontract from any third Party (or subcontractor of any tier) under any other solicitation during or after termination of this Agreement; or

(c) Limit the rights of either Party to promote, market, sell, lease, license or otherwise dispose of its standard products or services, except where such would conflict with the obligations of the Party under this Agreement.

ARTICLE 5 RELATIONSHIP

Nothing in this Agreement shall be deemed to constitute, create, give effect to, or otherwise recognize a joint venture, partnership, or formal business entity of any kind, and the rights and obligations of the Parties shall be limited to those expressly set forth herein. Nothing herein shall be construed as providing for the sharing of profits or losses arising out of the efforts of either or both of the Parties; except as may be provided for in any resultant contractual arrangement agreed to between the Parties. The cooperation of the Parties is for the purpose of complementing their respective capabilities in pursuit and execution of the subject solicitation.

ARTICLE 6 EXCHANGE OF CONFIDENTIAL INFORMATION

During the term of this Agreement, each Party agrees to receive from the other, cost, pricing and technical information and data, hereinafter referred to as "Data", for the purpose of responding to the request for proposal for the Project from the Customer. Such Data shall consist of that needed to satisfy the requirements of Exhibit "A" and Customer's request for proposal.

For a term of five (5) years from the date of this Agreement, each Party agrees to keep in confidence and to use its best efforts to prevent the disclosure to any person or persons outside its own organization all Data (i) which is designated in writing, by appropriate stamp (or legend) by the disclosing Party, to be of a proprietary or confidential nature, (ii) which is received from the disclosing Party under this Agreement, and (iii) which pertains to proprietary or confidential data regarding the disclosing Party's costs, pricing and technological techniques, processes, inventions, and research and development; provided, however, that neither Party shall be liable for use or disclosure of any such Data if the same:

(a) Is in the public domain at the time it is disclosed; or

(b) Is known, as demonstrated by written documentation, to the Party receiving it at the time of disclosure; or

(c) Is used or disclosed with the prior written approval of the other Party; or

(d) Becomes known to the receiving Party from a source other than the disclosing Party; or

(e) Is independently developed, separate from the activities undertaken pursuant to this Agreement; or

(f) Is disclosed under legal compulsion provided that the disclosing Party is given a reasonable opportunity to pursue injunctive relief.

ARTICLE 7 TERMINATION

All rights and obligations of the Parties under this Agreement shall terminate on the earliest of the following:

(a) Notice from Customer that the Project has been cancelled, or that the prime contract will not be awarded to RS or PCG;

(b) Award to other contractors to the exclusion of RS or PCG of contracts for all or substantially all of the Project work contemplated by the proposal;

(c) Notice from the Customer that RS or PCG is unacceptable in the role and function set forth in the proposal; however, if the Customer requests a change in the role and/or function of RS or PCG, this Agreement shall not be deemed terminated unless RS and PCG fail to agree to effect appropriate changes within the time period permitted by the Customer;

(d) Either Party hereto may exercise an option to terminate this Agreement for its convenience. A condition enabling this right is that the Party which withdraws shall not compete for this Project either as an individual firm or in combination with any other firm;

(e) Execution by both Parties hereto of the contractual arrangement between themselves contemplated by this Agreement, or failure of the Parties hereto to agree on the terms of the contemplated arrangement;

(f) The failure of the Parties hereto and the Customer to reach agreement on the terms of the contemplated prime contract;

(g) The expiration of 24 months from the effective date hereof; provided, however, if the proposal has been submitted and is under consideration by the Customer upon the expiration of such 24 month period, this Agreement shall continue to be in force until terminated pursuant to one of the foregoing conditions; and provided further that if an award is made by the Customer on the proposal at any time after the 24 month period is over, this Agreement shall be deemed to have continued in full force and effect.

(h) Mutual agreement of the Parties.

ARTICLE 8 COSTS

Each Party shall perform its obligations hereunder at its own cost unless the Parties agree in writing to other cost sharing arrangements.

ARTICLE 9 DAMAGES

Neither Party shall be liable to the other for any indirect, special or consequential losses, whether arising in contract, tort (including negligence), or otherwise.

ARTICLE 10 ASSIGNMENT

This Agreement shall not be assigned by either Party without the prior written approval of the other Party.

ARTICLE 11 NOTICE

All notices hereunder shall be given by letter addressed, except as each may change its address pursuant hereto, as follows:

Attention: Mark Ward	Attention: Jay Handegan
Restoration Specialists, LLC	Palmetto Construction Group, LLC
PO Box 5352	2265 Clements Ferry Rd. Suite 204
Savannah, Ga. 31414	Charleston, SC 29492
(912) 659-4355	(843) 971-7156

ARTICLE 12 ENTIRE AGREEMENT

This document contains the entire agreement between the Parties and supersedes any previous understandings, commitments or agreements, oral or written, with respect to the subject matter hereof. It shall not be varied, except by an instrument in writing of subsequent date, duly executed by an authorized representative of each Party. The validity, construction, scope, and performance of this Agreement shall be governed by the laws of the State of Georgia.

RESTORATION SPECIALISTS LLC	PALMETTO CONSTRUCTION GROUP
By: _____	By: _____
(Authorized Signature)	(Authorized Signature)
Title: Managing Member	Title: Vice President
Date: 12-01-11	Date: 12/7/11

EXHIBIT A

AREAS OF PROJECT PARTICIPATION

This Exhibit is based on Customer's stated plans to pursue the Project. It is currently contemplated that as the Project develops from the bid phase through the final contract award phase, one or more special purpose entities may be established to bid and execute the Project. The following represents a general distribution of Project participation. As the Project develops, this Exhibit will be modified as required as detailed scope of work responsibilities and specific contractual arrangements are determined.

AREAS OF RESPONSIBILITY

RS

Restoration Specialists, LLC, a Verified SDVOSB, will serve as the Prime Contractor on this project. The role of the prime will include contract administration, subcontractor administration, material procurement, project management, scheduling, site supervision, quality control and health and safety management.

PCG

Palmetto Construction Group, LLC, a Certified Small Business, shall provide field Project Managers and Superintendents and a qualified labor force to perform the construction of the New SCIU Parking Deck.

SPS

Structured Parking Solutions, a Certified Small Business, will provide all design services including architectural, mechanical, electrical, plumbing, structural and civil engineering and environmental consulting. If requested, SPS will provide contract administration, inspection and testing services during the construction phase of the projects.

Other Sub Contractors

Pre Casters

EXHIBIT B

Standard Subcontract Terms and Conditions

Bond No. 1944091

PAYMENT BOND *(See Instructions on reverse)*	DATE BOND EXECUTED *(Must be same or later than date of contract)*	OMB No.:9000-0045 Expires: 11/30/2012
	April 23, 2012	

Public reporting burden for this collection of information is estimate to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, DC 20405.

PRINCIPAL *(Legal name and business address)*	TYPE OF ORGANIZATION *("X" one)*
Restoration Specialists, LLC P. O. Box 5352 Savannah, GA 31414	☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☒ CORPORATION STATE OF INCORPORATION: GA
SURETY(IES) *(Name(s) and business address(es))*	PENAL SUM OF BOND
The Hanover Insurance Company 440 Lincoln Street Worcester, MA 01653	MILLION(S): 5 · THOUSAND(S): 999 · HUNDRED(S): 860 · CENTS: 00 CONTRACT DATE: March 13, 2012 · CONTRACT NO.: VA247-C-0035

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. for payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The above obligation is void if the Principal promptly makes payment to all persons having a direct relationship with the Principal or a subcontractor of the Principal for furnishing labor, material or both in the prosecution of the work provided for in the contract identified above, and any authorized modifications of the contract that subsequently are made. Notice of those modifications to the Surety(ies) are waived.

WITNESS:

The Principal and Surety(ies) executed this payment bond and affixed their seals on the above date.

Binderlok #OLEX

Restoration Specialists, LLC — PRINCIPAL

	1.	2.	3.	
SIGNATURE(S)	(Seal)	(Seal)	(Seal)	Corporate Seal
NAME(S) & TITLE(S) *(Typed)*	1.	2.	3.	

INDIVIDUAL SURETY(IES)

	1.	2.
SIGNATURE(S)	(Seal)	(Seal)
NAME(S) *(Typed)*	1.	2.

The Hanover Insurance Company — CORPORATE SURETY(IES)

SURETY A	NAME & ADDRESS	440 Lincoln Street, Worcester, MA 01653	STATE OF INC.: NH	LIABILITY LIMIT: $96,082,000
	SIGNATURE(S)	1.	2.	Corporate Seal
	NAME(S) & TITLE(S) *(Typed)*	1. Laura W. Dennison Attorney-in-Fact	2.	

THE HANOVER INSURANCE COMPANY WORCESTER, MASS. 1852

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Previous edition is usable

STANDARD FORM 25A (REV. 10-98)
Prescribed by GSA-FAR (48 CFR) 53.2228(c)

CORPORATE SURETY(IES) *(Continued)*

SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		

INSTRUCTIONS

. This form, for the protection of persons supplying labor and material, is sed when a payment bond is required under the Act of August 24, 1935, 49 tat. 793 (40 U.S.C. 270a-270e). Any deviation from this form will require the ritten approval of the Administrator of General Services.

. Insert the full legal name and business address of the Principal in the pace designated "Principal" on the face of the form. An authorized person hall sign the bond. Any person signing in a representative capacity (e.g., an ttorney-in-fact) must furnish evidence of authority if that representative is not member of the firm, partnership, or joint venture, or an officer of the orporation involved.

. (a) Corporations executing the bond as sureties must appear on the epartment of the Treasury's list of approved sureties and must act within the mitation listed therein. Where more than one corporate surety is involved, eir names and addresses shall appear in the spaces (Surety A, Surety B, tc.) headed "CORPORATE SURETY(IES)."

In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28) for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

BOND NO. 194409

PERFORMANCE BOND *(See instructions on reverse)*	DATE BOND EXECUTED *(Must be same or later than date of contract)* April 23, 2012	OMB No.: 9000-0045

Public reporting burden for this collection of information is estimated to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, D.C. 20405

PRINCIPAL *(Legal name and business address)*	TYPE OF ORGANIZATION *("X" one)*
Restoration Specialists, LLC P. O. Box 5352 Savannah, GA 31414	☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☒ CORPORATION STATE OF INCORPORATION: GA
SURETY(IES) *(Name(s) and business address(es))*	PENAL SUM OF BOND
The Hanover Insurance Company 440 Lincoln Street Worcester, MA 01653	MILLION(S): 5 · THOUSAND(S): 999 · HUNDRED(S): 860 · CENTS: 00 CONTRACT DATE: March 13, 2012 · CONTRACT NO.: VA247-C-0035

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The Principal has entered into the contract identified above.

THEREFORE:

The above obligation is void if the Principal –

(a)(1) Performs and fulfills all the undertakings, covenants, terms, conditions, and agreements of the contract during the original term of the contract and any extensions thereof that are granted by the Government, with or without notice to the Surety(ies), and during the life of any guaranty required under the contract, and (2) performs and fulfills all the undertakings, covenants, terms conditions, and agreements of any and all duly authorized modifications of the contract that hereafter are made. Notice of those modifications to the Surety(ies) are waived.

(b) Pays to the Government the full amount of the taxes imposed by the Government, if the said contract is subject to the Mil[illegible] Act, (40 U.S.C. 270a-270e), which are collected, deducted, or withheld from wages paid by the Principal in carrying out the construction contra[illegible] with respect to which this bond is furnished.

WITNESS:

The Principal and Surety(ies) executed this performance bond and affixed their seals on the above date.

Restoration Specialists, LLC — PRINCIPAL

SIGNATURE(S)	1. (Seal)	2. (Seal)	3. (Seal)	Corporate Seal
NAME(S) & TITLE(S) *(Typed)*	1.	2.	3.	

INDIVIDUAL SURETY(IES)

SIGNATURE(S)	1. (Seal)	2. (Seal)	
NAME(S) *(Typed)*	1.	2.	

The Hanover Insurance Company — CORPORATE SURETY(IES)

SURETY A	NAME & ADDRESS	440 Lincoln Street Worcester, MA 01653	STATE OF INC.: NH	LIABILITY LIMIT: $96,082,000.00	
	SIGNATURE(S)	1.	2.		Corporate Seal
	NAME(S) & TITLE(S) *(Typed)*	1. Laura W. Dennison Attorney-in-Fact	2.		

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STANDARD FORM 25 (REV. 5-96)
Prescribed by GSA-FAR (48 CFR) 53.228(b)

CORPORATE SURETY(IES) *(Continued)*

SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		

BOND PREMIUM	RATE PER THOUSAND $ $15 1st 500M; $12 next $2 mil; $9 next $2.5mil; $8 next $2.5 mil	TOTAL $61,999.00 $0.00

INSTRUCTIONS

1. This form is authorized for use in connection with Government contracts. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of the approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the paces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28) for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	CASE NO. 2016-CP-10- 1143 **MOTION TO STAY AND TO COMPEL**

FILED
2016 MAR -7 PM 12:40
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Plaintiff, Palmetto Construction Group, LLC ("Palmetto"), hereby moves this court for an order staying this matter and compelling mediation and, if necessary, arbitration by the parties to proceed as contractually required by Article 6 of their Subcontract Agreement. In support thereof, Plaintiff states as follows:

1. Palmetto entered into a Subcontract Agreement (Exhibit A) with Restoration Specialists, LLC ("Restoration") on or about September 10, 2014 for the construction of facilities for the United States government on a project located in Augusta, Georgia.

2. The Subcontract Agreement contains a provision (Section 6.1.1) requiring the submission of any claim arising out of or related to the agreement to mediation as a condition precedent to binding dispute resolution. Additionally, Section 6.1.2 sets out specifically that the mediation shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the agreement.

EXHIBIT C

3. Section 6.1.2 of the Subcontract Agreement provides that a request for mediation may be made concurrently with the filing of binding dispute resolution proceedings. Under Section 6.2, any claim subject to but not resolved by mediation shall be resolved by binding arbitration pursuant to Section 6.3 of the agreement. Further, Section 6.3.1 provides that the arbitration shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the agreement.

4. Palmetto now alleges that a dispute has arisen out of and involving said Subcontract Agreement and that the Defendants are bound to mediate and arbitrate.

WHEREFORE, Palmetto prays that an order of this court be made directing that the claims asserted by Palmetto against the Defendants that arise out of the parties dealings be stayed, that mediation, and, if necessary, arbitration proceed in the manner provided for in said agreement, and for such other and further relief as to the court may seem proper.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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

ATTORNEYS FOR PLAINTIFFS

On this 12 day of February 2016
Charleston, SC

AIA® Document A401™ – 2007

Standard Form of Agreement Between Contractor and Subcontractor

AGREEMENT made as of the 10 day of September in the year 2014
(In words, indicate day, month and year.)

BETWEEN the Contractor:
(Name, legal status, address and other information)

Restoration Specialists LLC a South Carolina Corporation
1042-A East Montague Ave.
Charleston, SC 29405

and the Subcontractor:
(Name, legal status, address and other information)

Palmetto Construction Group, LLC
2265 Clements Ferry Road, Suite 204
Charleston, SC 29492

The Contractor has made a contract for construction (hereinafter, the Prime Contract) dated: March 29, 2012

with the Owner:
(Name, legal status, address and other information)

Department of Veterans Affairs / Charlie Norwood VAMC
950 15th Street
Augusta, GA 30901

for the following Project:
(Name, location and detailed description)

CHARLIE NORWOOD VAMC PARKING GARAGE
950 15th Street
August, GA 30901
Phase I – Uptown Temporary Parking Lot
Phase II – Downtown Parking Garage Sitework

The Prime Contract provides for the furnishing of labor, materials, equipment and services in connection with the construction of the Project. A copy of the Prime Contract, consisting of the Agreement Between Owner and Contractor (from which compensation amounts may be deleted) and the other Contract Documents enumerated therein, has been made available to the Subcontractor.

The Architect for the Project:
(Name, legal status, address and other information)

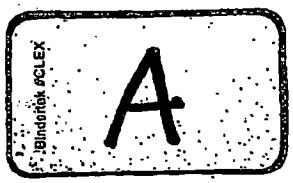
Structured Parking Solutions
21 South Tarragona Street, Suite 101

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

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

AIA Document A201™–2007, General Conditions of the Contract for Construction, is adopted in this document by reference.

This document has been approved and endorsed by the Associated Specialty Contractors, Inc.



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User Notes:

Init. 1

(1114130519)

Pensacola, FL 32502

The Contractor and the Subcontractor agree as follows.

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User Notes:
(1114130519)

Init.

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2

TABLE OF ARTICLES

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2 MUTUAL RIGHTS AND RESPONSIBILITIES

3 CONTRACTOR

4 SUBCONTRACTOR

5 CHANGES IN THE WORK

6 MEDIATION AND BINDING DISPUTE RESOLUTION

7 TERMINATION, SUSPENSION OR ASSIGNMENT OF THE SUBCONTRACT

8 THE WORK OF THIS SUBCONTRACT

9 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

10 SUBCONTRACT SUM

11 PROGRESS PAYMENTS

12 FINAL PAYMENT

13 INSURANCE AND BONDS

14 TEMPORARY FACILITIES AND WORKING CONDITIONS

15 MISCELLANEOUS PROVISIONS

16 ENUMERATION OF SUBCONTRACT DOCUMENTS

ARTICLE 1 THE SUBCONTRACT DOCUMENTS

§ 1.1 The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement; (4) other documents listed in Article 16 of this Agreement; and (5) Modifications to this Subcontract issued after execution of this Agreement. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein. The Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Subcontract Documents, other than Modifications issued subsequent to the execution of this Agreement, appears in Article 16.

§ 1.2 Except to the extent of a conflict with a specific term or condition contained in the Subcontract Documents, the General Conditions governing this Subcontract shall be the AIA Document A201™–2007, General Conditions of the Contract for Construction.

§ 1.3 The Subcontract may be amended or modified only by a Modification. The Subcontract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and the Subcontractor, (2) between the Owner and the Subcontractor, or (3) between any persons or entities other than the Contractor and Subcontractor.

§ 1.4 The Contractor shall make available the Subcontract Documents to the Subcontractor prior to execution of this Agreement, and thereafter, upon request, but the Contractor may charge the Subcontractor for the reasonable cost of reproduction.

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User Notes:
(1114130519)

ARTICLE 2 MUTUAL RIGHTS AND RESPONSIBILITIES

The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201–2007 apply to this Agreement pursuant to Section 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

ARTICLE 3 CONTRACTOR

§ 3.1 SERVICES PROVIDED BY THE CONTRACTOR

§ 3.1.1 The Contractor shall cooperate with the Subcontractor in scheduling and performing the Contractor's Work to avoid conflicts or interference in the Subcontractor's Work and shall expedite written responses to submittals made by the Subcontractor in accordance with Section 4.1 and Article 5. Promptly after execution of this Agreement, the Contractor shall provide the Subcontractor copies of the Contractor's construction schedule and schedule of submittals, together with such additional scheduling details as will enable the Subcontractor to plan and perform the Subcontractor's Work properly. The Contractor shall promptly notify the Subcontractor of subsequent changes in the construction and submittal schedules and additional scheduling details.

§ 3.1.2 The Contractor shall provide suitable areas for storage of the Subcontractor's materials and equipment during the course of the Work. Additional costs to the Subcontractor resulting from relocation of such storage areas at the direction of the Contractor, except as previously agreed upon, shall be reimbursed by the Contractor.

§ 3.1.3 Except as provided in Article 14, the Contractor's equipment will be available to the Subcontractor only at the Contractor's discretion and on mutually satisfactory terms.

§ 3.2 COMMUNICATIONS

§ 3.2.1 The Contractor shall promptly make available to the Subcontractor information, including information received from the Owner, that affects this Subcontract and that becomes available to the Contractor subsequent to execution of this Subcontract.

§ 3.2.2 The Contractor shall not give instructions or orders directly to the Subcontractor's employees or to the Subcontractor's Sub-subcontractors or material suppliers unless such persons are designated as authorized representatives of the Subcontractor.

§ 3.2.3 The Contractor shall permit the Subcontractor to request directly from the Architect information regarding the percentages of completion and the amount certified on account of Work done by the Subcontractor.

§ 3.2.4 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Contractor, a subcontractor or anyone directly or indirectly employed by them (other than the Subcontractor), the Contractor shall, prior to harmful exposure of the Subcontractor's employees to such substance, give written notice of the chemical composition thereof to the Subcontractor in sufficient detail and time to permit the Subcontractor's compliance with such laws.

