

RECEIVED

Jan 21 2021

SC Court of Appeals

RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Circuit Case No. 2018-CP-10-00262

Appellate Case 2020-000921

Steeple Dorchester, Ltd. and
Hamilton Management
Services Company, Inc.,

Respondent,

v.

Marsh Waterproofing, Inc.,

Appellant.

RECORD ON APPEAL

C. Clay Olson, Esq.
Harper Little, PLLC
164 Market Street, Suite 139
Charleston, South Carolina 29401
843.224.6676
Attorney for Appellant

Albert A. Lacour III, Esq.
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
843-577-2026 Ext. 2207
Attorney for Respondent

INDEX
(Volume I)

Form 4 Order dated February 12, 2020.....	1
Hon. Judge Addy’s Order of March 9, 2020.....	3
Hon. Judge Addy’s Final Order of March 11, 2020.....	13
Hon. Judge Addy’s Supplemental Order of May 11, 2020.	27
Marsh Waterproofing, Inc.’s Amended Lis Pendens dated January 22, 2018.	33
Marsh Waterproofing, Inc.’s Summons and Complaint dated January 22, 2018.	36
Marsh Waterproofing, Inc.’s Second Amended Lis Pendens dated March 12, 2018.	49
Marsh Waterproofing, Inc.’s Amended Summons and Complaint Foreclosure of Mechanic’s Lien dated March 12, 2018.	50
Steeple Dorchester, Ltd. and Hamilton Management Services Company, Inc.’s Answer and Counterclaim dated February 28, 2019.....	63
Marsh Waterproofing, Inc.’s Reply to Counterclaims dated March 6, 2019.....	68
Steeple Dorchester, Ltd. and Hamilton Management Services Company, Inc.’s Pre-Trial Brief dated February 6, 2020 and all Exhibits.....	73
Marsh Waterproofing, Inc.’s Post-Trial Memorandum dated February 10, 2020.....	79
Steeple Dorchester, Ltd. and Hamilton Management Services Company, Inc.’s Supplemental Brief dated February 10, 2020 and all Exhibits.....	84
Marsh Waterproofing, Inc.’s Motion to Modify Judgment to Add Attorney’s Fees and Costs dated February 21, 2020.....	88
Steeple Dorchester, Ltd. and Hamilton Management Services Company, Inc.’s Motion to Amend Judgment or for New Trial in the Alternative dated February 24, 2020 and Exhibits.....	92
Marsh Waterproofing, Inc.’s Notice of Motion to Alter or Amend Judgment dated March 10, 2020.....	112
Marsh Waterproofing, Inc.’s Amended Notice of Motion to Alter or Amend Judgment dated March 11, 2020.....	114
Steeple Dorchester, Ltd. and Hamilton Management Services Company, Inc.’s Motion under Rule 59 dated March 23, 2020 and all Exhibits.....	126
Steeple Dorchester, Ltd. and Hamilton Management Services Company, Inc.’s Notice of Appeal of June 10, 2019.....	344

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018 CP-10- 00262

Marsh Waterproofing, Inc.,

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: COURT

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

This matter came before the Court on February 5, 2020 for a bench trial. Having reviewed applicable law, pre and post-trial memorandums submitted to the Court, and considered the arguments of counsel, the Court finds the mechanics lien dated November 16, 2018 in the amount of \$36,800.00 is valid and duly enforceable. Counsel shall confer on the issue of attorney's fees, and if the parties cannot agree, the matter can be submitted to the court via brief.

Counsel for Plaintiff is requested to submit a more formal order within thirty (30) days.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

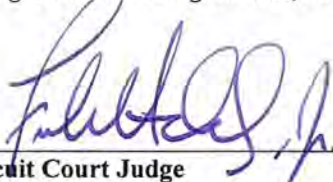
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

Marsh Waterproofing	Steeple Dorchester Ltd.; Hamilton Management Services Co., Inc.	\$36,800.00 plus applicable interest and attorney's fees
		\$
		\$
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.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.



Circuit Court Judge

2159

Judge Code

02/11/2020

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:

Albert A. Lacour, III

ATTORNEY(S) FOR THE PLAINTIFF(S)

Christopher Clay Olson

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: K. Nicole Carney

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,

Plaintiff,

vs.

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.,

Defendant(s).

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-00262

**FINAL ORDER FOR FORECLOSURE
OF MECHANIC'S LIEN
NON-JURY DECISION**

This matter came on before me for a jury trial at the February 3, 2020 term of court and was called for 9:30 AM on Wednesday February 5, 2020. At the outset, the Defendants indicated that the amount of the debt was not disputed, though Plaintiff's entitlement was, and the parties then agreed to waive the right to have the jury decide the facts concerning the amount of the debt and to try the case to the Court alone, whereupon the jury venire was discharged. The hearing was attended by Albert A. Lacour, III, Esq. and witnesses Tim Marsh and Avant Armentrout for the Plaintiff, Marsh Waterproofing, Inc., (or "Marsh"). C. Clay Olson, Esq., appeared for the Defendants. The testimony was taken, and from the testimony and exhibits in evidence, I find and conclude as follows:

FINDINGS OF FACT:

1. The initial Lis Pendens was filed on January 11, 2018.
2. The Amended Lis Pendens, Summons and Complaint were filed on January 22, 2018, and the Second Amended Lis Pendens and Amended Summons and



ROA000003

Amended Complaint were filed March 12, 2018.

3. Service was made upon the Defendant Hamilton Management Services Company, Inc. on January 23, 2018 and on the owner, ARC CAFEUSA001, LLC, on January 24, 2018 as shown by the proof of service filed herein.

4. The Defendants Steeple Dorchester, Ltd. and Hamilton Management Services Company, Inc., answered and asserted a Counterclaim on February 28, 2019 and a Reply to the Counterclaim was filed March 6, 2019.

5. The Defendants ARC CAFEUSA001, LLC, and Churpeyes II, Inc. were removed by the amendments to the pleadings. Paragraph 3 of the Amended Complaint alleges that the Churpeyes entity is the tenant of record, and the Steeple entity is the tenant in fact. Plaintiff is proceeding on its contract against Hamilton Management Services Company, Inc., and Steeple, and on its lien against the leasehold interest of the Defendant Steeple Dorchester, Ltd.

6. I find that the parties hereto and the real property which is the subject of the within action are within the jurisdiction of this Court.