§ 3.2.5 The Contractor shall furnish to the Subcontractor within 30 days after receipt of a written request, or earlier if so required by law, information necessary and relevant for the Subcontractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property, usually referred to as the site, on which the Project is located and the Owner's interest therein.

§ 3.2.6 If the Contractor asserts or defends a claim against the Owner that relates to the Work of the Subcontractor, the Contractor shall promptly make available to the Subcontractor all information relating to the portion of the claim that relates to the Work of the Subcontractor.

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§ 3.3 CLAIMS BY THE CONTRACTOR

§ 3.3.1 Liquidated damages for delay, if provided for in Section 9.3 of this Agreement, shall be assessed against the Subcontractor only to the extent caused by the Subcontractor or any person or entity for whose acts the Subcontractor may be liable, and in no case for delays or causes arising outside the scope of this Subcontract.

§ 3.3.2 The Contractor's claims for the costs of services or materials provided due to the Subcontractor's failure to execute the Work shall require

.1 seven days' written notice prior to the Contractor's providing services or materials, except in an emergency; and

.2 written compilations to the Subcontractor of services and materials provided by the Contractor and charges for such services and materials no later than the fifteenth day of the month following the Contractor's providing such services or materials.

.3 Liquidated Damages will be assessed at $ N/A per calendar day past the established completion date.

§ 3.4 CONTRACTOR'S REMEDIES

If the Subcontractor defaults or neglects to carry out the Work in accordance with this Agreement and fails within five working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by appropriate Modification, and without prejudice to any other remedy the Contractor may have, make good such deficiencies and may deduct the reasonable cost thereof from the payments then or thereafter due the Subcontractor.

ARTICLE 4 SUBCONTRACTOR

§ 4.1 EXECUTION AND PROGRESS OF THE WORK

§ 4.1.1 For all Work the Subcontractor intends to subcontract, the Subcontractor shall enter into written agreements with Sub-subcontractors performing portions of the Work of this Subcontract by which the Subcontractor and the Sub-subcontractor are mutually bound, to the extent of the Work to be performed by the Sub-subcontractor, assuming toward each other all obligations and responsibilities that the Contractor and Subcontractor assume toward each other and having the benefit of all rights, remedies and redress each against the other that the Contractor and Subcontractor have by virtue of the provisions of this Agreement.

§ 4.1.2 The Subcontractor shall supervise and direct the Subcontractor's Work, and shall cooperate with the Contractor in scheduling and performing the Subcontractor's Work to avoid conflict, delay in or interference with the Work of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.1.3 The Subcontractor shall promptly submit Shop Drawings, Product Data, Samples and similar submittals required by the Subcontract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Contractor or other subcontractors.

§ 4.1.4 The Subcontractor shall furnish to the Contractor periodic progress reports on the Work of this Subcontract as mutually agreed, including information on the status of materials and equipment that may be in the course of preparation, manufacture, or transit.

§ 4.1.5 The Subcontractor agrees that the Contractor and the Architect each have the authority to reject Work of the Subcontractor that does not conform to the Prime Contract. The Architect's decisions on matters relating to aesthetic effect shall be final and binding on the Subcontractor if consistent with the intent expressed in the Prime Contract.

§ 4.1.6 The Subcontractor shall pay for all materials, equipment and labor used in connection with the performance of this Subcontract through the period covered by previous payments received from the Contractor, and shall furnish satisfactory evidence, when requested by the Contractor, to verify compliance with the above requirements.

§ 4.1.7 The Subcontractor shall take necessary precautions to protect properly the work of other subcontractors from damage caused by operations under this Subcontract.

§ 4.1.8 The Subcontractor shall cooperate with the Contractor, other subcontractors, the Owner, and separate contractors whose work might interfere with the Subcontractor's Work. The Subcontractor shall participate in the preparation of coordinated drawings in areas of congestion, if required by the Prime Contract, specifically noting and

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advising the Contractor of potential conflicts between the Work of the Subcontractor and that of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.2 PERMITS, FEES, NOTICES, AND COMPLIANCE WITH LAWS

§ 4.2.1 The Subcontractor shall give notices and comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on performance of the Work of this Subcontract. The Subcontractor shall secure and pay for permits, fees, licenses and inspections by government agencies necessary for proper execution and completion of the Subcontractor's Work, the furnishing of which is required of the Contractor by the Prime Contract.

§ 4.2.2 The Subcontractor shall comply with Federal, state and local tax laws, social security acts, unemployment compensation acts and workers' compensation acts insofar as applicable to the performance of this Subcontract.

§ 4.3 SAFETY PRECAUTIONS AND PROCEDURES

§ 4.3.1 The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime Contract. The Subcontractor shall report to the Contractor within three days an injury to an employee or agent of the Subcontractor which occurred at the site.

§ 4.3.2 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Subcontractor, the Subcontractor's Sub-subcontractors or anyone directly or indirectly employed by them, the Subcontractor shall, prior to harmful exposure of any employees on the site to such substance, give written notice of the chemical composition thereof to the Contractor in sufficient detail and time to permit compliance with such laws by the Contractor, other subcontractors and other employers on the site.

§ 4.3.3 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a hazardous material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Subcontractor, the Subcontractor shall, upon recognizing the condition, immediately stop Work in the affected area and promptly report the condition to the Contractor in writing. When the material or substance has been rendered harmless, the Subcontractor's Work in the affected area shall resume upon written agreement of the Contractor and Subcontractor. The Subcontract Time shall be extended appropriately and the Subcontract Sum shall be increased in the amount of the Subcontractor's reasonable additional costs of demobilization, delay and remobilization, which adjustments shall be accomplished as provided in Article 5 of this Agreement.

§ 4.3.4 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Subcontractor, the Subcontractor's Sub-subcontractors, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 4.3.3 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

§ 4.3.5 The Subcontractor shall indemnify the Contractor for the cost and expense the Contractor incurs (1) for remediation of a material or substance brought to the site and negligently handled by the Subcontractor or (2) where the Subcontractor fails to perform its obligations under Section 4.3.3, except to the extent that the cost and expense are due to the Contractor's fault or negligence.

§ 4.4 CLEANING UP

§ 4.4.1 The Subcontractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations performed under this Subcontract. The Subcontractor shall not be held responsible for conditions caused by other contractors or subcontractors.

§ 4.4.2 As provided under Section 3.3.2, if the Subcontractor fails to clean up as provided in the Subcontract Documents, the Contractor may charge the Subcontractor for the Subcontractor's appropriate share of cleanup costs.

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§ 4.5 WARRANTY

The Subcontractor warrants to the Owner, Architect, and Contractor that materials and equipment furnished under this Subcontract will be of good quality and new unless the Subcontract Documents require or permit otherwise. The Subcontractor further warrants that the Work will conform to the requirements of the Subcontract Documents and will be free from defects, except for those inherent in the quality of the Work the Subcontract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Subcontractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Subcontractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect and Contractor, the Subcontractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 4.6 INDEMNIFICATION

§ 4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6.

§ 4.6.2 In claims against any person or entity indemnified under this Section 4.6 by an employee of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 4.6.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor or the Subcontractor's Sub-subcontractors under workers' compensation acts, disability benefit acts or other employee benefit acts.

§ 4.7 REMEDIES FOR NONPAYMENT

If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate Modification, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization.

ARTICLE 5 CHANGES IN THE WORK

§ 5.1 The Owner may make changes in the Work by issuing Modifications to the Prime Contract. Upon receipt of such a Modification issued subsequent to the execution of the Subcontract Agreement, the Contractor shall promptly notify the Subcontractor of the Modification. Unless otherwise directed by the Contractor, the Subcontractor shall not thereafter order materials or perform Work that would be inconsistent with the changes made by the Modification to the Prime Contract.

§ 5.2 The Subcontractor may be ordered in writing by the Contractor, without invalidating this Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions, deletions or other revisions, including those required by Modifications to the Prime Contract issued subsequent to the execution of this Agreement, the Subcontract Sum and the Subcontract Time being adjusted accordingly. The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for adjustment to the Subcontract Sum and Subcontract Time for such revised Work in a manner consistent with requirements of the Subcontract Documents.

§ 5.3 The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time

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by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

ARTICLE 6 MEDIATION AND BINDING DISPUTE RESOLUTION

§ 6.1 MEDIATION

§ 6.1.1 Any claim arising out of or related to this Subcontract, except those waived in this Subcontract, shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 6.1.2 The parties shall endeavor to resolve their claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to this Subcontract and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section, the parties may nonetheless proceed to the selection of the arbitrators(s) and agree upon a schedule for later proceedings.

§ 6.1.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 6.2 BINDING DISPUTE RESOLUTION

For any claim subject to, but not resolved by mediation pursuant to Section 6.1, the method of binding dispute resolution shall be as follows:
(Check the appropriate box. If the Contractor and Subcontractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, claims will be resolved by litigation in a court of competent jurisdiction.)

[X] Arbitration pursuant to Section 6.3 of this Agreement

[ ] Litigation in a court of competent jurisdiction

[ ] Other: *(Specify)*

§ 6.3 ARBITRATION

§ 6.3.1 If the Contractor and Subcontractor have selected arbitration as the method of binding dispute resolution in Section 6.2, any claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Subcontract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded.

§ 6.3.2 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim.

§ 6.3.3 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

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§ 6.3.4 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a claim not described in the written consent.

§ 6.3.5 The Contractor and Subcontractor grant to any person or entity made a party to an arbitration conducted under this Section 6.3, whether by joinder or consolidation, the same rights of joinder and consolidation as the Contractor and Subcontractor under this Agreement.

§ 6.3.6 This agreement to arbitrate and any other written agreement to arbitrate with an additional person or persons referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 7 TERMINATION, SUSPENSION OR ASSIGNMENT OF THE SUBCONTRACT

§ 7.1 TERMINATION BY THE SUBCONTRACTOR

The Subcontractor may terminate the Subcontract for the same reasons and under the same circumstances and procedures with respect to the Contractor as the Contractor may terminate with respect to the Owner under the Prime Contract, or for nonpayment of amounts due under this Subcontract for 60 days or longer. In the event of such termination by the Subcontractor for any reason which is not the fault of the Subcontractor, Sub-subcontractors or their agents or employees or other persons performing portions of the Work under contract with the Subcontractor, the Subcontractor shall be entitled to recover from the Contractor payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

§ 7.2 TERMINATION BY THE CONTRACTOR

§ 7.2.1 If the Subcontractor repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Subcontract and fails within a ten-day period after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by written notice to the Subcontractor and without prejudice to any other remedy the Contractor may have, terminate the Subcontract and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

§ 7.2.2 If the Owner terminates the Prime Contract for the Owner's convenience, the Contractor shall promptly deliver written notice to the Subcontractor.

§ 7.2.3 Upon receipt of written notice of termination, the Subcontractor shall

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

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

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

§ 7.2.4 In case of such termination for the Owner's convenience, the Subcontractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

§ 7.3 SUSPENSION BY THE CONTRACTOR FOR CONVENIENCE

§ 7.3.1 The Contractor may, without cause, order the Subcontractor in writing to suspend, delay or interrupt the Work of this Subcontract in whole or in part for such period of time as the Contractor may determine. In the event of suspension ordered by the Contractor, the Subcontractor shall be entitled to an equitable adjustment of the Subcontract Time and Subcontract Sum.

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§ 7.3.2 An adjustment shall be made for increases in the Subcontract Time and Subcontract Sum, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent that

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

.2 an equitable adjustment is made or denied under another provision of this Subcontract.

§ 7.4 ASSIGNMENT OF THE SUBCONTRACT

§ 7.4.1 In the event the Owner terminates the Prime Contract for cause, this Subcontract is assigned to the Owner pursuant to Section 5.4 of AIA Document A201–2007 provided the Owner accepts the assignment.

§ 7.4.2 Without the Contractor's written consent, the Subcontractor shall not assign the Work of this Subcontract, subcontract the whole of this Subcontract, or subcontract portions of this Subcontract.

ARTICLE 8 THE WORK OF THIS SUBCONTRACT

The Subcontractor shall execute the following portion of the Work described in the Subcontract Documents, including all labor, materials, equipment, services and other items required to complete such portion of the Work, except to the extent specifically indicated in the Subcontract Documents to be the responsibility of others.

(Insert a precise description of the Work of this Subcontract, referring where appropriate to numbers of Drawings, sections of Specifications and pages of Addenda, Modifications and accepted alternates.)

ARTICLE 9 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 9.1 Subcontract Time is the period of time, including authorized adjustments, allotted in the Subcontract Documents for Substantial Completion of the Work described in the Subcontract Documents. The Subcontractor's date of commencement is the date from which the Subcontract Time of Section 9.3 is measured; it shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Contractor.

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

§ 9.2 Unless the date of commencement is established by a notice to proceed issued by the Contractor, or the Contractor has commenced visible Work at the site under the Prime Contract, the Subcontractor shall notify the Contractor in writing not less than five days before commencing the Subcontractor's Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

§ 9.3 The Work of this Subcontract shall be substantially completed not later than .

(Insert the calendar date or number of calendar days after the Subcontractor's date of commencement. Also insert any requirements for earlier substantial completion of certain portions of the Subcontractor's Work, if not stated elsewhere in the Subcontract Documents.)

Portion of Work	Substantial Completion Date
Provide supervision and management of concrete subcontractor (Atlantic Concrete Contractors). See PCG Subcontract Breakdown spreadsheet dated 9/5/14 provided, attached. Note: It is the subcontractor's responsibility to visit Submittal Exchange (www.submittalexchange.com) to access and verify they are using the latest revisions of all contract documents. An email invitation will be sent to each subcontractor's point of contact to initiate	Commence Work: Mobilize 9/22/14 Completion Date: Final Completion 7/7/15

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access to the site. ALL SUBMITTALS FROM SUBCONTRACTORS ARE TO BE SUBMITTED TO RESTORATION SPECIALISTS BY UPLOADING PDF DOCUMENTS TO THE SUBMITTAL EXHANGE SITE.
Schedule: As follows
Submittals: Submittals are due no later than 9/23/14 (submitted electronically via. Submittal Exchange)

, subject to adjustments of this Subcontract Time as provided in the Subcontract Documents.
(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)

§ 9.4 With respect to the obligations of both the Contractor and the Subcontractor, time is of the essence of this Subcontract.

§ 9.5 No extension of time will be valid without the Contractor's written consent after claim made by the Subcontractor in accordance with Section 5.3.

ARTICLE 10 SUBCONTRACT SUM

§ 10.1 The Contractor shall pay the Subcontractor in current funds for performance of the Subcontract the Subcontract Sum of One million eighty two thousand three hundred forty two dollars and 10/100, ($ 1,082,342.10), subject to additions and deductions as provided in the Subcontract Documents.

§ 10.2 The Subcontract Sum is based upon the following alternates, if any, which are described in the Subcontract Documents and have been accepted by the Owner and the Contractor:
(Insert the numbers or other identification of accepted alternates.)

§ 10.3 Unit prices, if any:
(Identify and state the unit price, and state the quantity limitations, if any, to which the unit price will be applicable.)

Item	Units and Limitations	Price Per Unit ($0.00)
N/A		

§ 10.4 Allowances included in the Subcontract Sum, if any:
(Identify allowance and state exclusions, if any, from the allowance price.)

Item	Price
N/A	

ARTICLE 11 PROGRESS PAYMENTS

§ 11.1 Based upon applications for payment submitted to the Contractor by the Subcontractor, corresponding to applications for payment submitted by the Contractor to the Government, and certificates for payment issued by the Government, the Contractor shall make progress payments on account of the Subcontract Sum to the Subcontractor as provided below and elsewhere in the Subcontract Documents. Unless the Contractor provides the Government with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor and Subcontractor for Work properly performed by their contractors and suppliers shall be held by the Contractor and Subcontractor for those contractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor or Subcontractor for which payment was made to the Contractor by the Owner or to the Subcontractor by the Contractor, as applicable. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor or Subcontractor, shall create any fiduciary liability or tort liability on the

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User Notes: (1114130519)

part of the Contractor or Subcontractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor or Subcontractor for breach of the requirements of this provision.

§ 11.2 The period covered by each application for payment shall be one calendar month ending on the last day of the month, or as follows:

§ 11.3 Provided an application for payment is received by the Contractor not later than the 25th day of a month, the Contractor shall include the Subcontractor's Work covered by that application in the next application for payment which the Contractor is entitled to submit to the Government. The Contractor shall pay the Subcontractor each progress payment no later than seven working days after the Contractor receives payment from the Government.

§ 11.4 If the Subcontractor's application for payment is received by the Contractor after the application date fixed above, the Subcontractor's Work covered by it shall be included by the Contractor in the next application for payment submitted to the Architect.

§ 11.5 The Subcontractor shall submit to the Contractor a schedule of values prior to submitting the Subcontractor's first Application for Payment. Each subsequent application for payment shall be based upon the most recent schedule of values submitted by the Subcontractor in accordance with the Subcontract Documents. The schedule of values shall allocate the entire Subcontract Sum among the various portions of the Subcontractor's Work and be prepared in such form and supported by such data to substantiate its accuracy as the Contractor may require. This schedule, unless objected to by the Contractor, shall be used as a basis for reviewing the Subcontractor's applications for payment.

§ 11.6 Applications for payment submitted by the Subcontractor shall indicate the percentage of completion of each portion of the Subcontractor's Work as of the end of the period covered by the application for payment.

§ 11.7 Subject to the provisions of the Subcontract Documents, the amount of each progress payment shall be computed as set forth in the sections below.

§ 11.7.1 Take that portion of the Subcontract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Subcontractor's Work by the share of the total Subcontract Sum allocated to that portion of the Subcontractor's Work in the schedule of values, less that percentage actually retained, if any, from payments to the Contractor on account of the Work of the Subcontractor. Pending final determination of cost to the Contractor of changes in the Work that have been properly authorized by the Contractor, amounts not in dispute shall be included to the same extent provided in the Prime Contract, even though the Subcontract Sum has not yet been adjusted;

§ 11.7.2 Add that portion of the Subcontract Sum properly allocable to materials and equipment delivered and suitably stored at the site by the Subcontractor for subsequent incorporation in the Subcontractor's Work or, if approved by the Contractor, suitably stored off the site at a location agreed upon in writing, less the same percentage retainage required by the Prime Contract to be applied to such materials and equipment in the Contractor's application for payment;

§ 11.7.3 Subtract the aggregate of previous payments made by the Contractor; and

§ 11.7.4 Subtract amounts, if any, calculated under Section 11.7.1 or 11.7.2 that are related to Work of the Subcontractor for which the Architect has withheld or nullified, in whole or in part, a certificate of payment for a cause that is the fault of the Subcontractor.

§ 11.8 Upon the partial or entire disapproval by the Contractor of the Subcontractor's application for payment, the Contractor shall provide written notice to the Subcontractor. When the basis for the disapproval has been remedied, the Subcontractor shall be paid the amounts withheld.

§ 11.9 SUBSTANTIAL COMPLETION

When the Subcontractor's Work or a designated portion thereof is substantially complete and in accordance with the requirements of the Prime Contract, the Contractor shall, upon application by the Subcontractor, make prompt application for payment for such Work. Within 30 days following issuance by the Architect of the certificate for

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(1114130519)

Init. 12

payment covering such substantially completed Work, the Contractor shall, to the full extent allowed in the Prime Contract, make payment to the Subcontractor, deducting any portion of the funds for the Subcontractor's Work withheld in accordance with the certificate to cover costs of items to be completed or corrected by the Subcontractor. Such payment to the Subcontractor shall be the entire unpaid balance of the Subcontract Sum if a full release of retainage is allowed under the Prime Contract for the Subcontractor's Work prior to the completion of the entire Project. If the Prime Contract does not allow for a full release of retainage, then such payment shall be an amount which, when added to previous payments to the Subcontractor, will reduce the retainage on the Subcontractor's substantially completed Work to the same percentage of retainage as that on the Contractor's Work covered by the certificate.

ARTICLE 12 FINAL PAYMENT

§ 12.1 Final payment, constituting the entire unpaid balance of the Subcontract Sum, shall be made by the Contractor to the Subcontractor when the Subcontractor's Work is fully performed in accordance with the requirements of the Subcontract Documents, the Architect has issued a certificate for payment covering the Subcontractor's completed Work and the Contractor has received payment from the Owner. If, for any cause which is not the fault of the Subcontractor, a certificate for payment is not issued or the Contractor does not receive timely payment or does not pay the Subcontractor within seven days after receipt of payment from the Owner, final payment to the Subcontractor shall be made upon demand.