7. I find that all of the correspondence between the Defendant, Hamilton Management Services Company, Inc., and Marsh Waterproofing, Inc., indicates Alexander Burns was acting for Hamilton Management Services Company, Inc. I find that Hamilton Management Services Company, Inc. authorized improvements to the property to be made by Marsh Waterproofing, Inc. and signed the acceptance of Plaintiff's proposal (Exhibit 6), thereby forming a valid and binding agreement supported by valid consideration.



8. I find that Plaintiff fully performed all the work it committed to perform but has not been paid for said work. The testimony reflects that there was never any complaint made about the quality of the work or the quantity of the work of Marsh.

9. I find that the Plaintiff timely filed its Statement for Mechanic's Lien which was introduced into evidence as Exhibit 11. The Statement for Lien was timely served as reflected by the Affidavit of Service, Exhibit 12. I further find that the Plaintiff perfected its lien by the timely filing a Lis Pendens and the commencement of this action to foreclose the lien, as detailed above.

10. When the time came for presentation of the Defendants' case, Defendants withdrew their Counterclaim and elected not to call any witnesses. Defendants rely on the fact that Plaintiff was not licensed in South Carolina as a general contractor and therefore maintain that Plaintiff is not entitled to recover on the contract or the lien.

11. Title 40, Chapter 11 of the South Carolina Code is the statutory regulatory scheme for general and mechanical contractors. A "general contractor" is one who performs or supervises or offers to perform or supervise "general construction". S.C. Code §40-11-20(9). "General construction" is installation, replacement or repair of a building or structure. S.C. Code §40-11-20(8). I find that the facts in the record establish that Marsh Waterproofing, Inc. and the work it performed do not fall within these definitions. The definitions reflect the history and common understanding that general contractors are defined essentially by either the nature of the work performed or the scope of the work performed.

12. Analyzing this case by the nature of the work, S.C. Code §40-11-20(8)



would require Marsh to build a building or structure, or replace a building or structure, or repair a building or structure. I find Marsh made absolutely no repairs or modifications to the structural elements of the building other than to mix up a couple of bags of concrete to close up the access opening in the slab. That work does not amount to \$5,000 worth of work to the existing structural elements. I find the foam was installed by Marsh in the open air space between grade and the bottom of the steel deck. It does not attach to any of the structural elements and does not modify or change any of the structural elements. The foam simply occupies the airspace to prevent the slab from moving downward if the slab fails. The scope of work outlined in the engineering report does not specify any repairs to any existing structural elements. I find that Marsh made no repairs to any footings, CMU walls, brick masonry walls, steel girders, steel joists, steel decking or the existing slab. None were called for by the engineering report. The installation of foam for supplemental support is not a classification of work identified in the statutory scheme as being the work of a general contractor in code section S.C. Code §40-11-410. (Exhibit 14).

13. Analyzing this case by the scope of the work, general contractors are sometimes identified by the fact that they contract to perform all of the work required to complete the project. Marsh clearly did not do this. I find that Marsh was not the only contractor on the project. The other contractor worked ahead of Marsh to perform the preparatory work. Marsh arrived last, in the order of the work, to install the foam in the airspace above grade and below the slab.

14. The scope of the general contractor's work generally includes providing



permitting, temporary utilities, temporary facilities, scheduling of the trades, sequencing of the trades, supervision of the trades, and general overall responsibility to see all of the work gets fully and properly executed. I find that none of the foregoing are within the scope of work defined by the proposal of Marsh. (Exhibit 6). The testimony of the witnesses for Marsh indicates that, to the extent that Marsh employees could observe whether these "general contractor" obligations were being met by others, they appeared to be furnished by someone else.

15. Additionally, I find that the representations of the Defendants to Marsh that they had a "contractor" working one step ahead of Marsh to do the preparatory work outlined in the engineer's report reasonably led Marsh to believe a general contractor was working ahead of Marsh on the project. The preparation work involved multiple trades, all of which required separate trade licenses, and would have required someone to pull a building permit before Marsh ever set foot on the project.

16. Additionally, I find that Defendants did not rely on the existence or non-existence of a license. Marsh made no representation to Defendants that it was licensed in the correspondence, the proposal, or the discussions of the parties. The Teseniar case stands for the proposition that "where the reason for the rule ends, so ends the rule." Teseniar v. Professional Plastering & Stucco, Inc., 407 SC 83, 754 SE2d 267 (Ct. App. 2014). On the facts in the record I find the parties discussed licensing before the work started and Tim Marsh told Mr. Burns that he was not licensed in South Carolina and asked if Mr. Burns thought he needed to be. Mr. Burns promised to check on it. Thereafter the parties proceeded with the work. Mr. Burns could not rely upon the



existence of a license for the qualifications of the contractor if he knew none existed.

17. Additionally, I find that Mr. Burns was referred to Marsh by Church's Chicken and was aware of the past activities of Marsh making repairs for the Church's franchise stores in multiple states at numerous store locations. I find that Defendants were made aware of the extensive experience and the ability of Marsh to install the foam by Marsh and by Church's. I find Defendants were not relying upon the existence of a license to know the contractor's qualifications to do the work. Defendants were made aware of the experience, the qualifications, and the track record of the contractor and were relying upon that knowledge, rather than the existence of a license, in deciding whether to engage the contractor. As the Court observed in Teseniar, "The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. ... In the case before us, [Defendant] was in a position to know, and did know, the qualifications of [Marsh]. No reliance was placed upon the existence of a license, as presumptively would be the case if [Marsh] was dealing with the general public." Teseniar, 407 SC at 97, 754 SE2d at 274.

18. I have reviewed the Affidavit of Counsel and the itemized time and cost entries submitted in support of Plaintiff's request for an award of attorney's fees, and I find that the fees and costs as set forth therein are reasonable. I find that the total fees and costs requested do not exceed the amount of the lien.

19. There are 6 factors to consider in determining an award of attorney's fees:
1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted



to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. Bloomberg v. Nealco, Inc. 310 S.C. 492, 427 SE2d 659 (1993); citing Collins v. Collins 239 S.C. 170, 122 S.E.2d 1 (1961). I find that the litigation has been aggressively defended and involved novel arguments and issues on both sides. I find that counsel was required to prepare for numerous hearings prior to the trial itself. I find that the total attorney's hours devoted to this case exceed 120 hours as detailed in the motion for the award of the fees and costs and supporting documents. I find that counsel for Marsh enjoys high professional standing and has extensive experience in construction litigation. I find the rates charged are reasonable and in line with those customarily charged for similar services and that the results obtained justify the amount awarded.