(Insert provisions for earlier final payment to the Subcontractor, if applicable.)

§ 12.2 Before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied. Acceptance of final payment by the Subcontractor shall constitute a waiver of claims by the Subcontractor, except those previously made in writing and identified by the Subcontractor as unsettled at the time of final application for payment.

ARTICLE 13 INSURANCE AND BONDS

§ 13.1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability as will protect the Subcontractor from claims that may arise out of, or result from, the Subcontractor's operations and completed operations under the Subcontract:

Type of insurance or bond	Limit of liability or bond amount ($1,000,000.00 per incident)
Commercial General Liability Insurance	$ 1,000,000.00 (per incident)
Business Automobile Liability Insurance	$ 1,000,000.00 (per incident)
Commercial Umbrella Coverage	$ 1,000,000.00 (limits must include as insureds all entities that are additional insureds on the CGL)
Worker's Compensation and Employer's Liability Insurance	$ 1,000,000.00 (per incident & per employee)

§ 13.2 Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Subcontractor's Work until the date of final payment and termination of any coverage required to be maintained after final payment to the Subcontractor, and, with respect to the Subcontractor's completed operations coverage, until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Prime Contract.

§ 13.3 Certificates of insurance acceptable to the Contractor shall be filed with the Contractor prior to commencement of the Subcontractor's Work. These certificates and the insurance policies required by this Article 13 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final application for payment as required in Article 12. If any information concerning reduction of coverage is not furnished by the insurer, it shall be furnished by the Subcontractor with reasonable promptness according to the Subcontractor's information and belief.

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§ 13.4 The Subcontractor shall cause the commercial liability coverage required by the Subcontract Documents to include: (1) the Contractor, the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's operations; and (2) the Contractor as an additional insured for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's completed operations:

§ 13.5 The Contractor shall furnish to the Subcontractor satisfactory evidence of insurance required of the Contractor under the Prime Contract.

§ 13.6 The Contractor shall promptly, upon request of the Subcontractor, furnish a copy or permit a copy to be made of any bond covering payment of obligations arising under the Subcontract.

§ 13.7 Performance Bond and Payment Bond:
(If the Subcontractor is to furnish bonds, insert the specific requirements here.)

Bond type	Bond amount ($0.00)	Bond delivery date	Bond form
N/A			

§ 13.8 PROPERTY INSURANCE

§ 13.8.1 When requested in writing, the Contractor shall provide the Subcontractor with copies of the property and equipment policies in effect for the Project. The Contractor shall notify the Subcontractor if the required property insurance policies are not in effect.

§ 13.8.2 If the required property insurance is not in effect for the full value of the Subcontractor's Work, then the Subcontractor shall purchase insurance for the value of the Subcontractor's Work, and the Subcontractor shall be reimbursed for the cost of the insurance by an adjustment in the Subcontract Sum.

§ 13.8.3 Property insurance for the Subcontractor's materials and equipment required for the Subcontractor's Work, stored off site or in transit and not covered by the Project property insurance, shall be paid for through the application for payment process.

§ 13.9 WAIVERS OF SUBROGATION

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

ARTICLE 14 TEMPORARY FACILITIES AND WORKING CONDITIONS

§ 14.1 The Contractor shall furnish and make available at no cost to the Subcontractor the Contractor's temporary facilities, equipment and services, except as noted below:

Temporary Facility, Equipment or Service	Cost, if any ($0.00)

§ 14.2 Specific working conditions:
(Insert any applicable arrangements concerning working conditions and labor matters for the Project.)

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ARTICLE 15 MISCELLANEOUS PROVISIONS

§ 15.1 Where reference is made in this Subcontract to a provision of another Subcontract Document, the reference refers to that provision as amended or supplemented by other provisions of the Subcontract Documents.

(Insert rate of interest agreed upon, if any.)

%

(Paragraphs deleted)

§ 15.3 Retainage and any reduction thereto are as follows:

0% (zero)

(Paragraph deleted)

ARTICLE 16 ENUMERATION OF SUBCONTRACT DOCUMENTS

§ 16.1 The Subcontract Documents, except for Modifications issued after execution of this Subcontract, are enumerated in the sections below.

§ 16.1.1 This executed AIA Document A401–2007, Standard Form of Agreement Between Contractor and Subcontractor.

§ 16.1.2 The Prime Contract, consisting of the Agreement between the Owner and Contractor dated as first entered above and the other Contract Documents enumerated in the Owner-Contractor Agreement.

§ 16.1.3 The following Modifications to the Prime Contract, if any, issued subsequent to the execution of the Owner-Contractor Agreement but prior to the execution of this Agreement:

Modification **Date**

§ 16.1.4 Additional Documents, if any, forming part of the Subcontract Documents:

.1 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed by the parties, or the following:

.2 Other documents:
(List here any additional documents that are intended to form part of the Subcontract Documents. Requests for proposal and the Subcontractor's bid or proposal should be listed here only if intended to be made part of the Subcontract Documents.)

1. PCG Subcontract Breakdown
2. Atlantic Concrete Subcontract

This Contract / P.O. Number will be: 1401-010000-005
This Contract / P.O. # is to be referenced on all billings / invoices / submittals, etc.

This Agreement entered into as of the day and year first written above.

RESTORATION SPECIALISTS, LLC	PALMETTO CONSTRUCTION GROUP, LLC
CONTRACTOR *(Signature)*	SUBCONTRACTOR *(Signature)*
Mark Ward – Managing Member	Jay Hannegan - Vice President
(Printed name and title)	*(Printed name and title)*

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	CASE NO: 2016-CP-10-1143 **MOTION TO REFER TO THE MASTER IN EQUITY AND FOR ENTRY OF DEFAULT**

FILED
2016 APR 18 PM 3:2
JULIE J. ARMSTRONG
CLERK OF COURT

The Plaintiff, Palmetto Construction Group, LLC ("Palmetto"), hereby moves this Court for an order referring this case to the Master in Equity and for entry of default against the Defendants. As appears from the attached affidavit of default, Plaintiff served Defendants by way of process server with a copy of the summons and complaint and discovery requests on March 14, 2016. (See Exhibit A). Defendants have filed no pleading and have made no appearance in this case. Therefore, Plaintiff respectfully requests a default and that this matter be referred to the Master in Equity pursuant to Rule 53(b) SCRCP for all purposes including entry of final judgment against Defendants.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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

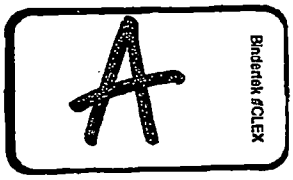
DATED: April 18, 2016
Charleston, South Carolina

EXHIBIT D

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	CASE NO. 2016-CP-10-1143 **AFFIDAVIT OF DEFAULT**

PERSONALLY APPEARED before me, Andrew K. Epting, Jr., who, being duly sworn, alleges and says as follows:

1. I am the attorney for Palmetto Construction Group, LLC. in the above captioned matter, and I have personal knowledge of the facts relating to this action.
2. On March 7, 2016, Plaintiff filed a Summons and Complaint against Defendants Restoration Specialist, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, in the Charleston County Court of Common Pleas.
3. A copy of the Summons and Complaint was served on Defendant Restoration Specialists, LLC, by personal service, as evidenced by the Affidavit of Service dated March 14, 2016, attached hereto as EXHIBIT 1.
4. A copy of the Summons and Complaint was served on Defendant Reuben Mark Ward by personal service, as evidenced by the Affidavit of Service dated March 14, 2016, and attached hereto as EXHIBIT 2.
5. A copy of the Summons and Complaint was served on Defendant Lynnette Pennington Ward by personal service, as evidenced by the Affidavit of Service dated



March 14, 2016, and attached hereto as EXHIBIT 3.

6. More than thirty (30) days have elapsed since service of Plaintiff's Summons and Complaint. Defendants Restoration Specialist, LLC, Reuben Mark Ward, and Lynnette Pennington Ward have failed to answer or otherwise respond to the Complaint. Neither the Defendants nor counsel for Defendants have made an appearance or contacted Plaintiff or counsel for plaintiff.

7. Defendant Restoration Specialists, LLC is in default.

8. Defendant Rueben Mark Ward is in default.

9. Defendant Lynnette Pennington Ward is in default.

10. Defendant Reuben Mark Ward is not a minor, incompetent or in the military service.

11. Defendant Lynnette Pennington Ward is not a minor, incompetent or in the military service.

Andrew K. Epting

ANDREW K. EPTING, JR., ESQUIRE
Andrew K. Epting, Jr.
Michelle N. Endemann
Attorneys for Plaintiff
46A State Street
Charleston, SC 29401
Phone: (843) 722-6612
Fax: (843) 377-1310
ake@epting-law.com
mne@epting-law.com

SWORN TO BEFORE ME THIS
18 day of APRIL, 2016.

Notary Public for South Carolina

ANGELA GODDARD GROOM NOTARY PUBLIC SOUTH CAROLINA My Comm. Exp. 10-20-2018

AFFIDAVIT OF SERVICE

State of South Carolina **County of Charleston** **Common Pleas Court**

Case Number: 2016-CP-10-1143

Plaintiff:
Palmetto Construction Group, LLC
vs.
Defendant:
Restoration Specialists, LLC, Reuben Mark Ward, and Lynette Pennington Ward

For: Andrew Epting

Received by SERVE ONE PROCESS SERVING CORP to be served on **Restoration Specialists, LLC, Reuben Mark Ward, Registered Agent, 3 Bailey Reach, Savannah, GA 31411.** I, Bennett Crisp, being duly sworn, depose and say that on the 14th day of March, 2016 at 3:20pm., executed service by delivering a true copy of the **Summons, Complaint, Motion to Stay and to Compel, Plaintiff's First Set of Interrogatories to All Defendants, Plaintiff's First Set of Request for Production to Defendant and Exhibits** in accordance with state statutes in the manner marked below:

(X) CORPORATE SERVICE: By serving Reuben Ward as Registered Agent; a person authorized to accept service.

( ) GOVERNMENT AGENCY: By serving _____ as _____ of the within named agency.

( ) NON SERVICE: Due to reasons detailed in Comments below.

COMMENTS: Served at: 7 Diamond Causeway, Savannah, GA 31406

Age 40 Sex (M) F Race White Height 5'10" Weight 185 Hair Bald Glasses (Y) (N)

Blindtek #CLEX 1

RECEIVED
MAR 22 2016
By _____

AFFIDAVIT OF SERVICE For 2016-CP-10-1143

I certify that I have no interest in the above action, am of legal age and have proper authority in the jurisdiction in which this service was made.

Subscribed and Sworn to before me on the 15 day of November 2016 by the affiant who is personally known to me.

NOTARY PUBLIC

My Commission Expires OCT. 15 2019

CHATHAM CO. GEORGIA NOTARY PUBLIC

PROCESS SERVER # _____
Appointed in accordance with State Statute

SERVE ONE PROCESS SERVING CORP
P.O. Box 2584
Greenville, SC 29602
(864) 235-7766

Our Job Serial Number: 2016000516

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AFFIDAVIT OF SERVICE

State of South Carolina **County of Charleston** **Common Pleas Court**

Case Number: 2016-CP-10-1143

Plaintiff:
Palmetto Construction Group, LLC
vs.
Defendant:
Restoration Specialists, LLC, Reuben Mark Ward, and Lynette Pennington Ward

For: Andrew Epting

Received by SERVE ONE PROCESS SERVING CORP to be served on **Reuben Mark Ward, 3 Bailey Reach, Savannah, GA 31411.** I, Bennett Crisp, being duly sworn, depose and say that on the 14th day of March, 2016 at 8:10p.m., executed service by delivering a true copy of the **Summons, Complaint, Motion to Stay and to Compel, Plaintiff's First Set of Interrogatories to All Defendants, Plaintiff's First Set of Request for Production to Defendant and Exhibits** in accordance with state statutes in the manner marked below:

( ) INDIVIDUAL SERVICE: Served personally to the within-named.

(X) SUBSTITUTE SERVICE: By delivering to: Lynnete Ward, as co-resident/spouse, a person authorized to accept service and a person of discretion and appropriate age, residing at the residence of the within named person and present at said residence at the time of service.

( ) OTHER SERVICE: As described in the Comments below by serving _____ as _____.

( ) NON SERVICE: Due to reasons detailed in Comments below.

( ) MILITARY STATUS: Y N If Yes, what branch: _____

COMMENTS: _____

Age F Sex M(F) Race White Height 5'6" Weight 130 Hair Blond Glasses Y(N)

RECEIVED
MAR 22 2016
By _____

Bindertek #CLEX 2

AFFIDAVIT OF SERVICE For 2016-CP-10-1143

I certify that I have no interest in the above action, am of legal age and have proper authority in the jurisdiction in which this service was made.

Subscribed and Sworn to before me on the 15 day of March 2016 by the affiant who is personally known to me.

NOTARY PUBLIC

My Commission Expires OCT. 15 2019

CHATHAM CO., GEORGIA NOTARY PUBLIC

PROCESS SERVER # _____
Appointed in accordance with State Statutes

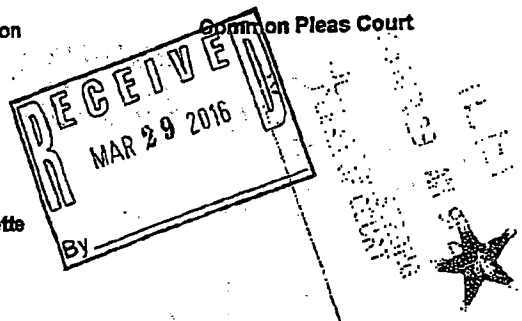
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P.O. Box 2584
Greenville, SC 29602
(864) 235-7766

Our Job Serial Number: 2016000515

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AFFIDAVIT OF SERVICE

State of South Carolina **County of Charleston** **Common Pleas Court**



Case Number: 2016-CP-10-1143

Plaintiff:
Palmetto Construction Group, LLC
vs.
Defendant:
Restoration Specialists, LLC, Reuben Mark Ward, and Lynette Pennington Ward

For: Andrew Epting

Received by SERVE ONE PROCESS SERVING CORP to be served on Lynnete Pennington Ward, 3 Bailey Reach, Savannah, GA 31411. I, Bennett Crisp, being duly sworn, depose and say that on the 14th day of March, 20 16 at 8:10p.m., executed service by delivering a true copy of the **Summons, Complaint, Motion to Stay and to Compel, Plaintiff's First Set of Interrogatories to All Defendants, Plaintiff's First Set of Request for Production to Defendant and Exhibits** in accordance with state statutes in the manner marked below:

(X) INDIVIDUAL SERVICE: Served personally to the within-named.

( ) SUBSTITUTE SERVICE: By delivering to: _____, as _____, a person authorized to accept service and a person of discretion and appropriate age, residing at the residence of the within named person and present at said residence at the time of service.

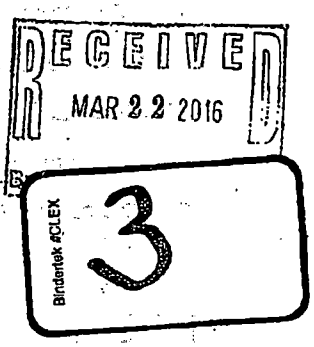
( ) OTHER SERVICE: As described in the Comments below by serving _____ as _____.

( ) NON SERVICE: Due to reasons detailed in Comments below.

( ) MILITARY STATUS: Y N If Yes, what branch: _____

COMMENTS: _____

Age 35 Sex M(F) Race White Height 5'6" Weight 130 Hair Blond Glasses Y(N)



AFFIDAVIT OF SERVICE For 2016-CP-10-1143

I certify that I have no interest in the above action, am of legal age and have proper authority in the jurisdiction in which this service was made.

Subscribed and Sworn to before me on the 15 day of March 2016 by the affiant who is personally known to me.

NOTARY PUBLIC

My Commission Expires:

JESSICA GRISP NOTARY PUBLIC GWINNETT CO., GEORGIA COMMISSION EXPIRES OCT 15 2019

PROCESS SERVER # _____
Appointed in accordance with State Statutes

SERVE ONE PROCESS SERVING CORP
P.O. Box 2584
Greenville, SC 29602
(864) 235-7766

Our Job Serial Number: 2016000517

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	CASE NO. 2016-CP-10[illegible]-1143 **ORDER**

FILED
2016 APR 21 PM 2:37
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court on the motion of Plaintiff seeking a referral to the Master in Equity and that the Defendants be declared in default.

WHEREAS an affidavit of default was filed on April 18, 2016;

WHEREAS from the affidavit of default, it appears that no pleading has been filed and no appearance on behalf of the Defendants made;

WHEREAS the Plaintiff seeks to have this matter referred to the Master in Equity and seeks a default against Defendants;

IT IS ORDERED that the Defendants are in default and this matter is referred to the Master in Equity pursuant to Rule 53(b) SCRCP for all purposes including entry of final judgment against Defendants.

IT IS SO ORDERED.

The Honorable Roger M. Young, Sr.
Chief Administrative Judge
Ninth Judicial Circuit

On this 20th day of April 2016
Charleston, SC

EXHIBIT E

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, v. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO. 2016-CP-10-1143 **AFFIDAVIT OF REUBEN MARK WARD**

FILED
2016 JUN -6 AM 11: 1
CLERK OF COURT
BY

PERSONALLY APPEARED BEFORE ME, Reuben Mark Ward, who having been first duly sworn, deposes and states as follows:

1. I am the Managing Member of Restoration Specialists, LLC ("Restoration Specialists").

I was served with the Notice of Hearing for the default damages hearing on June 2, 2016 at 6:30 p.m. by process server at my home located at 3 Bailey Reach, Savannah, Ga. 31411.

FURTHER DEPONENT SAYETH NAUGHT.

Reuben Mark Ward

Sworn to before me
This 3 th day of June 2016.

Notary Public for the State of Georgia

My Commission Expires 09/4/2019

REBECCA M MAZUR NOTARY PUBLIC CHATHAM COUNTY, GA

EXHIBIT F

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants	)	CASE NO. 2016-CP-1001143 NOTICE OF HEARING

PLEASE TAKE NOTICE that a default damages hearing is scheduled on Monday, June 6, 2016, at 11:30 a.m. before the Honorable Mikell R. Scarborough in the Charleston County Court of Common Pleas located at 100 Broad Street, Charleston, SC 29401 pursuant to the enclosed Order of the Honorable Roger M. Young, Sr. dated April 20, 2016.

Respectfully submitted,

ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
45A State Street, Charleston, SC 29401
P: 843.817.1871
F: 843.277.1310
dre@epting-law.com; mne@epting-law.com
ATTORNEYS FOR PLAINTIFF

June ___, 2016
Charleston, South Carolina

EXHIBIT G

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, v. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO. 2016-CP-10-1143 **AFFIDAVIT OF REUBEN MARK WARD**

FILED
2016 JUN -6 AM 11:15
JULIE J. ARMSTRONG
CLERK OF COURT

PERSONALLY APPEARED BEFORE ME, Reuben Mark Ward, who having been first duly sworn, deposes and states as follows:

1. I am the Managing Member of Restoration Specialists, LLC ("Restoration Specialists").

2. On March 29, 2012, Restoration Specialists was awarded a contract to construct the Charlie Norwood VAMC Parking Garage in Augusta, Georgia (the "Project").

3. On April 23, 2012, pursuant to the terms of that contract, Restoration Specialists provided Payment Bond 1944091 (the "Bond"), which was issued by The Hanover Insurance Company ("Hanover"). The Bond is at issue in this action.

4. I received the Summons and Complaint in the above referenced action on or about March 14, 2016.

5. Prior to receipt of the Summons and Complaint, I was contacted by James E. Rudnik, Esq., the Director – Risk Mitigation|Surety for The Hanover Insurance Group regarding the Bond.

6. On or about March 10, 2016, Mr. Rudnik notified me of certain bond claims that had been made against the Bond.

7. Pursuant to my discussions with Mr. Rudnik, Restoration Specialists has made direct payment to several subcontractors deemed to have valid bond claims.

8. Further, Restoration Specialists continues to have discussions with Hanover regarding other bond claims made.

EXHIBIT H

9. When I received the Summons and Complaint for the instant action, I thought that it was related to my arrangements with Hanover.

10. I am not an attorney and did not understand that the above captioned action was separate and apart from the bond claims that I have been working directly with Mr. Rudnik and Hanover to address.