20. I find that the amount due and owing to the Plaintiff upon its mechanic's lien is \$36,800, together with attorney's fees in the amount of _____ together with costs in the amount of _____ for a total debt of _____.

21. I find that the agreement of the parties is silent as to interest, and in the absence of an agreement on the matter, I decline to award pre-judgment interest. I find Plaintiff shall be entitled to recover interest after the entry of this judgment at the judgment rate as established by the current Order of the South Carolina Supreme Court dated January 6, 2020 in the amount of eight and three-quarters percent (8.75%) per annum upon the total debt set forth above and that such interest should be added to the total debt to determine the total amount secured by Plaintiff's lien through the date to



which such interest is computed. Upon the forgoing findings, I reach the following conclusions of law:

CONCLUSIONS OF LAW

22. I conclude Plaintiff constructed valuable improvements to the subject property leased to Steeple Dorchester Ltd. for which the Plaintiff has not been paid, and the Plaintiff is entitled to claim a Mechanic's Lien to secure the debt due together with costs and attorney's fees.

23. I conclude Plaintiff should have judgment for foreclosure of Plaintiff's mechanic's lien for the Total Amount Due of _____ together with interest from the date of entry of this order at 8.75%, as set forth above, and that the leasehold interest of Steeple Dorchester Ltd. in the subject property shall be sold at public auction after due advertisement.

24. I conclude that Hamilton Management Services Company, Inc. entered into the agreement for the work, and Plaintiff should have judgment against it on the contract claim. The mechanics lien statute preserves the claimant's right to pursue the contract remedy simultaneously in S.C. Code §29-5-420.

25. I conclude that Marsh Waterproofing, Inc. was not the general contractor on the job and was not required to be licensed as a general contractor.

26. I conclude that Hamilton Management Services Company, Inc. did not rely on the licensing of Marsh to determine the qualifications of the contractor; rather, Defendants relied on the information made known to it by Marsh and by the franchisor, Church's Chicken, as to the numerous restaurants upon which Marsh performed similar



work, and the experience, qualifications, and ability of the contractor to perform the work.

27. I conclude the cases relied upon by Defendants which deny recovery to general contractors are distinguishable from the facts of this case. As an example, the C-Sculptures case cited by Defendants reflects in the very first paragraph of the syllabus that it arises from a construction contract by which "a general contractor agreed to build a home..." C-Sculptures, LLC v. Brown 403 SC 53, 55, 742 SE2d 359, 360, (2013). I conclude that the decided cases cited by Defendants uniformly involve contractors who were either admittedly general contractors, or were adjudged to be general contractors based upon either the nature of the work or the scope of the work; therefore, the cases are inapplicable to these facts.

28. Neither of the parties filed an offer of settlement pursuant to the Mechanic's Lien Statute, and I conclude that the verdict is closer to the prayer in Plaintiff's Complaint, resulting in Plaintiff being the prevailing party.

29. I conclude the Plaintiff filed and served its Statement of Mechanic's Lien within 90 days of the last date of labor or materials furnished and also filed and served its Lis Pendens, Summons and Complaint for foreclosure within six months of the last date of labor or materials furnished.

30. I conclude that since the Plaintiff prevails, this case shall be referred to the Master in Equity so that he may conduct the sale and any additional proceedings incidental thereto.

It is therefore:



assigns in full, quiet and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

The following is a description of the premises herein ordered to be sold:

The leasehold interest of Defendant Steeple Dorchester, Ltd., in and to:

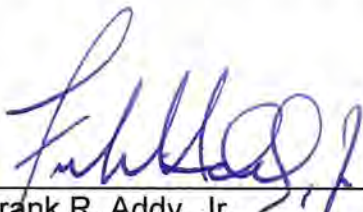
All that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Charleston County, City of North Charleston, State of South Carolina, being as shown on an ALTA/ACSM Land Title Survey prepared for Churpeyes Real Estate Limited Partnership, by Cox and Dinkins, Inc., dated May 21, 1990, and recorded June 28, 1991 in the Office of the RMC for Charleston County in Plat Book CD at Page 91. The aforesaid plat is incorporated by reference herein.

TMS: 408-10-00-229

Present Address: 5343 Dorchester Road, Charleston, SC 29418-5620

Present Derivation: Memorandum of Assignment of lease to Churpeyes II, Inc. dated June 30, 2008 and recorded July 24, 2008 in Book N 655, Page 085 in the RMC Office for Charleston County.

AND IT IS SO ORDERED this 9th day of March, 2020 at Greenwood, South Carolina.



Frank R. Addy, Jr.
Presiding Judge, Ninth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,

Plaintiff,

vs.

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.,

Defendant(s).

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-00262

**FINAL ORDER FOR FORECLOSURE
OF MECHANIC'S LIEN
NON-JURY DECISION**

This matter came on before me for a jury trial at the February 3, 2020 term of court and was called for 9:30 AM on Wednesday February 5, 2020. At the outset, the Defendants indicated that the amount of the debt was not disputed, though Plaintiff's entitlement was, and the parties then agreed to waive the right to have the jury decide the facts concerning the amount of the debt and to try the case to the Court alone, whereupon the jury venire was discharged. The hearing was attended by Albert A. Lacour, III, Esq. and witnesses Tim Marsh and Avant Armentrout for the Plaintiff, Marsh Waterproofing, Inc., (or "Marsh"). C. Clay Olson, Esq., appeared for the Defendants. The testimony was taken, and from the testimony and exhibits in evidence, I find and conclude as follows:

FINDINGS OF FACT:

1. The initial Lis Pendens was filed on January 11, 2018.
2. The Amended Lis Pendens, Summons and Complaint were filed on January 22, 2018, and the Second Amended Lis Pendens and Amended Summons and



ROA000013

Amended Complaint were filed March 12, 2018.

3. Service was made upon the Defendant Hamilton Management Services Company, Inc. on January 23, 2018 and on the owner, ARC CAFEUSA001, LLC, on January 24, 2018 as shown by the proof of service filed herein.

4. The Defendants Steeple Dorchester, Ltd. and Hamilton Management Services Company, Inc., answered and asserted a Counterclaim on February 28, 2019 and a Reply to the Counterclaim was filed March 6, 2019.

5. The Defendants ARC CAFEUSA001, LLC, and Churpeyes II, Inc. were removed by the amendments to the pleadings. Paragraph 3 of the Amended Complaint alleges that the Churpeyes entity is the tenant of record, and the Steeple entity is the tenant in fact. Plaintiff is proceeding on its contract against Hamilton Management Services Company, Inc., and Steeple, and on its lien against the leasehold interest of the Defendant Steeple Dorchester, Ltd.

6. I find that the parties hereto and the real property which is the subject of the within action are within the jurisdiction of this Court.

7. I find that all of the correspondence between the Defendant, Hamilton Management Services Company, Inc., and Marsh Waterproofing, Inc., indicates Alexander Burns was acting for Hamilton Management Services Company, Inc. I find that Hamilton Management Services Company, Inc. authorized improvements to the property to be made by Marsh Waterproofing, Inc. and signed the acceptance of Plaintiff's proposal (Exhibit 6), thereby forming a valid and binding agreement supported by valid consideration.



8. I find that Plaintiff fully performed all the work it committed to perform but has not been paid for said work. The testimony reflects that there was never any complaint made about the quality of the work or the quantity of the work of Marsh.

9. I find that the Plaintiff timely filed its Statement for Mechanic's Lien which was introduced into evidence as Exhibit 11. The Statement for Lien was timely served as reflected by the Affidavit of Service, Exhibit 12. I further find that the Plaintiff perfected its lien by the timely filing a Lis Pendens and the commencement of this action to foreclose the lien, as detailed above.

10. When the time came for presentation of the Defendants' case, Defendants withdrew their Counterclaim and elected not to call any witnesses. Defendants rely on the fact that Plaintiff was not licensed in South Carolina as a general contractor and therefore maintain that Plaintiff is not entitled to recover on the contract or the lien.

11. Title 40, Chapter 11 of the South Carolina Code is the statutory regulatory scheme for general and mechanical contractors. A "general contractor" is one who performs or supervises or offers to perform or supervise "general construction". S.C. Code §40-11-20(9). "General construction" is installation, replacement or repair of a building or structure. S.C. Code §40-11-20(8). I find that the facts in the record establish that Marsh Waterproofing, Inc. and the work it performed do not fall within these definitions. The definitions reflect the history and common understanding that general contractors are defined essentially by either the nature of the work performed or the scope of the work performed.

12. Analyzing this case by the nature of the work, S.C. Code §40-11-20(8)



would require Marsh to build a building or structure, or replace a building or structure, or repair a building or structure. I find Marsh made absolutely no repairs or modifications to the structural elements of the building other than to mix up a couple of bags of concrete to close up the access opening in the slab. That work does not amount to \$5,000 worth of work to the existing structural elements. I find the foam was installed by Marsh in the open air space between grade and the bottom of the steel deck. It does not attach to any of the structural elements and does not modify or change any of the structural elements. The foam simply occupies the airspace to prevent the slab from moving downward if the slab fails. The scope of work outlined in the engineering report does not specify any repairs to any existing structural elements. I find that Marsh made no repairs to any footings, CMU walls, brick masonry walls, steel girders, steel joists, steel decking or the existing slab. None were called for by the engineering report. The installation of foam for supplemental support is not a classification of work identified in the statutory scheme as being the work of a general contractor in code section S.C. Code §40-11-410. (Exhibit 14).

13. Analyzing this case by the scope of the work, general contractors are sometimes identified by the fact that they contract to perform all of the work required to complete the project. Marsh clearly did not do this. I find that Marsh was not the only contractor on the project. The other contractor worked ahead of Marsh to perform the preparatory work. Marsh arrived last, in the order of the work, to install the foam in the airspace above grade and below the slab.

14. The scope of the general contractor's work generally includes providing



permitting, temporary utilities, temporary facilities, scheduling of the trades, sequencing of the trades, supervision of the trades, and general overall responsibility to see all of the work gets fully and properly executed. I find that none of the foregoing are within the scope of work defined by the proposal of Marsh. (Exhibit 6). The testimony of the witnesses for Marsh indicates that, to the extent that Marsh employees could observe whether these "general contractor" obligations were being met by others, they appeared to be furnished by someone else.

15. Additionally, I find that the representations of the Defendants to Marsh that they had a "contractor" working one step ahead of Marsh to do the preparatory work outlined in the engineer's report reasonably led Marsh to believe a general contractor was working ahead of Marsh on the project. The preparation work involved multiple trades, all of which required separate trade licenses, and would have required someone to pull a building permit before Marsh ever set foot on the project.

16. Additionally, I find that Defendants did not rely on the existence or non-existence of a license. Marsh made no representation to Defendants that it was licensed in the correspondence, the proposal, or the discussions of the parties. The Teseniar case stands for the proposition that "where the reason for the rule ends, so ends the rule." Teseniar v. Professional Plastering & Stucco, Inc., 407 SC 83, 754 SE2d 267 (Ct. App. 2014). On the facts in the record I find the parties discussed licensing before the work started and Tim Marsh told Mr. Burns that he was not licensed in South Carolina and asked if Mr. Burns thought he needed to be. Mr. Burns promised to check on it. Thereafter the parties proceeded with the work. Mr. Burns could not rely upon the



existence of a license for the qualifications of the contractor if he knew none existed.

17. Additionally, I find that Mr. Burns was referred to Marsh by Church's Chicken and was aware of the past activities of Marsh making repairs for the Church's franchise stores in multiple states at numerous store locations. I find that Defendants were made aware of the extensive experience and the ability of Marsh to install the foam by Marsh and by Church's. I find Defendants were not relying upon the existence of a license to know the contractor's qualifications to do the work. Defendants were made aware of the experience, the qualifications, and the track record of the contractor and were relying upon that knowledge, rather than the existence of a license, in deciding whether to engage the contractor. As the Court observed in Teseniar, "The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. ... In the case before us, [Defendant] was in a position to know, and did know, the qualifications of [Marsh]. No reliance was placed upon the existence of a license, as presumptively would be the case if [Marsh] was dealing with the general public." Teseniar, 407 SC at 97, 754 SE2d at 274.