11. I have no record and no recollection of receiving 1) a notice of motion hearing related to the Motion to Stay and to Compel, 2) the Motion to Refer to the Master in Equity and for Entry of Default, or 3) the Order for Entry of Default and Referral to the Master in Equity.

12. Upon receipt of the Notice of Hearing for the default damages hearing, the defendants understood for the first time that this was a separate action and immediately notified their attorney.

FURTHER DEPONENT SAYETH NAUGHT.

Reuben Mark Ward

Sworn to before me
This 3 th day of June 2016.

Notary Public for the State of Georgia

My Commission Expires 09/11/2019

REBECCA M MAZUR NOTARY PUBLIC CHATHAM COUNTY, GA Exp. Sept. 11, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group	)	
	)	
Plaintiff,	)	**DEFENDANTS' NOTICE OF MOTION AND MOTION FOR CONTINUANCE AND PROTECTION PURSUANT TO SCRCP 6(d) and 40(i)**
	)	
vs.	)	
	)	
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward	)	
	)	
Defendants.	)	

2016 JUN -3 PM 3:32

TO: ANDREW K. EPTING, JR., ESQUIRE, AND MICHELLE N. ENDEMANN, ESQUIRE, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, will move before the presiding Judge or Master in Equity of the Ninth Judicial circuit at a time and place to be arranged by the Court and counsel involved for an Order continuing the default damages hearing scheduled for Monday, June 6, 2016, at 11:30 a.m. before the Honorable Mikell R. Scarborough in the Court of Common Pleas and for an Order of Protection for the period of June 10 – 24, 2016. This Motion is made for good cause, pursuant to Rules 6(d) and 40(i) of the South Carolina Rules of Civil Procedure.

This Motion is made on the following grounds:

(1): The Defendants have promptly and timely filed a Motion to Set Aside Entry of Default, which Motion is pending before the Court for decision;

(2): The Defendants were served with the Notice of the default damages hearing on June 2, 2016 at 6:30 p.m. and; therefore, have not received timely notice of the hearing pursuant to SCRCP 6(d);

(3): The Defendants retained legal counsel on June 3, 2016 immediately after service of the hearing notice; and, said counsel has had insufficient time to prepare for the default damages hearing. Further, counsel has long standing vacation plans for the period of June 10 – 24, and while counsel has obtained Orders of Protection in all courts in which she has active cases, she has not obtained an Order of Protection in the Ninth Circuit as she had no active cases in that Court prior to this date; and

(4): The Plaintiff has filed a Motion to Stay the claims asserted by it against the Defendants and to

EXHIBIT I

order mediation, and, if necessary, arbitration of these claims pursuant to the contract that is the subject of this action. This motion remains pending before the Court for decision.

This Motion is based on upon the complete files and records in this action, such oral and documentary evidence as may be allowed at the hearing of this motion and upon all applicable law pertaining thereto.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

June 3, 2016
Charleston, SC 29412

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group	)	
	)	
Plaintiff,	)	**DEFENDANTS' NOTICE OF MOTION AND MOTION FOR CONTINUANCE AND PROTECTION PURSUANT TO SCRCP 6(d) and 40(i)**
	)	
vs.	)	
	)	
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward	)	
	)	
Defendants.	)	

2016 JUN -3 PM 3:33

TO: ANDREW K. EPTING, JR., ESQUIRE, AND MICHELLE N. ENDEMANN, ESQUIRE, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, will move before the presiding Judge or Master in Equity of the Ninth Judicial circuit at a time and place to be arranged by the Court and counsel involved for an Order continuing the default damages hearing scheduled for Monday, June 6, 2016, at 11:30 a.m. before the Honorable Mikell R. Scarborough in the Court of Common Pleas and for an Order of Protection for the period of June 10 – 24, 2016. This Motion is made for good cause, pursuant to Rules 6(d) and 40(i) of the South Carolina Rules of Civil Procedure.

This Motion is made on the following grounds:

(1): The Defendants have promptly and timely filed a Motion to Set Aside Entry of Default, which Motion is pending before the Court for decision;

(2): The Defendants were served with the Notice of the default damages hearing on June 2, 2016 at 6:30 p.m. and; therefore, have not received timely notice of the hearing pursuant to SCRCP 6(d);

(3): The Defendants retained legal counsel on June 3, 2016 immediately after service of the hearing notice; and, said counsel has had insufficient time to prepare for the default damages hearing. Further, counsel has long standing vacation plans for the period of June 10 – 24, and while counsel has obtained Orders of Protection in all courts in which she has active cases, she has not obtained an Order of Protection in the Ninth Circuit as she had no active cases in that Court prior to this date; and

(4): The Plaintiff has filed a Motion to Stay the claims asserted by it against the Defendants and to

order mediation, and, if necessary, arbitration of these claims pursuant to the contract that is the subject of this action. This motion remains pending before the Court for decision.

This Motion is based on upon the complete files and records in this action, such oral and documentary evidence as may be allowed at the hearing of this motion and upon all applicable law pertaining thereto.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

June 3, 2016
Charleston, SC 29412

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	CASE NO.: 2016-CP-10-1143
)	
Palmetto Construction Group)	
)	
Plaintiff,)	**DEFENDANTS' NOTICE OF MOTION AND MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT TO SCRCP 55(c)**
)	
vs.)	
)	
Restoration Specialists, LLC,)	
Reuben Mark Ward, and Lynnette)	
Pennington Ward)	
)	
Defendants.)	

2016 JUN -3 P 3:

TO: ANDREW K. EPTING, JR., ESQUIRE, AND MICHELLE N. ENDEMANN, ESQUIRE, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, will move before the presiding Judge or Master in Equity of the Ninth Judicial circuit at a time and place to be arranged by the Court and counsel involved for an Order setting aside the Entry of Default for good cause, pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure.

This Motion is made on the following grounds:

(1): The Defendant have promptly and timely filed their Motion seeking relief from the Entry of Default;

(2): The Defendants delay in responding to the Plaintiff's lawsuit was not culpable;

(3): The Defendants have a meritorious defense to the Plaintiff's lawsuit; and

(4): The Plaintiff will not suffer prejudice if Entry of Default is set aside.

This Motion is based on upon Defendants' Memorandum of Law in Support of Motion to Set Aside Entry of Default which will be submitted to the Court prior to the hearing of this motion, the complete files and records in this action, such oral and documentary evidence as may be allowed at the hearing of this motion and upon all applicable law pertaining thereto.

EXHIBIT J

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

June 3, 2016
Charleston, SC 29412

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

Palmetto Construction Group,

Plaintiff,

vs. CASE NO. 2016-CP-10-1143

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward,

Defendants.

Hearing before the Honorable Mikell R. Scarborough, reported by Christine A. Smith, Court Reporter and Notary Public, at 11:29 a.m. on June 6, 2016 at 100 Broad Street, Charleston, South Carolina.

COPY

Christine A. Smith, Court Reporter
Master-in-Equity
P.O. Box 30276
Charleston, South Carolina, 29417
(843) 958-5071
casmith@charlestoncounty.org

EXHIBIT K

APPEARANCES OF COUNSEL:

ATTORNEYS FOR THE PLAINTIFF:

Andrew K. Epting, Jr., Esq.
Michelle Endemann, Esq.
Andrew K. Epting, Jr., LLC
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Charleston, SC 29401
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Mne@epting-law.com

ATTORNEYS FOR THE DEFENDANT:

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Law Office of A. Bright Ariail, LLC
125-E Wappoo Creek Drive
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Charleston, SC 29412
(843) 814-8805
Bright@brightariaillaw.com

PROCEEDINGS

THE COURT: This matter is captioned Palmetto Construction Group, LLC versus Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward. The case number is 2016-CP-10-1143.

The matter is set today as a default damages hearing, and the matter was referred to the Court on April 18th, and entry of default was entered on that same date. It appears that service process was performed on Reuben Ward on or about March 14th, the case having been filed on March 7th, and also on Lynnette Ward on that same date it appears.

I believe Mr. Ward was served as the agent for the corporation, Restoration Specialists, LLC. This Court set it for a hearing in April on damages. I did receive, and I don't know -- have you got that --

MR. FISHBURNE: That is it.

THE COURT: Late last week from the Law Office of A. Bright Ariail a Motion to Set Aside the Entry of Default and also for continuance. Have you-all been provided with that as well?

MS. ENDEMANN: Yes, Judge, we were served on Friday afternoon.

THE COURT: Do you want to be heard first on

the motion before we get to the subset of the aspect of it, or where do we stand on that?

MS. ENDEMANN: Well, Judge, we were served late Friday, and we are amenable to try to come to some resolution of these motions. If I could give you a little bit of context and background for the case?

THE COURT: Sure.

MS. ENDEMANN: It's a case that arises out of a project for the VA. It was completing a hospital parking deck in Georgia. So Restoration Specialists was the general contractor on the project with the Department of Veteran's Affairs. My client, Palmetto Construction Group -- I have Mr. Kendle with me here today -- was approached by Restoration.

This was a large project for them. They needed some help getting a bond in place. In order to complete the job they needed help managing the project. They needed help completing the project. So they came to my client, Palmetto Construction Group, and asked for assistance.

A teaming agreement was entered into. So under this agreement Palmetto would manage the project, they would do other certain responsibilities, and Restoration would stay as the

general contractor. There would be a profit split as a result of this agreement. The project started -- seemingly it was going pretty well.

Towards the end of the project, we started to get some red flags. We started to get notices that some of the subcontractors, some of the suppliers, are not being paid by Restoration. Unfortunately, as part of this agreement with Restoration, Palmetto got their bonding company to write this bond. Palmetto is liable on the bond with Mr. Ward and Restoration and Ms. Ward. Mr. Kendle personally is liable on the bond. Mr. Handegan, another primary principal at Palmetto is obligated on the bond and so is his wife.

So when all of these claims start coming in from these subcontractors who say they're not getting paid from Restoration, it becomes our problem in a very large way. Hanover, the bonding company, turns to us and says, You need to pay for this. You're obligors on the bond. Now we have approximately $1.4 million dollars in claims on this bond for subcontractors and suppliers that have not been paid, and Hanover is looking to us to pay it.

It's impacting other jobs because obviously they have this issue with the bonding company, getting other bonds is becoming a problem. So

there's some real urgency on our clients' part to get this worked out as fast as we possibly can.

Mr. Ward had been making some overtures. Ms. Ariail was retained, and she filed the motions that you discussed earlier on Friday. If we could get some agreement, Judge? We need the file. We need the financials. We need the bank accounts. We need to get these documents in place, and we would like to ask him some questions about, where are these funds? You are receiving payments from the Federal Government. Where is the money going because Hanover is coming to us saying we need to pay it. We did our part but we're going to end up in a really tough spot here. So the urgency is really what we're impressing here.

We're amenable to trying to work something out on these motions, but we really need to have an agreement and exchange so that we can have these documents. We actually served the discovery with the Complaint, so it's already pretty well overdue. I actually today just served some deposition notices on Ms. Ariail. Of course she's just getting involved in the case.

We are looking to get these records as soon as possible. That's a little bit about potential

accounting that would be great. If that can't be done in the short term we would like the file. We would like the file anyway, but we would like that at least in the next seven or so days. If we can take a deposition in the next 14 days I think Ms. Ariail might have some issues with the date but as soon as possible, and maybe even get a hearing in front of Your Honor in case any other issues come up with the discovery or if we need to go to mediation. If there is any kind of order that we would like the Court's help with we could come back to you in order to work this out as quickly as we possibly can.

THE COURT: Ms. Ariail?

MS. ARIAIL: Your Honor, I learned of this matter Thursday night of last week. I have represented Restoration Specialists in other matters, so I am, unfortunately very new to this issue. I do understand from Mr. Ward, who is the managing member of Restoration Specialists, that he has been in contact with the attorney -- I guess it's an in-house attorney with the bonding company, and he has made some payments on some of these claims that are considered valid reaching back into the March timeframe of this year.

I know that he is eager to get this issue

resolved and behind him also. I've spoken to him after speaking with Palmetto's counsel on Friday, and he is willing to provide the documentation and absolutely would be willing to mediate this case. I believe there were -- per the contractors there was a mediation and then mandatory mediation as condition precedent to arbitration. So we would like to do that.

Unfortunately it's compounded by -- I'm actually leaving the country on Saturday for two weeks. I had not asked for an order of protection in this Court because I didn't have anything active in this Court. So that unfortunately is going to impact the time. I'm willing to do what I need to do to try to facilitate the exchange of information and move forward with this.

THE COURT: I think June 10th through the 24th were the dates you were requesting that you would be out?

MS. ARIAIL: Yes, sir.

THE COURT: Do you have information? Do you have documentation from your client based on your conversation you must have had last week with them? Have you gotten any of this stuff? Do you have it in hand I guess is my question?

MS. ARIAIL: I do not. The only thing I have are a couple of affidavits that are specific to the subject of the motions that I had filed.

THE COURT: I haven't seen any affidavits.

MS. ARIAIL: I just filed them this morning, Your Honor. He's out of state, so I had to have them overnighted to me on Saturday.

THE COURT: Sure.

MS. ARIAIL: I'll be happy to pass a copy up to you.

THE COURT: Okay.

MS. ARIAIL: Again, I had filed a Motion for Continuance and Protection. This is just dealing with this schedule to try to give me some time to figure out what's going on here and -- and then the Motion to Set Aside the Default. So there's two affidavits.

THE COURT: Okay. You have two affidavits from Mr. Ward: One explaining what was going on relative to the bond, and acknowledging receipt of the Summons and Complaint on or about March 14th; the other stating he's the managing member and just got notice of this hearing on June 2, which would have been last Thursday night at 6:30.

Ms. Endemann?

MS. ENDEMANN: Thank, you, Judge. I'm going to object to these just because I haven't seen them before now. One of the things I would like to point out -- we did serve Mr. Ward pursuant to the Rule last week with the notice of this hearing, and then ever since then there's sort of been a flurry of e-mail correspondence with the bonding company, and there have been some payments, but my understanding is that it's right near $20,000 on the $1.4 million that's outstanding.

So while he's making overtures, respectfully, we really need to push forward with the discovery because obviously that's not even putting a dent into what's owed. We're copied on most of this correspondence with the bonding company since they're coming to us weekly, if not daily, to get updates and try to get their money.

THE COURT: Are you-all already out the 1.4 or is that the amount of the claim.

MS. ENDEMANN: That's the amount of the claims. The bonding company has been making demand on this because they have been starting to pay these claims, and so our time is running very short. Then Ms. Ariail is going on vacation. I understand that. We can maybe work with her on the deposition dates.

I think we noticed it on the 20th. She will be back on the 26th. We can certainly move it until when she gets back, but Your Honor, I would really, really request that we can get these documents produced and the bank account information produced in advance of her going on her trip.

THE COURT: Ms. Arial, is that possible?

MS. ARIAIL: Your Honor, I will speak to my client. I can't represent to you when I can do it. I know he's out of the state today. He's in Oklahoma. I'm not sure when he's coming back, but I will absolutely do my best to make that happen.

THE COURT: All right. Here's what I'm going to do. I'm going to see if -- you-all need to get on a short timetable to see if you-all can't get a little scheduling order worked out over the next 60 days. I'm going to bring you-all back in here. I'm going to hold both of these motions under -- I'm going to essentially grant your Motion to Continue the Matter. Okay? Your Motion for Relief from the Entry of Default I'm not going to rule on yet. There's not much I saw in that affidavit that would give me indication that I would grant that motion. I can tell you that right now. Okay?

I will give you-all some time to see what

you-all can do to work out in the meanwhile, but it sounds like it needs to happen sooner than later. Okay? So I'll hold the Motion to Reopen the Entry of Default in abeyance.

As it stands now, the Defendants are in default. I'm going to give you some time because you are going on vacation, but it sounds to me like your client needs to come up with some information pretty darn quick. Okay? Let's see if you-all can't get this thing resolved. You indicated there was -- I think I read that in your correspondence. There was some sort of mandatory mediation prior to arbitration was you-all's contractual arrangement; is that what it was?

MS. ARIAIL: Yes, sir.

THE COURT: Well, we'll cross that bridge when we get to it. Okay? I would see if you-all can't set that up and get some information and get rolling with this. I'm going to bring you-all back in here. Let's get a date.

MS. BECK: We have some time July 14th.

THE COURT: Do you want to get a status about that time? July 14th? Does that give you enough time? You're going to be gone until the 24th, so back in the office -- that would be -- we ought to

find out where we're going at that time? Why don't you-all give me a response -- what does that day look like? Is it wide open?

MS. BECK: The 14th?

THE COURT: Yes.

MS. BECK: We have one at 11:00.

THE COURT: I'll put you-all down for 11:00 a.m. on the 14th of July. We'll reconvene at that time. See what you-all can resolve.

MS. ENDEMANN: Thank you, Judge.

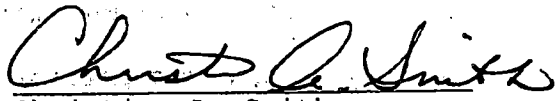
(The proceedings were concluded at 11:43 a.m.)

State of South Carolina)
)
County of Charleston) C E R T I F I C A T E

I, Christine A. Smith, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

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

Witness my hand, I have hereunto affixed my official seal this 26th day of July, 2016 at Charleston, Charleston County, South Carolina.



Christine A. Smith
Notary Public
My Commission Expires
May 12, 2021

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Palmetto Construction Group Plaintiff, vs. Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2016-CP-10-1143 **DEFENDANTS' NOTICE OF MOTION AND MOTION TO STAY AND TO COMPEL PURSUANT TO SCRCP 12(b)(1) AND APPLICABLE CASE LAW**

FILED
2016 JUL 11 AM 11:59
CHARLESTON COUNTY
CLERK OF COURT

TO: ANDREW K. EPTING, JR., ESQUIRE, AND MICHELLE N. ENDEMANN, ESQUIRE, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, will move before the presiding Judge or Master in Equity of the Ninth Judicial circuit at a time and place to be arranged by the Court and counsel involved for an Order staying this matter and compelling mediation and, if necessary, arbitration by the parties, pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure and all applicable case law.

This Motion is made on the following grounds:

(1): The Plaintiff's Complaint, and the causes of action asserted therein, arise out of or are related to a contract containing mandatory mediation/arbitration provisions. These provisions require all claims arising out of or related to the contract to be mediated, and if not resolved by mediation, to be resolved by binding arbitration. As such, the Court lacks subject matter jurisdiction of this matter and should stay this action and submit the matter to mediation, and if necessary, binding arbitration. S.C.R.C.P. 12(b)(1); *Steinmetz v. American Media Services, LLC*, 393 S.C. 72, 709 S.E. 2d 708 (S.C. Ct. App. 2011); *Widner v. Fort Mill Ford*, 381 S.C. 522, 674 S. E. 2d 172 (S.C. Ct. App. 2009); *U.S. ex rel. Coastal Roofing Co., Inc. v. P Browne & Associates, Inc.*, 585 F.Supp. 2d 708 (D.S.C. 2007).

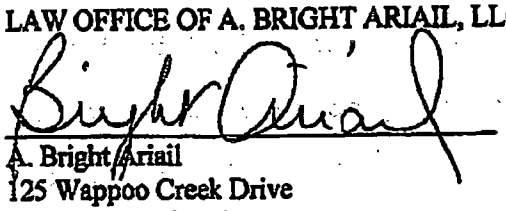
(2): The Plaintiff has moved the Court to stay this action and compel mediation, and if necessary, arbitration by the parties to proceed as contractually required by the mandatory mediation/arbitration provisions contained in Article 6 of the contract. The Defendants hereby join in and consent to Plaintiff's motion and the relief requested therein, including the stay of this matter and submission of

EXHIBIT L

Plaintiff's claims to mediation and, and if necessary, binding arbitration.

This Motion is based on upon Defendants' Memorandum of Law in Support of Motion to Stay and to Compel which will be submitted to the Court prior to the hearing of this motion, the complete files and records in this action, such oral and documentary evidence as may be allowed at the hearing of this motion and upon all applicable law pertaining thereto.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC



A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

July 11, 2016
Charleston, SC 29412

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

Palmetto Construction Group

Plaintiff,

vs.