18. I have reviewed the Affidavit of Counsel and the itemized time and cost entries submitted in support of Plaintiff's request for an award of attorney's fees, and I find that the fees and costs as set forth therein are reasonable. I find that the total fees and costs requested do not exceed the amount of the lien.

19. There are 6 factors to consider in determining an award of attorney's fees:
1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted



to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. Bloomberg v. Nealco, Inc. 310 S.C. 492, 427 SE2d 659 (1993); citing Collins v. Collins 239 S.C. 170, 122 S.E.2d 1 (1961). I find that the litigation has been aggressively defended and involved novel arguments and issues on both sides. I find that counsel was required to prepare for numerous hearings prior to the trial itself. I find that the total attorney's hours devoted to this case exceed 120 hours as detailed in the motion for the award of the fees and costs and supporting documents. I find that counsel for Marsh enjoys high professional standing and has extensive experience in construction litigation. I find the rates charged are reasonable and in line with those customarily charged for similar services and that the results obtained justify the amount awarded.

20. I find that the amount due and owing to the Plaintiff upon its mechanic's lien is \$36,800, together with attorney's fees in the amount of _____ together with costs in the amount of _____ for a total debt of _____.

21. I find that the agreement of the parties is silent as to interest, and in the absence of an agreement on the matter, I decline to award pre-judgment interest. I find Plaintiff shall be entitled to recover interest after the entry of this judgment at the judgment rate as established by the current Order of the South Carolina Supreme Court dated January 6, 2020 in the amount of eight and three-quarters percent (8.75%) per annum upon the total debt set forth above and that such interest should be added to the total debt to determine the total amount secured by Plaintiff's lien through the date to



which such interest is computed. Upon the forgoing findings, I reach the following conclusions of law:

CONCLUSIONS OF LAW

22. I conclude Plaintiff constructed valuable improvements to the subject property leased to Steeple Dorchester Ltd. for which the Plaintiff has not been paid, and the Plaintiff is entitled to claim a Mechanic's Lien to secure the debt due together with costs and attorney's fees.

23. I conclude Plaintiff should have judgment for foreclosure of Plaintiff's mechanic's lien for the Total Amount Due of _____ together with interest from the date of entry of this order at 8.75%, as set forth above, and that the leasehold interest of Steeple Dorchester Ltd. in the subject property shall be sold at public auction after due advertisement.

24. I conclude that Hamilton Management Services Company, Inc. entered into the agreement for the work, and Plaintiff should have judgment against it on the contract claim. The mechanics lien statute preserves the claimant's right to pursue the contract remedy simultaneously in S.C. Code §29-5-420.

25. I conclude that Marsh Waterproofing, Inc. was not the general contractor on the job and was not required to be licensed as a general contractor.

26. I conclude that Hamilton Management Services Company, Inc. did not rely on the licensing of Marsh to determine the qualifications of the contractor; rather, Defendants relied on the information made known to it by Marsh and by the franchisor, Church's Chicken, as to the numerous restaurants upon which Marsh performed similar



work, and the experience, qualifications, and ability of the contractor to perform the work.

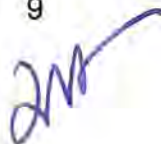
27. I conclude the cases relied upon by Defendants which deny recovery to general contractors are distinguishable from the facts of this case. As an example, the C-Sculptures case cited by Defendants reflects in the very first paragraph of the syllabus that it arises from a construction contract by which "a general contractor agreed to build a home..." C-Sculptures, LLC v. Brown 403 SC 53, 55, 742 SE2d 359, 360, (2013). I conclude that the decided cases cited by Defendants uniformly involve contractors who were either admittedly general contractors, or were adjudged to be general contractors based upon either the nature of the work or the scope of the work; therefore, the cases are inapplicable to these facts.

28. Neither of the parties filed an offer of settlement pursuant to the Mechanic's Lien Statute, and I conclude that the verdict is closer to the prayer in Plaintiff's Complaint, resulting in Plaintiff being the prevailing party.

29. I conclude the Plaintiff filed and served its Statement of Mechanic's Lien within 90 days of the last date of labor or materials furnished and also filed and served its Lis Pendens, Summons and Complaint for foreclosure within six months of the last date of labor or materials furnished.

30. I conclude that since the Plaintiff prevails, this case shall be referred to the Master in Equity so that he may conduct the sale and any additional proceedings incidental thereto.

It is therefore:



ORDERED, that there is due to the Plaintiff upon the contract claim set forth in the Complaint the sum of \$36,800 together with interest of 8.75% per annum accruing from and after the entry of this Order, and that judgment therefore shall be entered against Hamilton Management Services, Company, Inc.; and it is further,

ORDERED, that there is due to the Plaintiff upon the Mechanic's Lien set forth in the Complaint the Total Amount Due of _____ as of the date hereof, together with interest of 8.75% per annum accruing from and after the entry of this Order, and that the leasehold interest of Defendant Steeple Dorchester Ltd. in the property should be sold and the proceeds thereof applied to payment and satisfaction of the debt; and it is further,

ORDERED, that this matter is hereby referred to the Honorable Mikell R. Scarborough, Master in Equity for Charleston County, to conduct the Sale pursuant to S.C. Code Ann. §14-11-80 upon the terms hereinafter set forth and to conduct all further proceedings necessary or incidental thereto with leave to enforce final judgment herein and that any appeal shall be taken in accordance with S.C. Code Ann. §14-11-85; and it is further,

ORDERED, that the Defendant, Steeple Dorchester Ltd., shall on or before the date of Sale of the property hereinafter described, pay to the Plaintiff or the Plaintiff's attorney the full amount of the Plaintiff's debt, attorney's fees and costs as set forth herein; and it is further,

ORDERED, that on default of payment at or before the Sale date, the subject property described in the Complaint and hereinafter set forth, shall be sold by the



Master at public auction at the County Courthouse, in the City of Charleston, County and State aforesaid, on some convenient sale date hereafter (and should the regular day of judicial sales fall on a legal holiday, then, in such event, the sale day shall be the same day of the week next succeeding such holiday), that is to say:

(a) For cash; the Master will require a deposit of five (5%) percent on the amount of the bid (in cash or equivalent) the same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within thirty (30) days, the same to be forfeited and applied to the costs and Plaintiff's debt.