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-10-1143

CERTIFICATE OF SERVICE

FILED
2016 JUL 11 AM 11:56
JULIE J. ARMSTRONG
CLERK OF COURT

The undersigned hereby certifies, that on this 11th day of July, 2016, a true and correct copy of the foregoing: **DEFENDANTS' NOTICE OF MOTION AND MOTION TO STAY AND TO COMPEL PURSUANT TO SCRCP 12(b)(1) AND APPLICABLE LAW** has been served on the below counsel of record via hand delivery, email, facsimile and/or United States Mail with sufficient first class postage affixed thereto and addressed as follows:

Andrew K Epting, Jr., Esquire
Michelle N. Endemann, Esquire
ANDREW K. EPTING, JR., LLC
46A State Street
Charleston, SC 29401
ATTORNEYS FOR PLAINTIFF

A. Bright Ariail, Esquire
Law Office of A. Bright Ariail, LLC
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, S.C. 29412
ATTORNEY FOR DEFENDANTS

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

Palmetto Construction Group,

Plaintiff,

vs. CASE NO. 2016-CP-10-1143

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward,

Defendants.

Hearing before the Honorable Mikell R. Scarborough, reported by Christine A. Smith, Court Reporter and Notary Public, at 10:57 a.m. on July 14, 2016 at 100 Broad Street, Charleston, South Carolina.

COPY

Christine A. Smith, Court Reporter
Master-in-Equity
P.O. Box 30276
Charleston, South Carolina, 29417
(843) 958-5071
casmith@charlestoncounty.org

EXHIBIT M

APPEARANCES OF COUNSEL:

ATTORNEYS FOR THE PLAINTIFF:

Andrew K. Epting, Jr., Esq.
Michelle Endemann, Esq.
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46A State Street
Charleston, SC 29401
(843) 377-1871
Ake@epting-law.com
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ATTORNEYS FOR THE DEFENDANT:

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PROCEEDINGS

THE COURT: Palmetto Construction Group versus Restoration Specialists, LLC. For the Plaintiffs is Mr. Drew Epting and Ms. Michelle Endemann. For the Defendants is Ms. Bright Ariail. Good morning, Ms. Ariail. I believe we are here on your motion, are we? Is that what got us here?

MS. ENDEMANN: Judge, I think we are here on a couple of different things that were noticed. I think you set it for sort of a general status after we were here before you about a month ago. Also, there is a Motion to be Relieved from Default that Ms. Ariail has filed, as well as a Motion to Compel Arbitration.

I can give you a little bit of an overview of sort of where we are from last time. I think it would be helpful.

THE COURT: Sure.

MS. ENDEMANN: If you recall, Judge, this is a case where my client, Palmetto Construction has sued a business associate of theirs on a project for the V.A. The agreement between Restoration Specialist and the other Defendants which are the principals of that company and Palmetto was essentially that they

would work together on a job with the V.A. Restoration was to be the general contractor. Palmetto was to aid Restoration in this job, provide their expertise on a job of this size, provide the bonds that were required in order to complete the project. There would be a split of the profits, and Mr. Ward was the one who had the contracts with the V.A., and then all the subcontractors below.

Unfortunately what happened is Mr. Ward stopped paying his subcontractors. He stopped paying them it looks like all together. We started receiving bond claims coming in toward the end of the job. We didn't know what was going on because we weren't a party to those agreements. We weren't the ones that were paying them. We weren't the ones that were receiving money from the V.A.

So Mr. Ward is getting money from the V.A. He's diverting the funds. His subcontractors filed claims on the bond for which Palmetto was liable, and personally liable, all of its principals, their wives, and now Hanover, the bonding company with surety is looking to us to pay over a million dollars in bond claims.

We were here before you last time for a damages hearing because we had served discovery with

our Complaint and the Complaint went unanswered. We're here for a damages hearing. We served Mr. Ward with notice of that hearing pursuant to the Rules, and it was then that he had hired Ms. Ariail.

She came and actually had a vacation planned, so we kind of came to an agreement. She was able to get us some of the documents that were owed. The discovery is not complete. In particular we're missing some pretty important things like the payments from the V.A. to Mr. Ward and then where that money went.

From the documents that we have received it appears that the project was pretty profitable with all the subcontractors being paid, and then still some hundreds of thousands of dollars in profit. So we're left looking at records that show there should be a surplus of funds.

Instead we're faced with the surety coming to us and saying, Hey, you owe us over a million dollars. The other problem that my client has is they do a lot of bonded work. They have a surety that says, You owe us over a million dollars. Nobody wants to bond any projects. So time is really, really of the essence here because we can't get work. If we can't get work our business goes under, and all

of our people don't have jobs, so we're really sort of in dire straits here.

THE COURT: Okay.

MS. ENDEMANN: We were served with this Motion to Compel Arbitration this week, and Your Honor has set it probably for expediency today. We don't think, Your Honor, that we can go forward on that motion. First, we don't think that he can bring the motion, period, because he's in default; and second, it's not properly before this Court as we only got notice of it a couple of days ago.

We think that the tapat here might be to try to get relief from default, get this motion heard, and get it appealed if Your Honor does not rule in their favor and ties this up for several years. If that happens, again, my client's out of business.

What we would like to see happen here today is have a damages hearing set because Mr. Ward is in default. He's not provided the Court with any reasonable explanation for being in default and is not entitled to make this Motion for Arbitration since he is in default. Thank you, Your Honor.

THE COURT: Ms. Ariail, let me hear from you on that one.

MS. ARIAIL: Your Honor, I don't totally agree

with the facts, but I think the thing that disturbs me the most is the statement that we haven't provided payments from the V.A. We have provided documentation of the amount of payments that have been made.

When we were in front of you a month or so ago there was a -- and there still is a standing Motion for Compelling Arbitration by the Plaintiff. They actually filed that. The contract requires it, and there is a motion that has not been heard that was filed by the Plaintiff for compelling arbitration.

In the meantime, despite the requirement for mediation and arbitration, and based on direction from the Court at the last hearing, we have complied with discovery. We have answered discovery. We have been continuously providing documents as we've compiled them, and at my direction my client has concentrated on the financial records rather than the voluminous information that is compiled on a two-or-three-year construction project.

That being said, I think it's proper to hear the Motion to Compel Mediation and Arbitration today. We merely joined what the Plaintiff's have already filed. For that reason I would ask that you go ahead and hear that motion.

THE COURT: You want to get out of Default first, don't you? I didn't rule on that last time I don't think?

MS. ARIAIL: You did not.

THE COURT: You're right. Mr. Epting and Ms. Endemann, it looks like there was a motion filed back in March to Compel. Is it mediation or arbitration? Is it contract specific?

MS. ENDEMANN: Your Honor, it's a standard Form AIA contract, so there is a provision in there having to do with mediation and arbitration. We did file that motion assuming that we were going to get a responsive pleading and that we would send it to arbitration. That's not what happened in this case. Instead we set aside that motion and asked for an order referring this case to you for a damages hearing which was granted by the Circuit Court.

THE COURT: I've got it. This was filed March 7th. That motion was with those -- that was as a result of the matter to referral. Mr. Ward was served on the 14th of March. The Motion to Set Aside the Entry was there. I recall we had a quick meeting and then you-all did some discovery and I haven't been able to resolve anything. Basically, it's a Motion for a Continuance which we granted. And then

Mr. Ward's affidavit. All right. That rings a bell.

Well, Ms. Ariail, I think the first thing you have to do is get out of default before you can bring affirmative relief. It does appear that the matter was referred over here. I think that took care of the -- the clerk closed out the Motion to Compel the Arbitration because of the fact that it was referred over here. So that based some adjudication on that motion is how the Court considers that.

I think what we were wrestling with last time was whether or not you-all could resolve it. That doesn't look like it's been done. I find that because it was not shown by Mr. Ward in his affidavits that that supported why he was in default I find the Defendant in default and I so order.

So this will be a question of a damages hearing to be set. How much time do you-all want?

MS. ENDEMANN: Your Honor, we probably need about an hour to two hours for the hearing, and we can hear it whenever the Court is available.

THE COURT: Okay.

MS. ARIAIL: Your Honor, I would ask since I have in good faith participated in discovery that I at least be allowed to serve some form of discovery related to damages so that I can prepare properly for

the damages hearing.

THE COURT: Ms. Endemann?

MS. ENDEMANN: I don't think we're in a position, Your Honor, to consent to that. Ms. Ariail can certainly Cross the Plaintiff on any damages that we present at the hearing as is allowed by the Rules, but she isn't allowed to present her own evidence in any event.

We're happy to try to -- most of the documents that we would use in support of our case are her clients and also Hanover's, which are the bond claims spreadsheets and everything, which Hanover is sending directly to her client and which we're happy to provide if that's not happening. I think she has everything that she would need. It would just be the testimony, and of course, she's entitled to Cross under the Rules.

THE COURT: All right. I think that's the case. All right? I'm assuming you've got what you've got. You're entitled to participate in a damages hearing. There's no doubt about that by Cross-Examination but not by putting forth in evidence.

MS. ARIAIL: Right, Your Honor, but to properly prepare to Cross-Examine their witnesses,

I've seen nothing they have. They have discussed an indemnity agreement in the Complaint. I don't have that. My client doesn't have that.

THE COURT: Well, it may expedite the matter to move forward so everybody's talking with the same thing. We don't have to read documents when we're here. I would ask that you-all share what you can in that regard. I'm not going to mandate it because I don't think that's proper. If we don't get it worked out we'll have a hearing in the next, what, 60 days or so?

MS. BECK: I didn't know if this might be something you might want to put on the trial term as a possibility. If not, we've got some time the first week in October.

THE COURT: I can bring you-all back -- I've got some trials coming up. I've been squeezing stuff in there. I've got a trial term in August and one in September. The last week of September?

MS. BECK: Yes, sir, or if they prefer a date certain we can do the first week of October.

MS. ARIAIL: Your Honor, I have a Court-ordered mediation the last week of September, so if we could move it to the first week of October that would be helpful.

THE COURT: Okay.

MS. BECK: The afternoon of the 5th, after those allocation hearings that you set, we can do the rest in the afternoon.

THE COURT: What's going on on the 4th?

MS. BECK: Nothing. That would be fine, too.

THE COURT: Why don't we set this for October 4th at 2:00 p.m. Let's just set it up. That's a Tuesday afternoon the first week of October. Okay?

MS. ENDEMANN: Thank you, Judge.

MR. EPTING: Thank you, Judge.

THE COURT: Very good. I'm just going to do a Form 4, and I'll put that in there. If you-all want to follow up with an order you can. 2:00 p.m.

MS. ENDEMANN: Thank you.

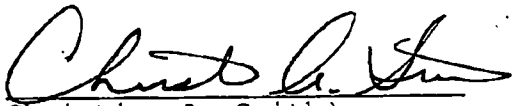
(The proceedings were concluded at 11:11 a.m.)

State of South Carolina)
)
County of Charleston) C E R T I F I C A T E

I, Christine A. Smith, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

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

Witness my hand, I have hereunto affixed my official seal this 26th day of July, 2016 at Charleston, Charleston County, South Carolina.



Christine A. Smith
Notary Public
My Commission Expires
May 12, 2021

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Palmetto Construction Group Plaintiff, vs. Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward Defendants.	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2016-CP-10-1143 **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT TO SCRCP 55(c)**

2016 JUL 14 AM 11:21

Pursuant to Rule 55(c), SCRCP, the Defendants, Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward (hereinafter collectively "Defendants"), by and through their undersigned counsel, submit this Memorandum in Support of their Motion to Set Aside Entry of Default.

STATEMENT OF FACTS

This action arises out of a construction project in Augusta, Georgia. On March 29, 2012, the Defendant, Restoration Specialists ("Restoration") was awarded a contract (the "Contract") to construct the Charlie Norwood VAMC Parking Garage in Augusta ("the Project") by the Department of Veteran's Affairs. The Plaintiff entered into a Teaming Agreement with Restoration in December 2011 The Plaintiff entered into a Subcontract Agreement with Restoration on September 10, 2014 in connection with the Project in the amount of One Million, Eighty Two Thousand, Three Hundred Forty Two and 10/100 Dollars ($1,082,342.10). (*Exhibit A).* Payment has been made to Plaintiff in the amount of One Million, Ninety Six Thousand, Five Hundred Sixty Nine and 19/100 Dollars ($1,096,569.19), an overpayment of Fourteen Thousand, Two Hundred Twenty Seven and 09/100 Dollars ($14,227.09). Currently, the Department of Veteran's Affairs is retaining Ninety Thousand, Eight Hundred Eighty Seven and 08/100 Dollars ($90.887.08) of contract funds due Restoration under the Contract.

Plaintiff's Complaint alleges that Restoration has failed to pay the contract balances due under the Subcontract Agreement and asserts additional claims against the Defendants, Reuben Mark Ward

EXHIBIT N

and Lynnette Pennington Ward arising out of and involving said Subcontract Agreement.

Plaintiff filed this lawsuit on March 7, 2016. Simultaneously with filing the lawsuit, Plaintiff filed a Motion to Stay and to Compel on March 7, 2016. The basis of Plaintiff's Motion to Stay and to Compel was that the Subcontract Agreement contained mandatory mediation/arbitration provisions requiring the Court to stay the litigation and the parties to mediate and, if necessary, arbitrate all claims contained in Plaintiff's lawsuit.

Plaintiff simultaneously served Defendants with both the Complaint and Motion to Stay and to Compel on March 14, 2016.

Plaintiff filed a Motion to Refer to the Master in Equity and for Entry of Default on April 18, 2016. The Court entered default against the Defendants on April 21, 2016. The Defendants have no record and no recollection of receiving: (1) the Motion to Refer to the Master in Equity and for Entry of Default or (2) the Order for Entry of Default and Referral to the Master in Equity.

On June 2, 2016 at 6:30 pm, the Defendants were served with a Notice of default damages hearing. The Defendants were unaware of the default status of the case and the scheduling of the damages hearing until they received this hearing Notice on June 2, 2016. Upon receipt of this Notice, the Defendants immediately retained legal counsel on June 3, 2016 and, through said counsel, filed their Motion to Set Aside Entry of Default.

LEGAL AUTHORITIES

A. Rule 55 (c), SCRCP

The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 753 S.E. 2d 537 (2014). "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E. 2d 885, 888 (2009). "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted." *White Oak Manor*, 407 S.C. at ___, 753 S.E.2d at 542. In applying this standard, Rule 55(c) "is liberally construed to promote justice and dispose of cases on the merits." *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 463 S.E. 2d 636, 638

(Ct. App. 1995).

LEGAL ANALYSIS

A. There is good cause for Defendants' brief delay in appearing in this action and vacation of the default entry will serve the interests of justice.

In the present case, the Defendants did not file a timely response to the Complaint for the reasons stated in the Affidavit of Reuben Mark Ward, dated June 3, 2016. The Defendants' omission was unintentional and the result of a good faith misunderstanding of the status of Defendants' arrangements with The Hanover Insurance Company ("Hanover") and the relation of Plaintiff's lawsuit thereto.

The Defendants are not attorneys and did not understand that Plaintiff's lawsuit was separate and apart from the bond claims that they have been working directly with Hanover to address. The Defendants' misunderstanding in this regard was innocent and carried no intention of gaining an unfair advantage over the Plaintiff or delaying legal proceedings. Upon learning of their error, Plaintiffs immediately retained legal counsel to appear and respond on their behalf in this matter.

Furthermore, the law does not favor defaults. As such, Rule 55(c) is liberally construed to promote justice and dispose of cases on the merits. *Dixon*, 320 S.C. at ___, 463 S.E. 2d at 638. The Defendants' short delay in appearing in and responding to Plaintiff's lawsuit constitutes no prejudice to the Plaintiff. The Defendants have asserted various defenses to Plaintiff's lawsuit, which if prevailed upon, would render a verdict contrary to the result reached by the entry of default.

For these reasons, and in light of the Defendants' good faith explanation for the default, vacating the entry of default would serve the interests of justice and promote disposition of the case on the merits.

B. The Defendants promptly and timely filed their motion seeking relief from the Entry of Default.

The Plaintiff filed a Motion to Refer to the Master In Equity and for Entry of Default on April 18, 2016. Thereafter, the Court entered default against the Defendants on April 21, 2016. The Defendants have no record and no recollection of receiving: (1) the Motion to Refer to the Master in Equity and for Entry of Default or (2) the Order for Entry of Default and Referral to the Master in

Equity. *Affidavit of Reuben Mark Ward, dated June 3, 2016.*

On June 2, 2016 at 6:30 pm, the Defendants were served with the Notice of the default damages hearing. *Affidavit of Reuben Mark Ward, dated June 3, 2016.* The Notice scheduled the default damages hearing for the morning of June 6, 2016. The Defendants retained legal counsel on June 3, 2016, the very next day after being served with the default damages hearing Notice the night before. The Defendants' counsel immediately appeared on behalf of Defendants and filed the instant Motion to Set Aside Entry of Default on the afternoon of June 3, 2016.

As established by the above timeline, the Defendants took immediate action upon learning of the default status and receipt of notice of the damages hearing. This action included the retention of defense counsel within 24 hours of becoming aware of the default status and damages hearing followed by the immediate filing of the Motion to Set Aside Entry of Default. Thus, the Defendants satisfied the good cause timely motion filing requirement under Rule 55(c), SCRCP.

C. The Defendants have a meritorious defense to the Plaintiff's lawsuit.

The Defendants' defenses to the Plaintiff's lawsuit, include, but are not limited to the following:

(1): The contract giving rise to Plaintiff's Complaint contains mandatory mediation/arbitration provisions. These provisions require all claims arising out of or related to the contract to be mediated, and if not resolved by mediation, to be resolved by binding arbitration. As such, the Court lacks subject matter jurisdiction of this matter and must stay this action and submit the matter to mediation, and if necessary, binding arbitration. Rule 55(c), SCRCP; *See also, Defendants' Motion to Stay and to Compel (and authorities cited therein); Plaintiff's Motion to Stay and to Compel.*

(2): Plaintiff has been paid in full under the Subcontract Agreement; in fact, Plaintiff has been overpaid by Fourteen Thousand, Two Hundred Twenty Seven and 09/110 Dollars ($14,227.09).

(3) There is no agreement for profit sharing between the parties. Per the Teaming Agreement, entered into between Restoration and Plaintiff in connection with the Project, "[n]othing herein shall be construed as providing for the sharing of profits or losses arising out of the efforts of either or both of the Parties; except as may be provided for in any resultant contractual arrangement agreed to between the Parties." *(Exhibit B).* There is no provision for profit sharing contained within the Subcontract Agreement.

(4) The Payment Bond delineates the obligation for payment of Project subcontractors and vendors as that of Restoration, as Principal, and The Hanover Insurance Company, as Surety. *(Exhibit C).* Restoration disputes the claims made by many of the subcontractors which have made claims against the Payment Bond.

(5) Restoration has not paid all subcontractors and vendors in full as the Department of Veterans' Affairs is retaining funds due under the Contract.

(6) The Teaming Agreement includes a waiver of damages, specifically: "ARTICLE 9 DAMAGES – Neither Party shall be liable to the other for any indirect, special or consequential losses, whether arising in contract, tort (including negligence), or otherwise."

If Defendants prevail on any of these defenses, the outcome would be contrary to the result rendered by the entry of default. Therefore, the Defendants have set forth a meritorious defense sufficient to satisfy the good cause standard of Rule 55(c), SCRCP.

D. The Plaintiff will not suffer prejudice if Entry of Default is set aside.

The Defendants responded to Plaintiff's lawsuit with the retention of counsel and filing of the instant Motion to Set Aside Entry of Default on June 3, 2016. The Defendants took these actions within 51 days of the date on which Defendants' Answer to Plaintiff's Complaint was originally due, within 43 days of the entry of default, and within 24 hours of first learning of the default status and damages hearing. The Defendants' delay was short and creates no prejudice to the Plaintiff's ability to litigate the case. This brief delay has caused no tangible harm to Plaintiff such as a loss of evidence, increased difficulties of discovery, opportunity for fraud or collusion, undue expense or damage to the Plaintiff's legal position.

In fact, the corollary to the lack of prejudice to the Plaintiff is the extreme prejudice the Defendants will suffer if the default is not lifted and the court proceeds with a default damages hearing. In this scenario, the Plaintiff will have received significant undue advantage in that a litigated result will have been achieved by the Plaintiff in a case which Plaintiff acknowledges is governed by mandatory alternative dispute resolution and in which the court has no subject matter jurisdiction. *See, Defendants' Motion to Stay and to Compel (and authorities cited therein); Plaintiff's Motion to Stay and to Compel.*

As no prejudice will result to Plaintiff in setting aside the entry of default, this good cause factor under Rule 55(c), SCRCP is satisfied.

CONCLUSION

Based on the foregoing, the Defendants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward are entitled to an Order Setting Aside the Entry of Default pursuant to Rule 55(c), SCRCP.