(b) Interest on the balance of the bid shall be paid to the day of compliance at the rate of 8.75% percent per annum.

(c) The sale shall be subject to taxes and assessments, existing easements and restrictions of record.

(d) Purchaser to pay for deed stamps and costs of recording the deed; and it is further,

ORDERED, that if Plaintiff is the successful bidder at the Sale, for a sum not exceeding the amount of costs, disbursements, expenses and indebtedness of Plaintiff in full, Plaintiff may pay to the Master in Equity only the amount of the costs, disbursements and expenses crediting the balance of the bid on Plaintiff's indebtedness; and it is further,

ORDERED, that the Plaintiff is seeking a deficiency judgment and the same having not been waived, the bidding shall not be closed upon the day of sale but shall remain open until the thirtieth (30th) day after such sale, exclusive at the day of sale,



whereupon the bidding shall be reopened by the Master and closed, all in accordance with S.C. Code Ann. §15-39-720 (1976 as amended); and it is further,

ORDERED, that the Master in Equity will, by advertisement, according to law, give notice of the time and place of such sale, and the terms thereof; and will execute to the purchaser, or purchasers, a deed to the premises sold. The Plaintiff or any other party to this action may become a purchaser at such Sale, and that if upon such Sale being made the purchaser, or purchasers, should fail to comply with the terms thereof within thirty (30) days after date of Sale, then the Master may advertise the premises for sale in the next or some subsequent sales date, at the risk of the former highest bidder, and sold from time to time thereafter until full compliance shall be secured; and it is further,

ORDERED, that the Master shall apply the proceeds at the Sale as follows:

First: To payment of the amount of the costs, disbursements, and expenses of this action, including any Guardian Ad Litem fees, or fees of attorneys appointed under Order of Court;

Next: To the payment to the Plaintiff or Plaintiff's attorney of the amount of Plaintiff's debt and interest or so much thereof as the purchase money will pay on same;

Next: Deficiency judgment being demanded by the Plaintiff, if the proceeds of sale be insufficient to pay the amounts hereinbefore authorized to be paid out of the proceeds with the costs and expenses, and the Plaintiff's debt and interest, then the Plaintiff shall have judgment for the unpaid portion thereof against Steeple



Dorchester Ltd.;

Next: Any surplus funds to be held pending the further Order of the Master; and it is further,

ORDERED, that upon entry of the report of the sale herein ordered, the Master shall enter judgment against the Defendant, Steeple Dorchester, Ltd., for any residue of the debt remaining unsatisfied after such sale.

ORDERED, that the Defendants and all persons whomsoever claiming under them be forever barred and foreclosed of all rights, title, interest and equity of redemption in the subject property so sold or any part thereof; and it is further,

ORDERED, that the deed of conveyance made pursuant to said sale shall contain the names of only the Plaintiff and the Defendant, Steeple Dorchester, Ltd., and Churpeyes II, Inc., who was the leasehold holder of record at the time of the filing of the initial notice of Lis Pendens in the within action, and the name of the grantee, and the Register of Mesne Conveyances of Clerk of the Court is authorized to omit from the indices pertaining to such conveyances the names of all parties not contained in said deed; and it is further,

ORDERED, that the Master in Equity will retain jurisdiction to do all necessary acts incident to this foreclosure including but not limited to the issuance of a Writ of Assistance. And in the event that the successful bidder is other than the Defendant in possession herein, a Master may enter such additional Orders or Writs as may be necessary to eject and remove from the premises the occupants of the property sold, together with all personal property located thereon, and put the successful bidder or his



assigns in full, quiet and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

The following is a description of the premises herein ordered to be sold:

The leasehold interest of Defendant Steeple Dorchester, Ltd., in and to:

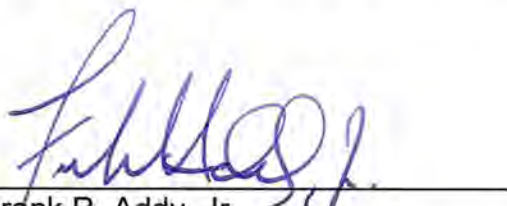
All that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Charleston County, City of North Charleston, State of South Carolina, being as shown on an ALTA/ACSM Land Title Survey prepared for Churpeyes Real Estate Limited Partnership, by Cox and Dinkins, Inc., dated May 21, 1990, and recorded June 28, 1991 in the Office of the RMC for Charleston County in Plat Book CD at Page 91. The aforesaid plat is incorporated by reference herein.

TMS: 408-10-00-229

Present Address: 5343 Dorchester Road, Charleston, SC 29418-5620

Present Derivation: Memorandum of Assignment of lease to Churpeyes II, Inc. dated June 30, 2008 and recorded July 24, 2008 in Book N 655, Page 085 in the RMC Office for Charleston County.

AND IT IS SO ORDERED this 9th day of March, 2020 at Greenwood, South Carolina.



Frank R. Addy, Jr.
Presiding Judge, Ninth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,

Plaintiff,

vs.

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.,

Defendant(s).

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-00262

**SUPPLEMENTAL ORDER TO AMEND
FINAL ORDER OF FORECLOSURE OF
MECHANICS LIEN, NON-JURY
DECISION FILED MARCH 11, 2020**

This matter came before me again for the hearing of post-trial motions via video conference at 10 AM on Tuesday, April 28, 2020. Participating were Albert A. Lacour, III, attorney for the Plaintiff and C. Clay Olson, attorney for the Defendants. The court reporter was Stacy Johnson and the video conference was also recorded. Before the Court were: (1) the Plaintiff's Motion to Modify Judgment to Add Award of Attorney's Fees and Costs Pursuant To The Mechanic's Lien Statute filed February 21, 2020; (2) Defendant's Notice of Motion and Motion to Amend Judgment or For a New Trial in the Alternative (Rule 59) filed February 24, 2020; and (3) Defendants Notice of Motion to Amend Judgment or in the Alternative for New Trial and Clarification (Rule 59 (A) (2)) filed March 23, 2020.

Upon consideration of the Motions of Defendants and the Exhibits filed along with those motions and also the arguments of counsel, I find and conclude that my rulings at the time of the trial of the case and those necessarily contained in the entry of Judgment were sound and are hereby reaffirmed. Defendant's Motions are therefore **DENIED**.