For these reasons, the Defendants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward hereby respectfully request that their Motion to Set Aside Entry of Default be granted.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

By: A Bright Ariail

A Bright Ariail
125E Wappoo Creek Drive, Suite 202
Charleston, SC 29412

ATTORNEY FOR RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD and LYNNETTE PENNINGTON WARD

July 14, 2016
Charleston, SC 29412

AIA Document A401™ – 2007

Standard Form of Agreement Between Contractor and Subcontractor

AGREEMENT made as of the 10 day of September in the year 2014
(In words, indicate day, month and year.)

BETWEEN the Contractor:
(Name, legal status, address and other information)

Restoration Specialists LLC a South Carolina Corporation
1042-A East Montague Ave.
Charleston, SC 29405

and the Subcontractor:
(Name, legal status, address and other information)

Palmetto Construction Group, LLC
2265 Clements Ferry Road, Suite 204
Charleston, SC 29492

The Contractor has made a contract for construction (hereinafter, the Prime Contract) dated: March 29, 2012

with the Owner:
(Name, legal status, address and other information)

Department of Veterans Affairs / Charlie Norwood VAMC
950 15th Street
Augusta, GA 30901

for the following Project:
(Name, location and detailed description)

CHARLIE NORWOOD VAMC PARKING GARAGE
950 15th Street
August, GA 30901
Phase I – Uptown Temporary Parking Lot
Phase II – Downtown Parking Garage Sitework

The Prime Contract provides for the furnishing of labor, materials, equipment and services in connection with the construction of the Project. A copy of the Prime Contract, consisting of the Agreement Between Owner and Contractor (from which compensation amounts may be deleted) and the other Contract Documents enumerated therein, has been made available to the Subcontractor.

The Architect for the Project:
(Name, legal status, address and other information)

Structured Parking Solutions
21 South Tarragona Street, Suite 101

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

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

AIA Document A201™–2007, General Conditions of the Contract for Construction, is adopted in this document by reference.

This document has been approved and endorsed by the Associated Specialty Contractors, Inc.

Blindtek #CUEX A

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Pensacola, FL 32502

The Contractor and the Subcontractor agree as follows.

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ARTICLE 1 THE SUBCONTRACT DOCUMENTS

§ 1.1 The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement; (4) other documents listed in Article 16 of this Agreement; and (5) Modifications to this Subcontract issued after execution of this Agreement. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein. The Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Subcontract Documents, other than Modifications issued subsequent to the execution of this Agreement, appears in Article 16.

§ 1.2 Except to the extent of a conflict with a specific term or condition contained in the Subcontract Documents, the General Conditions governing this Subcontract shall be the AIA Document A201™–2007, General Conditions of the Contract for Construction.

§ 1.3 The Subcontract may be amended or modified only by a Modification. The Subcontract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and the Subcontractor, (2) between the Owner and the Subcontractor, or (3) between any persons or entities other than the Contractor and Subcontractor.

§ 1.4 The Contractor shall make available the Subcontract Documents to the Subcontractor prior to execution of this Agreement, and thereafter, upon request, but the Contractor may charge the Subcontractor for the reasonable cost of reproduction.

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ARTICLE 2 MUTUAL RIGHTS AND RESPONSIBILITIES

The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201–2007 apply to this Agreement pursuant to Section 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

ARTICLE 3 CONTRACTOR

§ 3.1 SERVICES PROVIDED BY THE CONTRACTOR

§ 3.1.1 The Contractor shall cooperate with the Subcontractor in scheduling and performing the Contractor's Work to avoid conflicts or interference in the Subcontractor's Work and shall expedite written responses to submittals made by the Subcontractor in accordance with Section 4.1 and Article 5. Promptly after execution of this Agreement, the Contractor shall provide the Subcontractor copies of the Contractor's construction schedule and schedule of submittals, together with such additional scheduling details as will enable the Subcontractor to plan and perform the Subcontractor's Work properly. The Contractor shall promptly notify the Subcontractor of subsequent changes in the construction and submittal schedules and additional scheduling details.

§ 3.1.2 The Contractor shall provide suitable areas for storage of the Subcontractor's materials and equipment during the course of the Work. Additional costs to the Subcontractor resulting from relocation of such storage areas at the direction of the Contractor, except as previously agreed upon, shall be reimbursed by the Contractor.

§ 3.1.3 Except as provided in Article 14, the Contractor's equipment will be available to the Subcontractor only at the Contractor's discretion and on mutually satisfactory terms.

§ 3.2 COMMUNICATIONS

§ 3.2.1 The Contractor shall promptly make available to the Subcontractor information, including information received from the Owner, that affects this Subcontract and that becomes available to the Contractor subsequent to execution of this Subcontract.

§ 3.2.2 The Contractor shall not give instructions or orders directly to the Subcontractor's employees or to the Subcontractor's Sub-subcontractors or material suppliers unless such persons are designated as authorized representatives of the Subcontractor.

§ 3.2.3 The Contractor shall permit the Subcontractor to request directly from the Architect information regarding the percentages of completion and the amount certified on account of Work done by the Subcontractor.

§ 3.2.4 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Contractor, a subcontractor or anyone directly or indirectly employed by them (other than the Subcontractor), the Contractor shall, prior to harmful exposure of the Subcontractor's employees to such substance, give written notice of the chemical composition thereof to the Subcontractor in sufficient detail and time to permit the Subcontractor's compliance with such laws.

§ 3.2.5 The Contractor shall furnish to the Subcontractor within 30 days after receipt of a written request, or earlier if so required by law, information necessary and relevant for the Subcontractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property, usually referred to as the site, on which the Project is located and the Owner's interest therein.

§ 3.2.6 If the Contractor asserts or defends a claim against the Owner that relates to the Work of the Subcontractor, the Contractor shall promptly make available to the Subcontractor all information relating to the portion of the claim that relates to the Work of the Subcontractor.

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§ 3.3 CLAIMS BY THE CONTRACTOR

§ 3.3.1 Liquidated damages for delay, if provided for in Section 9.3 of this Agreement, shall be assessed against the Subcontractor only to the extent caused by the Subcontractor or any person or entity for whose acts the Subcontractor may be liable, and in no case for delays or causes arising outside the scope of this Subcontract.

§ 3.3.2 The Contractor's claims for the costs of services or materials provided due to the Subcontractor's failure to execute the Work shall require

.1 seven days' written notice prior to the Contractor's providing services or materials, except in an emergency; and

.2 written compilations to the Subcontractor of services and materials provided by the Contractor and charges for such services and materials no later than the fifteenth day of the month following the Contractor's providing such services or materials.

.3 Liquidated Damages will be assessed at $ N/A per calendar day past the established completion date.

§ 3.4 CONTRACTOR'S REMEDIES

If the Subcontractor defaults or neglects to carry out the Work in accordance with this Agreement and fails within five working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by appropriate Modification, and without prejudice to any other remedy the Contractor may have, make good such deficiencies and may deduct the reasonable cost thereof from the payments then or thereafter due the Subcontractor.

ARTICLE 4 SUBCONTRACTOR

§ 4.1 EXECUTION AND PROGRESS OF THE WORK

§ 4.1.1 For all Work the Subcontractor intends to subcontract, the Subcontractor shall enter into written agreements with Sub-subcontractors performing portions of the Work of this Subcontract by which the Subcontractor and the Sub-subcontractor are mutually bound, to the extent of the Work to be performed by the Sub-subcontractor, assuming toward each other all obligations and responsibilities that the Contractor and Subcontractor assume toward each other and having the benefit of all rights, remedies and redress each against the other that the Contractor and Subcontractor have by virtue of the provisions of this Agreement.

§ 4.1.2 The Subcontractor shall supervise and direct the Subcontractor's Work, and shall cooperate with the Contractor in scheduling and performing the Subcontractor's Work to avoid conflict, delay in or interference with the Work of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.1.3 The Subcontractor shall promptly submit Shop Drawings, Product Data, Samples and similar submittals required by the Subcontract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Contractor or other subcontractors.

§ 4.1.4 The Subcontractor shall furnish to the Contractor periodic progress reports on the Work of this Subcontract as mutually agreed, including information on the status of materials and equipment that may be in the course of preparation, manufacture, or transit.

§ 4.1.5 The Subcontractor agrees that the Contractor and the Architect each have the authority to reject Work of the Subcontractor that does not conform to the Prime Contract. The Architect's decisions on matters relating to aesthetic effect shall be final and binding on the Subcontractor if consistent with the intent expressed in the Prime Contract.

§ 4.1.6 The Subcontractor shall pay for all materials, equipment and labor used in connection with the performance of this Subcontract through the period covered by previous payments received from the Contractor, and shall furnish satisfactory evidence, when requested by the Contractor, to verify compliance with the above requirements.

§ 4.1.7 The Subcontractor shall take necessary precautions to protect properly the work of other subcontractors from damage caused by operations under this Subcontract.

§ 4.1.8 The Subcontractor shall cooperate with the Contractor, other subcontractors, the Owner, and separate contractors whose work might interfere with the Subcontractor's Work. The Subcontractor shall participate in the preparation of coordinated drawings in areas of congestion, if required by the Prime Contract, specifically noting and

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advising the Contractor of potential conflicts between the Work of the Subcontractor and that of the Contractor, other subcontractors, the Owner, or separate contractors.

§ 4.2 PERMITS, FEES, NOTICES, AND COMPLIANCE WITH LAWS

§ 4.2.1 The Subcontractor shall give notices and comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on performance of the Work of this Subcontract. The Subcontractor shall secure and pay for permits, fees, licenses and inspections by government agencies necessary for proper execution and completion of the Subcontractor's Work, the furnishing of which is required of the Contractor by the Prime Contract.

§ 4.2.2 The Subcontractor shall comply with Federal, state and local tax laws, social security acts, unemployment compensation acts and workers' compensation acts insofar as applicable to the performance of this Subcontract.

§ 4.3 SAFETY PRECAUTIONS AND PROCEDURES

§ 4.3.1 The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime Contract. The Subcontractor shall report to the Contractor within three days an injury to an employee or agent of the Subcontractor which occurred at the site.

§ 4.3.2 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Subcontractor, the Subcontractor's Sub-subcontractors or anyone directly or indirectly employed by them, the Subcontractor shall, prior to harmful exposure of any employees on the site to such substance, give written notice of the chemical composition thereof to the Contractor in sufficient detail and time to permit compliance with such laws by the Contractor, other subcontractors and other employers on the site.

§ 4.3.3 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a hazardous material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Subcontractor, the Subcontractor shall, upon recognizing the condition, immediately stop Work in the affected area and promptly report the condition to the Contractor in writing. When the material or substance has been rendered harmless, the Subcontractor's Work in the affected area shall resume upon written agreement of the Contractor and Subcontractor. The Subcontract Time shall be extended appropriately and the Subcontract Sum shall be increased in the amount of the Subcontractor's reasonable additional costs of demobilization, delay and remobilization, which adjustments shall be accomplished as provided in Article 5 of this Agreement.

§ 4.3.4 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Subcontractor, the Subcontractor's Sub-subcontractors, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 4.3.3 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

§ 4.3.5 The Subcontractor shall indemnify the Contractor for the cost and expense the Contractor incurs (1) for remediation of a material or substance brought to the site and negligently handled by the Subcontractor or (2) where the Subcontractor fails to perform its obligations under Section 4.3.3, except to the extent that the cost and expense are due to the Contractor's fault or negligence.

§ 4.4 CLEANING UP

§ 4.4.1 The Subcontractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations performed under this Subcontract. The Subcontractor shall not be held responsible for conditions caused by other contractors or subcontractors.

§ 4.4.2 As provided under Section 3.3.2, if the Subcontractor fails to clean up as provided in the Subcontract Documents, the Contractor may charge the Subcontractor for the Subcontractor's appropriate share of cleanup costs.

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§ 4.5 WARRANTY

The Subcontractor warrants to the Owner, Architect, and Contractor that materials and equipment furnished under this Subcontract will be of good quality and new unless the Subcontract Documents require or permit otherwise. The Subcontractor further warrants that the Work will conform to the requirements of the Subcontract Documents and will be free from defects, except for those inherent in the quality of the Work the Subcontract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Subcontractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Subcontractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect and Contractor, the Subcontractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 4.6 INDEMNIFICATION

§ 4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6.

§ 4.6.2 In claims against any person or entity indemnified under this Section 4.6 by an employee of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 4.6.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor or the Subcontractor's Sub-subcontractors under workers' compensation acts, disability benefit acts or other employee benefit acts.

§ 4.7 REMEDIES FOR NONPAYMENT

If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate Modification, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization.

ARTICLE 5 CHANGES IN THE WORK

§ 5.1 The Owner may make changes in the Work by issuing Modifications to the Prime Contract. Upon receipt of such a Modification issued subsequent to the execution of the Subcontract Agreement, the Contractor shall promptly notify the Subcontractor of the Modification. Unless otherwise directed by the Contractor, the Subcontractor shall not thereafter order materials or perform Work that would be inconsistent with the changes made by the Modification to the Prime Contract.

§ 5.2 The Subcontractor may be ordered in writing by the Contractor, without invalidating this Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions, deletions or other revisions, including those required by Modifications to the Prime Contract issued subsequent to the execution of this Agreement, the Subcontract Sum and the Subcontract Time being adjusted accordingly. The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for adjustment to the Subcontract Sum and Subcontract Time for such revised Work in a manner consistent with requirements of the Subcontract Documents.

§ 5.3 The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time

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by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

ARTICLE 6 MEDIATION AND BINDING DISPUTE RESOLUTION

§ 6.1 MEDIATION

§ 6.1.1 Any claim arising out of or related to this Subcontract, except those waived in this Subcontract, shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 6.1.2 The parties shall endeavor to resolve their claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to this Subcontract and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section, the parties may nonetheless proceed to the selection of the arbitrators(s) and agree upon a schedule for later proceedings.

§ 6.1.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 6.2 BINDING DISPUTE RESOLUTION

For any claim subject to, but not resolved by mediation pursuant to Section 6.1, the method of binding dispute resolution shall be as follows:
(Check the appropriate box. If the Contractor and Subcontractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, claims will be resolved by litigation in a court of competent jurisdiction.)

[X] Arbitration pursuant to Section 6.3 of this Agreement

[ ] Litigation in a court of competent jurisdiction

[ ] Other: *(Specify)*

§ 6.3 ARBITRATION

§ 6.3.1 If the Contractor and Subcontractor have selected arbitration as the method of binding dispute resolution in Section 6.2, any claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Subcontract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded.

§ 6.3.2 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim.

§ 6.3.3 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

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§ 6.3.4 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a claim not described in the written consent.

§ 6.3.5 The Contractor and Subcontractor grant to any person or entity made a party to an arbitration conducted under this Section 6.3, whether by joinder or consolidation, the same rights of joinder and consolidation as the Contractor and Subcontractor under this Agreement.

§ 6.3.6 This agreement to arbitrate and any other written agreement to arbitrate with an additional person or persons referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 7 TERMINATION, SUSPENSION OR ASSIGNMENT OF THE SUBCONTRACT

§ 7.1 TERMINATION BY THE SUBCONTRACTOR

The Subcontractor may terminate the Subcontract for the same reasons and under the same circumstances and procedures with respect to the Contractor as the Contractor may terminate with respect to the Owner under the Prime Contract, or for nonpayment of amounts due under this Subcontract for 60 days or longer. In the event of such termination by the Subcontractor for any reason which is not the fault of the Subcontractor, Sub-subcontractors or their agents or employees or other persons performing portions of the Work under contract with the Subcontractor, the Subcontractor shall be entitled to recover from the Contractor payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

§ 7.2 TERMINATION BY THE CONTRACTOR

§ 7.2.1 If the Subcontractor repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Subcontract and fails within a ten-day period after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by written notice to the Subcontractor and without prejudice to any other remedy the Contractor may have, terminate the Subcontract and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

§ 7.2.2 If the Owner terminates the Prime Contract for the Owner's convenience, the Contractor shall promptly deliver written notice to the Subcontractor.

§ 7.2.3 Upon receipt of written notice of termination, the Subcontractor shall

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

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

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

§ 7.2.4 In case of such termination for the Owner's convenience, the Subcontractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

§ 7.3 SUSPENSION BY THE CONTRACTOR FOR CONVENIENCE

§ 7.3.1 The Contractor may, without cause, order the Subcontractor in writing to suspend, delay or interrupt the Work of this Subcontract in whole or in part for such period of time as the Contractor may determine. In the event of suspension ordered by the Contractor, the Subcontractor shall be entitled to an equitable adjustment of the Subcontract Time and Subcontract Sum.

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§ 7.3.2 An adjustment shall be made for increases in the Subcontract Time and Subcontract Sum, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent that

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

.2 an equitable adjustment is made or denied under another provision of this Subcontract.

§ 7.4 ASSIGNMENT OF THE SUBCONTRACT

§ 7.4.1 In the event the Owner terminates the Prime Contract for cause, this Subcontract is assigned to the Owner pursuant to Section 5.4 of AIA Document A201–2007 provided the Owner accepts the assignment.

§ 7.4.2 Without the Contractor's written consent, the Subcontractor shall not assign the Work of this Subcontract, subcontract the whole of this Subcontract, or subcontract portions of this Subcontract.

ARTICLE 8 THE WORK OF THIS SUBCONTRACT

The Subcontractor shall execute the following portion of the Work described in the Subcontract Documents, including all labor, materials, equipment, services and other items required to complete such portion of the Work, except to the extent specifically indicated in the Subcontract Documents to be the responsibility of others.
(Insert a precise description of the Work of this Subcontract, referring where appropriate to numbers of Drawings, sections of Specifications and pages of Addenda, Modifications and accepted alternates.)

ARTICLE 9 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 9.1 Subcontract Time is the period of time, including authorized adjustments, allotted in the Subcontract Documents for Substantial Completion of the Work described in the Subcontract Documents. The Subcontractor's date of commencement is the date from which the Subcontract Time of Section 9.3 is measured; it shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Contractor.
(Insert the date of commencement, if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)

§ 9.2 Unless the date of commencement is established by a notice to proceed issued by the Contractor, or the Contractor has commenced visible Work at the site under the Prime Contract, the Subcontractor shall notify the Contractor in writing not less than five days before commencing the Subcontractor's Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

§ 9.3 The Work of this Subcontract shall be substantially completed not later than .
(Insert the calendar date or number of calendar days after the Subcontractor's date of commencement. Also insert any requirements for earlier substantial completion of certain portions of the Subcontractor's Work, if not stated elsewhere in the Subcontract Documents.)

Portion of Work	Substantial Completion Date
Provide supervision and management of concrete subcontractor (Atlantic Concrete Contractors). See PCG Subcontract Breakdown spreadsheet dated 9/5/14 provided, attached. Note: It is the subcontractor's responsibility to visit Submittal Exchange (www.submittalexchange.com) to access and verify they are using the latest revisions of all contract documents. An email invitation will be sent to each subcontractor's point of contact to initiate	Commence Work: Mobilize 9/22/14 Completion Date: Final Completion 7/7/15

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access to the site. ALL SUBMITTALS FROM SUBCONTRACTORS ARE TO BE SUBMITTED TO RESTORATION SPECIALISTS BY UPLOADING PDF DOCUMENTS TO THE SUBMITTAL EXHANGE SITE.
Schedule: As follows
Submittals: Submittals are due no later than 9/23/14 (submitted electronically via. Submittal Exchange)

, subject to adjustments of this Subcontract Time as provided in the Subcontract Documents.
(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)

§ 9.4 With respect to the obligations of both the Contractor and the Subcontractor, time is of the essence of this Subcontract.

§ 9.5 No extension of time will be valid without the Contractor's written consent after claim made by the Subcontractor in accordance with Section 5.3.

ARTICLE 10 SUBCONTRACT SUM

§ 10.1 The Contractor shall pay the Subcontractor in current funds for performance of the Subcontract the Subcontract Sum of One million eighty two thousand three hundred forty two dollars and 10/100, ($ 1,082,342.10), subject to additions and deductions as provided in the Subcontract Documents.

§ 10.2 The Subcontract Sum is based upon the following alternates, if any, which are described in the Subcontract Documents and have been accepted by the Owner and the Contractor:
(Insert the numbers or other identification of accepted alternates.)

§ 10.3 Unit prices, if any:
(Identify and state the unit price, and state the quantity limitations, if any, to which the unit price will be applicable.)

Item	Units and Limitations	Price Per Unit ($0.00)
N/A		

§ 10.4 Allowances included in the Subcontract Sum, if any:
(Identify allowance and state exclusions, if any, from the allowance price.)

Item	Price
N/A	

ARTICLE 11 PROGRESS PAYMENTS

§ 11.1 Based upon applications for payment submitted to the Contractor by the Subcontractor, corresponding to applications for payment submitted by the Contractor to the Government, and certificates for payment issued by the Government, the Contractor shall make progress payments on account of the Subcontract Sum to the Subcontractor as provided below and elsewhere in the Subcontract Documents. Unless the Contractor provides the Government with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor and Subcontractor for Work properly performed by their contractors and suppliers shall be held by the Contractor and Subcontractor for those contractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor or Subcontractor for which payment was made to the Contractor by the Owner or to the Subcontractor by the Contractor, as applicable. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor or Subcontractor, shall create any fiduciary liability or tort liability on the

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part of the Contractor or Subcontractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor or Subcontractor for breach of the requirements of this provision.

§ 11.2 The period covered by each application for payment shall be one calendar month ending on the last day of the month, or as follows:

§ 11.3 Provided an application for payment is received by the Contractor not later than the 25th day of a month, the Contractor shall include the Subcontractor's Work covered by that application in the next application for payment which the Contractor is entitled to submit to the Government. The Contractor shall pay the Subcontractor each progress payment no later than seven working days after the Contractor receives payment from the Government.

§ 11.4 If the Subcontractor's application for payment is received by the Contractor after the application date fixed above, the Subcontractor's Work covered by it shall be included by the Contractor in the next application for payment submitted to the Architect.

§ 11.5 The Subcontractor shall submit to the Contractor a schedule of values prior to submitting the Subcontractor's first Application for Payment. Each subsequent application for payment shall be based upon the most recent schedule of values submitted by the Subcontractor in accordance with the Subcontract Documents. The schedule of values shall allocate the entire Subcontract Sum among the various portions of the Subcontractor's Work and be prepared in such form and supported by such data to substantiate its accuracy as the Contractor may require. This schedule, unless objected to by the Contractor, shall be used as a basis for reviewing the Subcontractor's applications for payment.

§ 11.6 Applications for payment submitted by the Subcontractor shall indicate the percentage of completion of each portion of the Subcontractor's Work as of the end of the period covered by the application for payment.

§ 11.7 Subject to the provisions of the Subcontract Documents, the amount of each progress payment shall be computed as set forth in the sections below.

§ 11.7.1 Take that portion of the Subcontract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Subcontractor's Work by the share of the total Subcontract Sum allocated to that portion of the Subcontractor's Work in the schedule of values, less that percentage actually retained, if any, from payments to the Contractor on account of the Work of the Subcontractor. Pending final determination of cost to the Contractor of changes in the Work that have been properly authorized by the Contractor, amounts not in dispute shall be included to the same extent provided in the Prime Contract, even though the Subcontract Sum has not yet been adjusted;

§ 11.7.2 Add that portion of the Subcontract Sum properly allocable to materials and equipment delivered and suitably stored at the site by the Subcontractor for subsequent incorporation in the Subcontractor's Work or, if approved by the Contractor, suitably stored off the site at a location agreed upon in writing, less the same percentage retainage required by the Prime Contract to be applied to such materials and equipment in the Contractor's application for payment;

§ 11.7.3 Subtract the aggregate of previous payments made by the Contractor; and

§ 11.7.4 Subtract amounts, if any, calculated under Section 11.7.1 or 11.7.2 that are related to Work of the Subcontractor for which the Architect has withheld or nullified, in whole or in part, a certificate of payment for a cause that is the fault of the Subcontractor.

§ 11.8 Upon the partial or entire disapproval by the Contractor of the Subcontractor's application for payment, the Contractor shall provide written notice to the Subcontractor. When the basis for the disapproval has been remedied, the Subcontractor shall be paid the amounts withheld.

§ 11.9 SUBSTANTIAL COMPLETION

When the Subcontractor's Work or a designated portion thereof is substantially complete and in accordance with the requirements of the Prime Contract, the Contractor shall, upon application by the Subcontractor, make prompt application for payment for such Work. Within 30 days following issuance by the Architect of the certificate for

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payment covering such substantially completed Work, the Contractor shall, to the full extent allowed in the Prime Contract, make payment to the Subcontractor, deducting any portion of the funds for the Subcontractor's Work withheld in accordance with the certificate to cover costs of items to be completed or corrected by the Subcontractor. Such payment to the Subcontractor shall be the entire unpaid balance of the Subcontract Sum if a full release of retainage is allowed under the Prime Contract for the Subcontractor's Work prior to the completion of the entire Project. If the Prime Contract does not allow for a full release of retainage, then such payment shall be an amount which, when added to previous payments to the Subcontractor, will reduce the retainage on the Subcontractor's substantially completed Work to the same percentage of retainage as that on the Contractor's Work covered by the certificate.

ARTICLE 12 FINAL PAYMENT

§ 12.1 Final payment, constituting the entire unpaid balance of the Subcontract Sum, shall be made by the Contractor to the Subcontractor when the Subcontractor's Work is fully performed in accordance with the requirements of the Subcontract Documents, the Architect has issued a certificate for payment covering the Subcontractor's completed Work and the Contractor has received payment from the Owner. If, for any cause which is not the fault of the Subcontractor, a certificate for payment is not issued or the Contractor does not receive timely payment or does not pay the Subcontractor within seven days after receipt of payment from the Owner, final payment to the Subcontractor shall be made upon demand.
(Insert provisions for earlier final payment to the Subcontractor, if applicable.)

§ 12.2 Before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied. Acceptance of final payment by the Subcontractor shall constitute a waiver of claims by the Subcontractor, except those previously made in writing and identified by the Subcontractor as unsettled at the time of final application for payment.

ARTICLE 13 INSURANCE AND BONDS

§ 13.1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability as will protect the Subcontractor from claims that may arise out of, or result from, the Subcontractor's operations and completed operations under the Subcontract:

Type of insurance or bond	Limit of liability or bond amount ($1,000,000.00 per incident)
Commercial General Liability Insurance	$ 1,000,000.00 (per incident)
Business Automobile Liability Insurance	$ 1,000,000.00 (per incident)
Commercial Umbrella Coverage	$ 1,000,000.00 (limits must include as insureds all entities that are additional insureds on the CGL)
Worker's Compensation and Employer's Liability Insurance	$ 1,000,000.00 (per incident & per employee)

§ 13.2 Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Subcontractor's Work until the date of final payment and termination of any coverage required to be maintained after final payment to the Subcontractor, and, with respect to the Subcontractor's completed operations coverage, until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Prime Contract.

§ 13.3 Certificates of insurance acceptable to the Contractor shall be filed with the Contractor prior to commencement of the Subcontractor's Work. These certificates and the insurance policies required by this Article 13 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final application for payment as required in Article 12. If any information concerning reduction of coverage is not furnished by the insurer, it shall be furnished by the Subcontractor with reasonable promptness according to the Subcontractor's information and belief.

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§ 13.4 The Subcontractor shall cause the commercial liability coverage required by the Subcontract Documents to include: (1) the Contractor, the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's operations; and (2) the Contractor as an additional insured for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's completed operations.

§ 13.5 The Contractor shall furnish to the Subcontractor satisfactory evidence of insurance required of the Contractor under the Prime Contract.

§ 13.6 The Contractor shall promptly, upon request of the Subcontractor, furnish a copy or permit a copy to be made of any bond covering payment of obligations arising under the Subcontract.

§ 13.7 Performance Bond and Payment Bond:
(If the Subcontractor is to furnish bonds, insert the specific requirements here.)

Bond type	Bond amount ($0.00)	Bond delivery date	Bond form
N/A			

§ 13.8 PROPERTY INSURANCE
§ 13.8.1 When requested in writing, the Contractor shall provide the Subcontractor with copies of the property and equipment policies in effect for the Project. The Contractor shall notify the Subcontractor if the required property insurance policies are not in effect.

§ 13.8.2 If the required property insurance is not in effect for the full value of the Subcontractor's Work, then the Subcontractor shall purchase insurance for the value of the Subcontractor's Work, and the Subcontractor shall be reimbursed for the cost of the insurance by an adjustment in the Subcontract Sum.

§ 13.8.3 Property insurance for the Subcontractor's materials and equipment required for the Subcontractor's Work, stored off site or in transit and not covered by the Project property insurance, shall be paid for through the application for payment process.

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

ARTICLE 14 TEMPORARY FACILITIES AND WORKING CONDITIONS
§ 14.1 The Contractor shall furnish and make available at no cost to the Subcontractor the Contractor's temporary facilities, equipment and services, except as noted below:

Temporary Facility, Equipment or Service	Cost, if any ($0.00)

§ 14.2 Specific working conditions:
(Insert any applicable arrangements concerning working conditions and labor matters for the Project.)

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ARTICLE 15 MISCELLANEOUS PROVISIONS

§ 15.1 Where reference is made in this Subcontract to a provision of another Subcontract Document, the reference refers to that provision as amended or supplemented by other provisions of the Subcontract Documents.

(Insert rate of interest agreed upon, if any.)

%

(Paragraphs deleted)

§ 15.3 Retainage and any reduction thereto are as follows:

0% (zero)

(Paragraph deleted)

ARTICLE 16 ENUMERATION OF SUBCONTRACT DOCUMENTS

§ 16.1 The Subcontract Documents, except for Modifications issued after execution of this Subcontract, are enumerated in the sections below.

§ 16.1.1 This executed AIA Document A401–2007, Standard Form of Agreement Between Contractor and Subcontractor.

§ 16.1.2 The Prime Contract, consisting of the Agreement between the Owner and Contractor dated as first entered above and the other Contract Documents enumerated in the Owner-Contractor Agreement.

§ 16.1.3 The following Modifications to the Prime Contract, if any, issued subsequent to the execution of the Owner-Contractor Agreement but prior to the execution of this Agreement:

Modification	Date

§ 16.1.4 Additional Documents, if any, forming part of the Subcontract Documents:

.1 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed by the parties, or the following:

.2 Other documents:
(List here any additional documents that are intended to form part of the Subcontract Documents. Requests for proposal and the Subcontractor's bid or proposal should be listed here only if intended to be made part of the Subcontract Documents.)

1. PCG Subcontract Breakdown
2. Atlantic Concrete Subcontract

This Contract / P.O. Number will be: 1401-010000-005
This Contract / P.O. # is to be referenced on all billings / invoices / submittals, etc.

This Agreement entered into as of the day and year first written above.

RESTORATION SPECIALISTS, LLC	PALMETTO CONSTRUCTION GROUP, LLC
CONTRACTOR *(Signature)*	SUBCONTRACTOR *(Signature)*
Mark Ward – Managing Member	Jay Hannegan - Vice President
(Printed name and title)	*(Printed name and title)*

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TEAMING AGREEMENT

This Agreement is made and entered into as of the 28th day of November, 2011, by and between Restoration Specialists, LLC, a Georgia limited liability company (hereinafter called "RS"), and Palmetto Construction Group, LLC, a South Carolina limited liability company (hereinafter called "PCG"), each a "Party" and together the "Parties", for the purpose of submitting a proposal for Solicitation Number VA-247-11-RP-0211 (hereinafter the "Services") to Department of Veteran Affairs (the "Customer") for the New SCIU Hospital Parking Deck Minor Project: 509-325 project (the "Project"). ***RS, cage code 5GXE1, is a "Verified" Service Disabled Veteran Owned Small Business and PCG, cage code 3P1G3, is a "Certified" Small Business. RS and PCG have a successful teaming record on previous contracts such as: FA4418-11-R-0017-0004***

ARTICLE 1 SUBMISSION OF PROPOSAL

RS and PCG shall each undertake to accomplish certain tasks in connection with the preparation of a proposal to be submitted to the Customer for the Project (the "Proposal"). The Proposal will identify RS as the prime contractor and PCG as the subcontractor that will perform the Services. The Proposal will be developed in conformance with the delineation of respective areas of responsibility and contract share set forth in Exhibit A. Both Parties have the right to determine the contents of the Proposal to the Customer as it relates to that Party. RS will be responsible for preparing the final copies of all Proposal documents and submitting the Proposal to the Customer.

ARTICLE 2 PERFORMANCE OF CONTRACTS

If RS is selected as the prime contractor as a result of the Proposal, RS and PCG will provide assistance and support to each other in the joint negotiation of the terms and conditions of the prime contract with Customer so as to obtain terms and conditions which are mutually agreeable to RS and PCG. Additionally, RS and PCG shall enter into a contractual arrangement between themselves on mutually acceptable terms and conditions. The Parties will endeavor to incorporate terms consistent with the Scope of Work substantially in accord with the provisions of Exhibit A and Exhibit B, Standard Subcontract Terms and Conditions, as may be modified subject to the terms and conditions described in the prime contract.

ARTICLE 3 EXCLUSIVE AGREEMENT

When mutually agreed to for a specific Project, to preserve the interests of the Parties hereto in the competition for such Project only, RS and PCG shall work exclusively with each other with respect to its area of responsibility and share of the contract in a proposal for the Project. RS and PCG acknowledge that it may be necessary to utilize other subcontractors on the team as may be mutually agreed.

ARTICLE 4 SCOPE OF AGREEMENT

This Agreement shall relate only to the solicitation specified herein, and nothing herein shall be deemed to:



(a) Confer any right or impose any obligation or restriction on either Party with respect to any other efforts or marketing activity at any time undertaken by either Party hereto, jointly or separately; or

(b) Preclude either Party hereto from soliciting or accepting any prime contract or subcontract from any third Party (or subcontractor of any tier) under any other solicitation during or after termination of this Agreement; or

(c) Limit the rights of either Party to promote, market, sell, lease, license or otherwise dispose of its standard products or services, except where such would conflict with the obligations of the Party under this Agreement.

ARTICLE 5 RELATIONSHIP

Nothing in this Agreement shall be deemed to constitute, create, give effect to, or otherwise recognize a joint venture, partnership, or formal business entity of any kind, and the rights and obligations of the Parties shall be limited to those expressly set forth herein. Nothing herein shall be construed as providing for the sharing of profits or losses arising out of the efforts of either or both of the Parties; except as may be provided for in any resultant contractual arrangement agreed to between the Parties. The cooperation of the Parties is for the purpose of complementing their respective capabilities in pursuit and execution of the subject solicitation.

ARTICLE 6 EXCHANGE OF CONFIDENTIAL INFORMATION

During the term of this Agreement, each Party agrees to receive from the other, cost, pricing and technical information and data, hereinafter referred to as "Data", for the purpose of responding to the request for proposal for the Project from the Customer. Such Data shall consist of that needed to satisfy the requirements of Exhibit "A" and Customer's request for proposal.

For a term of five (5) years from the date of this Agreement, each Party agrees to keep in confidence and to use its best efforts to prevent the disclosure to any person or persons outside its own organization all Data (i) which is designated in writing, by appropriate stamp (or legend) by the disclosing Party, to be of a proprietary or confidential nature, (ii) which is received from the disclosing Party under this Agreement, and (iii) which pertains to proprietary or confidential data regarding the disclosing Party's costs, pricing and technological techniques, processes, inventions, and research and development; provided, however, that neither Party shall be liable for use or disclosure of any such Data if the same:

(a) Is in the public domain at the time it is disclosed; or

(b) Is known, as demonstrated by written documentation, to the Party receiving it at the time of disclosure; or

(c) Is used or disclosed with the prior written approval of the other Party; or

(d) Becomes known to the receiving Party from a source other than the disclosing Party; or

(e) Is independently developed, separate from the activities undertaken pursuant to this Agreement; or

(f) Is disclosed under legal compulsion provided that the disclosing Party is given a reasonable opportunity to pursue injunctive relief.

ARTICLE 7 TERMINATION

All rights and obligations of the Parties under this Agreement shall terminate on the earliest of the following:

(a) Notice from Customer that the Project has been cancelled, or that the prime contract will not be awarded to RS or PCG;

(b) Award to other contractors to the exclusion of RS or PCG of contracts for all or substantially all of the Project work contemplated by the proposal;

(c) Notice from the Customer that RS or PCG is unacceptable in the role and function set forth in the proposal; however, if the Customer requests a change in the role and/or function of RS or PCG, this Agreement shall not be deemed terminated unless RS and PCG fail to agree to effect appropriate changes within the time period permitted by the Customer;

(d) Either Party hereto may exercise an option to terminate this Agreement for its convenience. A condition enabling this right is that the Party which withdraws shall not compete for this Project either as an individual firm or in combination with any other firm;

(e) Execution by both Parties hereto of the contractual arrangement between themselves contemplated by this Agreement, or failure of the Parties hereto to agree on the terms of the contemplated arrangement;

(f) The failure of the Parties hereto and the Customer to reach agreement on the terms of the contemplated prime contract;

(g) The expiration of 24 months from the effective date hereof; provided, however, if the proposal has been submitted and is under consideration by the Customer upon the expiration of such 24 month period, this Agreement shall continue to be in force until terminated pursuant to one of the foregoing conditions; and provided further that if an award is made by the Customer on the proposal at any time after the 24 month period is over, this Agreement shall be deemed to have continued in full force and effect.

(h) Mutual agreement of the Parties.

ARTICLE 8 COSTS

Each Party shall perform its obligations hereunder at its own cost unless the Parties agree in writing to other cost sharing arrangements.

ARTICLE 9 DAMAGES

Neither Party shall be liable to the other for any indirect, special or consequential losses, whether arising in contract, tort (including negligence), or otherwise.

ARTICLE 10 ASSIGNMENT

This Agreement shall not be assigned by either Party without the prior written approval of the other Party.

ARTICLE 11 NOTICE

All notices hereunder shall be given by letter addressed, except as each may change its address pursuant hereto, as follows:

Attention: Mark Ward	Attention: Jay Handegan
Restoration Specialists, LLC	Palmetto Construction Group, LLC
PO Box 5352	2265 Clements Ferry Rd. Suite 204
Savannah, Ga. 31414	Charleston, SC 29492
(912) 659-4355	(843) 971-7156

ARTICLE 12 ENTIRE AGREEMENT

This document contains the entire agreement between the Parties and supersedes any previous understandings, commitments or agreements, oral or written, with respect to the subject matter hereof. It shall not be varied, except by an instrument in writing of subsequent date, duly executed by an authorized representative of each Party. The validity, construction, scope, and performance of this Agreement shall be governed by the laws of the State of Georgia.

RESTORATION SPECIALISTS LLC	PALMETTO CONSTRUCTION GROUP
By: _____ (Authorized Signature)	By: _____ (Authorized Signature)
Title: Managing Member	Title: Vice President
Date: 12-01-11	Date: 12/7/11

EXHIBIT A

AREAS OF PROJECT PARTICIPATION

This Exhibit is based on Customer's stated plans to pursue the Project. It is currently contemplated that as the Project develops from the bid phase through the final contract award phase, one or more special purpose entities may be established to bid and execute the Project. The following represents a general distribution of Project participation. As the Project develops, this Exhibit will be modified as required as detailed scope of work responsibilities and specific contractual arrangements are determined.

AREAS OF RESPONSIBILITY

RS

Restoration Specialists, LLC, a Verified SDVOSB, will serve as the Prime Contractor on this project. The role of the prime will include contract administration, subcontractor administration, material procurement, project management, scheduling, site supervision, quality control and health and safety management.

PCG

Palmetto Construction Group, LLC, a Certified Small Business, shall provide field Project Managers and Superintendents and a qualified labor force to perform the construction of the New SCIU Parking Deck.

SPS

Structured Parking Solutions, a Certified Small Business, will provide all design services including architectural, mechanical, electrical, plumbing, structural and civil engineering and environmental consulting. If requested, SPS will provide contract administration, inspection and testing services during the construction phase of the projects.

Other Sub Contractors

Pre Casters

EXHIBIT B

Standard Subcontract Terms and Conditions

Bond No. 1944091

PAYMENT BOND *(See instructions on reverse)*	DATE BOND EXECUTED *(Must be same or later than date of contract)* April 23, 2012	OMB No.:9000-0045 Expires: 11/30/2012

Public reporting burden for this collection of information is estimate to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, DC 20405.