Upon consideration of the Motion of Plaintiff and the Exhibits filed along with that motion and also the arguments of counsel, I find and conclude that an award of attorney's fees and costs under the statute is appropriate. Plaintiff's Motion is therefore **GRANTED**. The six factors to be considered in determining an award of attorney's fees are 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. Blumberg v. Nealco, Inc. 310 S.C. 492, 427 S.E.2d 659 (1993).

Plaintiffs Motion is supported by 30 pages of time entries providing detailed descriptions of the nature of the services being provided in Exhibit A to the Motion. The entries reflect that this particular case is one of six identical mechanics liens filed in five different counties across the state and that numerous activities were consolidated by counsel as the work proceeded. As a result there are some entries dedicated solely to this action in this county and there are other activities that must be aggregated and then divided by the six separate actions to allocate them equally between all six cases.

The nature and extent of the legal services rendered is contained in the descriptions. I find the difficulty of representation and the level of skill required was elevated by the time limitations in the statute which required the six cases to proceed simultaneously. I find Defendants have vigorously defended the case and the issues raised by defendants have also increased the difficulty of representation beyond that normally encountered in a mechanics lien foreclosure. The time entries document \$15,961 in attorney's time devoted to this case solely. The time entries further document a total of \$77,347 of attorney's time devoted to the six cases jointly, and therefore the

allocated portion of this case would be \$12,701. The entries further document \$1140 of paralegal time to be allocated across the six cases resulting in \$190 to be allocated for this case. The charges by paralegal staff are allowable in South Carolina. Spriggs Group PC v. Slivka 402 S.C. 42, 738 S.E.2d 495 (Ct. App. 2013). I find therefore the total fees incurred as to this case are \$28,852.

The Affidavit in support of the Motion, attached as Exhibit C thereto, indicates that the fee agreement with the client is in writing and contains an hourly rate of \$225 for attorney's time, \$150 for associate time and \$95 for paralegal or clerical time. Additionally the plaintiff is required to reimburse counsel for all out-of-pocket costs incurred. I find that the affidavit reflects counsel has been in practice for 38 years and holds a rating from Martindale Hubble as "AV Preeminent" in his chosen field. I find that the rates charged for the services rendered are within the range of rates typically and customarily charged for such services within South Carolina. I find the efforts of counsel have bestowed a beneficial result upon the Plaintiff and resulted in a full recovery of the claim despite the vigorous efforts of Defendants to prevent such result.

I find the Affidavit of counsel and Exhibit B to the Motion reflect that the costs incurred directly in association with this case total \$1042.

I therefore conclude that an award of attorney's fees and paralegal fees in the amount of \$28,852 and costs of \$1,042 for a total of \$29,894 is appropriate and reasonable under the circumstances of this case. The total amount of the fees and costs should be added to the judgment previously entered. It is therefore,

ORDERED, that Plaintiff's Motion to Modify Judgment to Add Award of Attorney's Fees and Costs Pursuant To The Mechanic's Lien Statute is **GRANTED** and the Final Order For Foreclosure Of Mechanic's Lien Non-Jury Decision filed March 11, 2020 is amended and supplemented as follows:

- Paragraph 20 of the Final Order is amended to read "I find that the amount due and owing to the Plaintiff upon its mechanic's lien is \$36,800, together with attorneys's fees in the amount of \$28,852, together with costs in the amount of \$1042 for a total debt of \$66,694."
- Paragraph 23 of the Final Order is amended to read "I conclude Plaintiff should have judgment for foreclosure of Plaintiffs mechanics lien for the Total Amount Due of \$66,694 together with interest from the date of entry of this order at 8.75%, as set forth above, and that the leasehold interest of Steeple Dorchester Ltd. In the subject property shall be sold at public auction after due advertisement."
- The second paragraph at the top of page 10 is amended to read "**ORDERED**, that there is due to the Plaintiff upon the mechanics lien set forth in the Complaint the Total Amount Due of \$66,694 as of the date hereof, together with interest of 8.75% per annum accruing from and after the entry of this Order, and that the leasehold interest of Defendant Steeple Dorchester Ltd. in the property should be sold and the proceeds thereof applied to payment and satisfaction of the debt; and it is further,"

AND IT IS FURTHER ORDERED that all terms and conditions of the Final Order For Foreclosure Of Mechanic's Lien Non-Jury Decision filed March 11, 2020 are reaffirmed and remain in full force and effect, except to the extent modified herein.

AND IT IS FURTHER ORDERED Defendant's Notice of Motion and Motion to Amend Judgment or For a New Trial in the Alternative (Rule 59) and Defendant's Notice of Motion to Amend Judgment or in the Alternative for New Trial and Clarification (Rule 59 (A) (2)) are **DENIED**.

AND IT IS SO ORDERED.



Charleston Common Pleas

Case Caption: Marsh Waterproofing Inc VS ARC CAFEUSA001 LLC , defendant,
et al
Case Number: 2018CP1000262
Type: Order/Other

So Ordered

s/Frank R. Addy, Jr., 2159

Electronically signed on 2020-05-07 13:00:44 page 6 of 6

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.

Plaintiff(s)

vs.

ARC CAFEUSA001, LLC, Churpeyes II, Inc., and
Hamilton Management Services Company, Inc.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2018 CP-10-262

Submitted By: Albert A. Lacour, III
Address: 126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144

SC Bar #: 3099
Telephone #: (843) 577-2026
Fax #: (843) 722-2867
E-mail: alacour@clawsonandstaufer.com

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

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

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

NATURE OF ACTION (Check One Box Below)

Contracts

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

Torts - Professional Malpractice

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

Torts - Personal Injury

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

Real Property

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

Inmate Petitions

- ☐ PCR (500)
☐ 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
☐ 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)
☐ 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)
☐ Permanent Restraining Order (680)
☐ 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

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

MARSH WATERPROOFING, INC.,

Plaintiff

vs.

ARC CAFEUSA001, LLC, Churpeyes II,
Inc. and Hamilton Management Services
Company, Inc.

Defendants.

1/22 2:38pm
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

2018-CP-10-262

AMENDED LIS PENDENS

FILED
2018 JAN 22 PM 2:36
JULIE J. ARMSTRONG
CLERK OF COURT

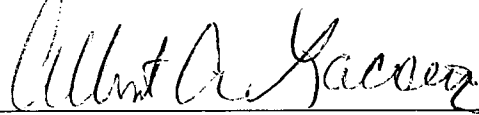
NOTICE is hereby given that an action has been commenced and is pending in this Court upon the Complaint for Foreclosure of Mechanic's Lien of the above named Plaintiff against the above named Defendant(s).