PRINCIPAL *(Legal name and business address)*	TYPE OF ORGANIZATION *("X" one)*
Restoration Specialists, LLC P. O. Box 5352 Savannah, GA 31414	☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☒ CORPORATION STATE OF INCORPORATION: GA
SURETY(IES) *(Name(s) and business address(es))*	PENAL SUM OF BOND
The Hanover Insurance Company 440 Lincoln Street Worcester, MA 01653	MILLION(S): 5 · THOUSAND(S): 999 · HUNDRED(S): 860 · CENTS: 00 CONTRACT DATE: March 13, 2012 · CONTRACT NO.: VA247-C-0035

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum, for payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The above obligation is void if the Principal promptly makes payment to all persons having a direct relationship with the Principal or a subcontractor of the Principal for furnishing labor, material or both in the prosecution of the work provided for in the contract identified above, and any authorized modifications of the contract that subsequently are made. Notice of those modifications to the Surety(ies) are waived.

WITNESS:

The Principal and Surety(ies) executed this payment bond and affixed their seals on the above date.

Blindtak #CLEK

Restoration Specialists, LLC — PRINCIPAL				
SIGNATURE(S)	1. (Seal)	2. (Seal)	3. (Seal)	Corporate Seal
NAME(S) & TITLE(S) *(Typed)*	1.	2.	3.	
INDIVIDUAL SURETY(IES)				
SIGNATURE(S)	1. (Seal)	2. (Seal)		
NAME(S) *(Typed)*	1.	2.		
The Hanover Insurance Company — CORPORATE SURETY(IES)				
NAME & ADDRESS	440 Lincoln Street, Worcester, MA 01653	STATE OF INC.: NH	LIABILITY LIMIT: $96,082,000	Corporate Seal
SIGNATURE(S)	1.	2.		
NAME(S) & TITLE(S) *(Typed)*	1. Laura W. Dennison Attorney-in-Fact	2.		

THE HANOVER INSURANCE COMPANY 1852

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STANDARD FORM 25A (REV. 10-98)
Prescribed by GSA-FAR (48 CFR) 53.228(c)

CORPORATE SURETY(IES) *(Continued)*

SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		

INSTRUCTIONS

. This form, for the protection of persons supplying labor and material, is sed when a payment bond is required under the Act of August 24, 1935, 49 Stat. 793 (40 U.S.C. 270a-270e). Any deviation from this form will require the written approval of the Administrator of General Services.

. Insert the full legal name and business address of the Principal in the pace designated "Principal" on the face of the form. An authorized person hall sign the bond. Any person signing in a representative capacity (e.g., an ttorney-in-fact) must furnish evidence of authority if that representative is not member of the firm, partnership, or joint venture, or an officer of the orporation involved.

. (a) Corporations executing the bond as sureties must appear on the epartment of the Treasury's list of approved sureties and must act within the mitation listed therein. Where more than one corporate surety is involved, heir names and addresses shall appear in the spaces (Surety A, Surety B, tc.) headed "CORPORATE SURETY(IES)."

In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28) for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

BOND NO. 1944091

PERFORMANCE BOND *(See instructions on reverse)*	DATE BOND EXECUTED *(Must be same or later than date of contract)* April 23, 2012	OMB No.: 9000-0045

Public reporting burden for this collection of information is estimated to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, D.C. 20405

PRINCIPAL *(Legal name and business address)*	TYPE OF ORGANIZATION *("X" one)*
Restoration Specialists, LLC P. O. Box 5352. Savannah, GA 31414	☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☒ CORPORATION STATE OF INCORPORATION: GA
SURETY(IES) *(Name(s) and business address(es))* The Hanover Insurance Company 440 Lincoln Street Worcester, MA 01653	PENAL SUM OF BOND MILLION(S): 5 — THOUSAND(S): 999 — HUNDRED(S): 360 — CENTS: 00 CONTRACT DATE: March 13, 2012 — CONTRACT NO.: VA247-C-0035

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The Principal has entered into the contract identified above.

THEREFORE:

The above obligation is void if the Principal –

(a)(1) Performs and fulfills all the undertakings, covenants, terms, conditions, and agreements of the contract during the original term of the contract and any extensions thereof that are granted by the Government, with or without notice to the Surety(ies), and during the life of any guaranty required under the contract, and (2) performs and fulfills all the undertakings, covenants, terms conditions, and agreements of any and all duly authorized modifications of the contract that hereafter are made. Notice of those modifications to the Surety(ies) are waived.

(b) Pays to the Government the full amount of the taxes imposed by the Government, if the said contract is subject to the Mil[illegible] Act, (40 U.S.C. 270a-270e), which are collected, deducted, or withheld from wages paid by the Principal in carrying out the construction contra[illegible] with respect to which this bond is furnished.

WITNESS:

The Principal and Surety(ies) executed this performance bond and affixed their seals on the above date.

Restoration Specialists, LLC — PRINCIPAL

SIGNATURE(S)	1. (Seal)	2. (Seal)	3. (Seal)	Corporate Seal
NAME(S) & TITLE(S) *(Typed)*	1.	2.	3.	

INDIVIDUAL SURETY(IES)

SIGNATURE(S)	1. (Seal)	2. (Seal)	
NAME(S) *(Typed)*	1.	2.	

The Hanover Insurance Company — CORPORATE SURETY(IES)

SURETY A	NAME & ADDRESS	440 Lincoln Street Worcester, MA 01653	STATE OF INC.: NH	LIABILITY LIMIT: $96,082,000.00	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1. Laura W. Dennison Attorney-in-Fact	2.		

THE HANOVER INSURANCE COMPANY 1852

CORPORATE SURETY(IES) *(Continued)*

SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) *(Typed)*	1.	2.		

BOND PREMIUM	RATE PER THOUSAND $ $15 1st 500M; $12 next $2 mil; $9 next $2.5mil; $8 next $2.5 mil	TOTAL $61,999.00 $0.00

INSTRUCTIONS

1. This form is authorized for use in connection with Government contracts. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of the approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the paces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28) for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PALMETTO CONSTRUCTION GROUP, LLC Plaintiff, vs. RESTORATION SPECIALISTS, LLC, REUBEN MARK WARD, and LYNNETTE PENNINGTON WARD Defendants.	CASE NO. 2016-CP-10-1143 **ORDER**

THIS MATTER CAME BEFORE ME on Defendants' motion to be relieved from default;

WHEREAS based on the record and the affidavits before me, Defendants failed to show good cause such that they should be relieved from default;

WHEREAS Defendants filed, on July 11, 2016, a motion to stay and to compel arbitration;

IT IS ORDERED THAT:

1) Defendants' motion to be relieved from default is DENIED;

2) A damages hearing is set for October 4, 2016 at 2:00pm; and

3) ~~No ruling is made on~~ Defendants' motion to stay and to compel arbitration is denied as Δ is in default.

The Honorable Mikell R. Scarborough
Master in Equity, Charleston County

On this 14 day of July 2016
Charleston, SC

Law Office of A. Bright Ariail, LLC

July 19, 2016

FILED
2016 JUL 22 PM 2:2
CLERK OF COURT

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*
C/A No. 2016-CP-10-1143

Dear Julie;

Enclosed, please find two copies of various email records related to the Order executed on July 14, 2016 in the above referenced action for filing. Please return one clocked copy to me in the enclosed SASE. Thank you for your assistance.

With kindest regards, I am

Sincerely yours,

A. Bright Ariail

Enclosures

cc: Andrew Epting, Esquire
Michelle Endemann, Esquire

EXHIBIT P

bright@brightariaillaw.com
125E Wappoo Creek Drive
Suite 202
Charleston, SC 29412
843/814-8805

Bright Ariail

From: Barnwell Fishburne <JFishburne@charlestoncounty.org>
Sent: Monday, July 18, 2016 8:42 AM
To: 'Michelle Endemann'; Bright Ariail; 'Andrew K. Epting'
Subject: Palmetto Construction Group v. Restoration Specialists et al.
Attachments: 201607180829.pdf

Dear All -

As to the last hearing in this matter, please see the attached order Judge Scarborough executed last week. I am forwarding it to the clerk right now for processing.

Best Regards,

Barnwell

--
J. Barnwell Fishburne, Jr., Esq.
Judicial Law Clerk to The Honorable Mikell R. Scarborough
100 Broad Street, Suite 266
Charleston, South Carolina
29401
Tel: 843-958-5053
jfishburne@charlestoncounty.org

Bright Ariail

From: Barnwell Fishburne <JFishburne@charlestoncounty.org>
To: Bright Ariail
Sent: Monday, July 18, 2016 8:35 AM
Subject: Read: RE: Palmetto Construction Group c. Restoration Specialists, et al;

Your message

To:
Subject: Palmetto Construction Group c. Restoration Specialists, et al;
Sent: Monday, July 18, 2016 5:35:12 AM (UTC-08:00) Pacific Time (US & Canada)

was read on Monday, July 18, 2016 5:35:02 AM (UTC-08:00) Pacific Time (US & Canada).

Bright Ariail

From:	Microsoft Outlook
To:	Barnwell Fishburne
Sent:	Friday, July 15, 2016 12:32 PM
Subject:	Relayed: RE: Palmetto Construction Group c. Restoration Specialists, et al;

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

Barnwell Fishburne (JFishburne@charlestoncounty.org)

Subject: RE: Palmetto Construction Group c. Restoration Specialists, et al;

Bright Ariail

From: Bright Ariail
Sent: Friday, July 15, 2016 12:32 PM
To: Barnwell Fishburne
Cc: Andrew K. Epting; 'Michelle Endemann'
Subject: RE: Palmetto Construction Group c. Restoration Specialists, et al;

Mr. Fishburne,

I have reviewed the proposed order and request that the Court also address its ruling/disposition of Plaintiff's Motion to Stay and Compel (filed on March 7, 2016) in the order when issued. Thanks for your assistance in this matter.

I have copied all counsel of record by this email.

VR. Bright Ariail

Law Office of A. Bright Ariail, LLC
125E Wappoo Creek Drive
Suite 202
Charleston, SC 29412

bright@brightariaillaw.com
843/814-8805

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From: Michelle Endemann [mailto:mne@epting-law.com]
Sent: Thursday, July 14, 2016 12:10 PM
To: Barnwell Fishburne <JFishburne@charlestoncounty.org>
Cc: Bright Ariail <bright@BRIGHTARIAILLAW.COM>; Andrew K. Epting <ake@epting-law.com>; Angela Gross <agg@epting-law.com>
Subject: Palmetto Construction Group c. Restoration Specialists, et al;

Mr. Fishburne,

We have prepared a simple proposed order for today's hearing so that Judge Scarborough does not have to prepare a Form 4.

Please note I have copied Ms. Ariail.

Best Regards,

Michelle N. Endemann, Esq.
ANDREW K. EPTING, JR., LLC
46A State Street, Charleston, SC 29401
P: 843-377-1871

F: 843-377-1310
mnc@epting-law.com

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1143
	)	
Palmetto Construction Group	)	
	)	
Plaintiff,	)	**DEFENDANTS' NOTICE OF MOTION AND MOTION TO RECONSIDER AND TO ALTER OR AMEND PURSUANT TO SCRCP 59(e) AND APPLICABLE CASE LAW**
	)	
vs.	)	
	)	
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward	)	
	)	
Defendants.	)	

FILED
2016 JUL 27 P 12:39

TO: ANDREW K. EPTING, JR., ESQUIRE, AND MICHELLE N. ENDEMANN, ESQUIRE, ATTORNEYS FOR PLAINTIFF, PALMETTO CONSTRUCTION GROUP

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, will move before the presiding Judge or Master in Equity of the Ninth Judicial Circuit at a time and place to be arranged by the Court and counsel involved for the Court to reconsider and amend its Order dated July 14, 2016 ("Order"). The Defendants will move the Court to amend its Order so as to make a final ruling on the merits of all motions filed in this matter and to lift the entry of default, stay this action and compel mandatory mediation/arbitration of this matter. The Defendants' Motion to Reconsider and to Alter or Amend ("Defendant's Motion) is made pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure and all applicable case law.

The Defendants' Motion is made on the following grounds:

(1): The Defendants showed good cause such that the entry of default should be lifted in this matter. *See, Defendants' Motion to Lift Entry of Default, dated June 3, 2016 and supporting legal memorandum (including, all referenced legal authorities and exhibits); Memorandum of Law in Support of Defendants' Motion to Reconsider and to Alter or Amend (to be submitted to the Court prior to the hearing of Defendants' Motion).*

(2): The Court lacks subject matter jurisdiction due to the mandatory and binding mediation/arbitration provisions contained in the contract giving rise to this action. *See, Defendants'*

EXHIBIT Q

Motion to Stay and to Compel, dated July 11, 2016 and supporting legal memorandum (including, all referenced legal authorities and exhibits); Memorandum of Law in Support of Defendant's Motion to Reconsider and to Alter or Amend (to be submitted to the Court prior to the hearing of Defendants' Motion).

(3): The contract giving rise to this action requires all claims arising out of or related to the contract to be mediated, and if not resolved by mediation, to be resolved by binding arbitration. Accordingly, the Court is required to stay this action and submit the matter to mediation, and if necessary, binding arbitration. *See, Plaintiff's Motion to Stay and Compel, dated March 7, 2016 (including, all referenced legal authorities and exhibits); Defendants' Motion to Stay and to Compel, dated July 11, 2016 and supporting legal memorandum (including, all referenced legal authorities and exhibits); Memorandum of Law in Support of Defendants' Motion to Reconsider and to Alter or Amend (to be submitted to the Court prior to the hearing of Defendants' Motion).*

(3): The Plaintiff made a demand for mandatory mediation/arbitration contemporaneously with the commencement of this action pursuant to its Motion to Stay and Compel ("Plaintiff's Motion"). The Defendants joined in and consented to Plaintiff's Motion, which motion should be properly adjudicated before the court and the relief requested therein granted. *See, Plaintiff's Motion to Stay and Compel, dated March 7, 2016 (including, all referenced legal authorities and exhibits); Defendants' Motion to Stay and Compel, dated July 11, 2016 (including, all referenced legal authorities and exhibits); Memorandum of Law in Support of Defendants' Motion to Reconsider and to Alter or Amend (to be submitted to the Court prior to the hearing of Defendants' Motion);*

(4): The Defendants have not defaulted upon nor waived their right to mediation/arbitration under the mandatory alternative dispute resolution provisions of the contract and applicable law. *See, Defendants' Motion to Lift Entry of Default, dated June 3, 2016 and supporting legal memorandum (including, all referenced legal authorities and exhibits); Defendants' Motion to Stay and Compel, dated July 11, 2016 (including, all referenced legal authorities and exhibits); Memorandum of Law in Support of Defendant's Motion to Reconsider and to Alter or Amend (to be submitted to the Court prior to the hearing of Defendants' Motion to Reconsider and to Alter or Amend).*

This Motion is based upon Defendants' Memorandum of Law in Support of Motion to Reconsider and to Alter or Amend which will be submitted to the Court prior to the hearing of

Defendants' Motion, the parties' prior motions and supporting memorandums of law referenced above, the complete files, exhibits, and records in this action, such oral and documentary evidence as may be allowed at the hearing of this motion and upon all applicable law pertaining thereto.

Respectfully submitted,

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

A. Bright Ariail
125 Wappoo Creek Drive
Building E, Suite 202
Charleston, SC 29412

ATTORNEY FOR DEFENDANTS

July 27, 2016
Charleston, SC 29412

Charleston County - Roster Details
Master's Docket for October 11, 2016

Court Section	Master In Equity	Judge	Scarborough	Room	952
Docket	Motion Hearings	Session	10/11/2016	Date	10/11/2016

Number of motions = 12

#	Date	Time	hr:mn	Description	Filing Party	Filed Date	Case	Sub Type	Tax Map	Plaintiff Attorney	Defendant Attorney	Notes
1	10/11/2016	10:00 AM		Motion/Reconsider by plaintiff, crt/srv	Maria Kiehling Brees-PAT	07/25/2016	2012CP1006835 Joanne S Reed VS Christina Salters , defendant, et al	Real Prop/Other 499	1880000169	Maria Kiehling Brees (843) 724-7707 D. Nathan Davis (843) 571-4042	Jestine Townsend Graham (843) 467-9492 Irene Townsend Hodge (843) 889-9513 Kelvin Maurice Huger (843) 573-0143 Althea Salters (843) 889-2450 Irma Townsend (843) 425-7226 Jessie Townsend Mary Alice Townsend Morrison Karen Waters	EXHIBIT R
2	[illegible]											
3	10/11/2016	11:00 AM		Motion/Dismiss by Thomas Calcote etal, crt/srv		07/28/2016	2010CP1002432 Regions Bank VS Bdt Projects Llc Etc , defendant, et al	Foreclosure 420	3281400181	Merritt Gordon Abney (843) 534-4110	Shawn M. French Sr. (843) 606-6440 H. Brewton Hagood (843) 577-6726 Patrick R. Watts (843) 851-7050	
4	[illegible]											
5	10/11/2016	2:00 PM		Motion/Alter or Amend by plaintiff, crt/srv	Andrew K. Epting Jr.-PAT	07/29/2016	2016CP1001143 Palmetto Construction Group LLC VS Restoration Specialists LLC	Breach of Cont 140		Michelle Nicole Endemann (843) 377-1871 Andrew K. Epting Jr. (843) 377-1871	A. Bright Ariail (843) 814-8805	
6	[illegible]											

Charleston County - Roster Details
Master's Docket for October 11, 2016

Court Action	Master In Equity	Office	Scarborough	Room	952
Roster Type	Motion Hearings	Roster Date	10/11/2016	Print Date	10/11/2016

Number of motions = 12

#	Date	Time	hr:mn	Description	Filing Party	Filed Date	Case	Sub Type	Tax Map	Plaintiff Attorney	Defendant Attorney	Notes
7	10/11/2016	3:00 PM		Master/QT AFTER TAX Hearing	Municipal Tax Investment LLC-PLT	07/29/2016	2015CP1006736 Municipal Tax Investment LLC VS Gilbert J White , defendant, et al	Real Prop/Other 499	4271600239	Scott Daniel Spivey (803) 225 -0463		
9	10/11/2016	3:00 PM		Master/QT AFTER TAX Hearings	Municipal Tax Investment LLC-PLT	07/29/2016	2015CP1006755 Municipal Tax Investment LLC VS William T Simmons III , defendant, et al	Real Prop/Other 499	4640100054	Scott Daniel Spivey (803) 225 -0463	Sean Matthew Foerster (803) 771-7900 T. Parkin C. Hunter (803) 734 -6151 Brittany Lauren Kilpatrick (843) 696-3048 E.B. "Trey" McLeod III (803) 737-3043	318
11	10/11/2016	3:00 PM		Master/Cross Claim Hearing	Municipal Tax Investment LLC-PLT	10/11/2016	2015CP1006756 Municipal Tax Investment LLC VS Llewellyn R Whaley	Real Prop/Other 499	4110800096	Scott Daniel Spivey (803) 225 -0463	Sean Matthew Foerster (803) 771-7900	

Law Office of A. Bright Ariail, LLC

RECEIVED
SEP 09 2016
By

September 7, 2016

VIA EMAIL AND US MAIL
The Honorable Mikell R. Scarborough
Charleston County Judicial Center
100 Broad Street, Suite 266
Charleston, SC 29401

FILED
2016 SEP 13 PM 4:16
JULIE J. ARMSTRONG
CLERK OF COURT

Re: ***Palmetto Construction Group, LLC v. Restoration Specialists, LLC et al.***
Civil Action 2016-CP-10-1143

Dear Judge Scarborough:

Concerning the above referenced case, you issued a bench and formal Order on July 14, 2016 denying Defendants' Motion to Set Aside Entry of Default and Defendants' Motion to Stay and to Compel Arbitration as well as finding as adjudicated the Plaintiff's Motion to Stay and Compel. You further ordered a damages hearing which is set for October 4, 2016 at 2:00 pm. Both Defendants[i] and Plaintiff[ii] have outstanding Motions for Reconsideration and/or to Alter or Amend the Court's Order as stated above. Both of these Motions have been scheduled to be heard on October 11, 2016. Insomuch as these motions will affect the case status and directly impact the arbitration rights of all parties concerned, I would respectfully request that they be scheduled to be heard on a date prior to the damages hearing.

Thank you in advance for your consideration in this matter.

With kindest regards, I am

Sincerely yours,

A. Bright Ariail

cc: All Counsel (via email only)

[i] Defendants' Notice of Motion and Motion to Reconsider and to Alter or Amend Pursuant to SCRCP 59(e) and Applicable Case Law filed July 27, 2016.
[ii] Palmetto Construction Group's Motion to Alter or Amend filed July 29, 2016.

EXHIBIT S

bright@brightariaillaw.com
125E Wappoo Creek Drive
Suite 202
Charleston, SC 29412
843/814-8805