The premises affected by this action is at the time of the filing hereof located in the County of Charleston, State of South Carolina and legally described as follows:

All that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Charleston County, City of North Charleston, State of South Carolina, being as shown on an ALTA/ACSM Land Title Survey prepared for Churpeyes Real Estate Limited Partnership, by Cox and Dinkins, Inc., dated May 21, 1990, and recorded June 28, 1991 in the Office of the RMC for Charleston County in Plat Book CD at Page 91. The aforesaid plat is incorporated by reference herein.

TMS: 408-10-00-229

CLAWSON and STAUBES, LLC



Albert A. Lacour, III

Bar No.: 3099

126 Seven Farms Drive, Suite 200

Charleston, South Carolina 29492-8144

Phone: (843) 577-2026

Fax: (843) 722-2867

Email: alacour@clawsonandstaubes.com

Attorney for Marsh Waterproofing, Inc.

Charleston, South Carolina

Jan 22, 2018

ROA000035

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,

Plaintiff,

vs.

ARC CAFEUSA001, LLC, Churpeyes II,
Inc. and Hamilton Management Services
Company, Inc.

Defendant(s).

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-262

SUMMONS FOR MECHANIC'S LIEN

(Contract, Mechanic's Lien, Quantum
Meruit)

JURY TRIAL DEMANDED

FILED
2018 JAN 22 PM 2:35
JULIUS A. STRONG
CLERK OF COURT

TO: THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and **REQUIRED** to answer the Complaint for Foreclosure of Mechanic's Lien of the Plaintiff in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint for Foreclosure of Mechanic's Lien on the subscriber at office at CLAWSON and STAUBES, LLC, 126 Seven Farms Drive, Suite 200, Charleston, South Carolina 29492-8144, within thirty (30) days after the service hereof, exclusive of the day of such service; and, if you fail to answer the Complaint for Foreclosure of Mechanic's Lien within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the said Complaint for Foreclosure of Mechanic's Lien.

CLAWSON and STAUBES, LLC



Albert A. Lacour, III
Bar No.: 3099

126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Phone: (843) 577-2026
Fax: (843) 722-2867
Email: alacour@clawsonandstaubes.com
Attorney for Plaintiff

Charleston, South Carolina

Jan. 22, 2018.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,

Plaintiff,

vs.

ARC CAFEUSA001, LLC, Churpeyes II,
Inc. and Hamilton Management Services
Company, Inc.,

Defendant(s).

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-262

**COMPLAINT FOR FORECLOSURE
MECHANIC'S LIEN
(Breach of Contract; Mechanic's Lien;
Quantum Meruit)**

JURY TRIAL DEMANDED

The Plaintiff, Marsh Waterproofing, Inc., complaining of the Defendants would
allege and show unto this Honorable Court as follows:

FOR A FIRST CAUSE OF ACTION:
(Breach of Contract)

1. That the Plaintiff is a corporation duly organized and existing pursuant to the laws of the State of Texas and having its principal place of business in that State.
2. That upon information and belief the Defendant ARC CAFEUSA001, LLC, is a limited liability company organized under the laws of the State of Delaware, the Defendant Hamilton Management Services Company, Inc. is, upon information and belief a corporation organized under the laws of the State of Delaware, and the Defendant Churpeyes II, Inc. is a domestic corporation organized under the law of the State of South Carolina.
3. That upon information and belief, the Defendant ARC CAFEUSA001, LLC, is the owner of the real property more particularly described in Exhibit "A", which is attached

hereto and made a part hereof which property is located in the County of Charleston, State of South Carolina, and the Defendant Churpeyes II, Inc. is a tenant and operator of the restaurant on the property.

4. That the Plaintiff and the Defendant, Hamilton Management Services Company, Inc., entered into an agreement for the Plaintiff to provide materials and labor for improvements which include but are not limited to the installation of expandable polyurethane foam under the building slab for structural support on the property which is described above.

5. That the Plaintiff furnished such labor and materials under the agreement with Hamilton Management Services Company, Inc. who had authority from or acted rightly for either the Defendant and owner, ARC CAFEUSA001, LLC or the tenant Churpeyes II, Inc.

6. That the Defendant and owner ARC CAFEUSA001, LLC, and the tenant Churpeyes II, Inc., knew and were aware of the work being performed by the Plaintiff.

7. That despite due demand for payment, the Defendant Hamilton Management Services Company, Inc. has failed and refused to pay the Plaintiff pursuant to the agreement between the parties and such failure to pay constitutes a material breach of the terms of the agreement and has caused damage to the Plaintiff Marsh Waterproofing, Inc. in the sum of \$36,800.00.

FOR A SECOND CAUSE OF ACTION:
(Mechanic's Lien)

8. That the Plaintiff would reallege the allegations contained in paragraphs 1

through 7 above, as fully as if the same were set forth here verbatim.

9. That the Plaintiff performed all of the work required and furnished all materials required by the Defendant, Hamilton Management Services Company, Inc., in a workmanlike manner and no complaints have been made to the Plaintiff regarding the work performed or the quality or the quantity of materials furnished.

10. That the Plaintiff timely recorded a Statement for Mechanic's Lien in the Office of the RMC for Charleston County in Book 0680 at Page 340 and served a copy of the same on the Defendant-Owner, ARC CAFEUSA001, LLC, and a copy of the same is attached hereto as Exhibit "B" and made a part hereof by reference.

11. That six months has not expired since the last day that work was performed or labor and materials furnished by the Plaintiff.

12. That there is a balance due and owing to the Plaintiff upon the agreement in the amount of \$36,800.00 together with a reasonable attorney's fee and the other costs and disbursements of this action, and interest on the amount so due, and despite due demand the Defendants have failed to pay same to the Plaintiff.

FOR A THIRD CAUSE OF ACTION:
(Quantum Meruit)

13. That the Plaintiff would reallege the allegations contained in paragraphs 1, 2, 3, 5, 6 and 7, above as fully as if the same were set forth here verbatim.

14. That the Plaintiff furnished materials and labor for improvements which include but are not limited to the installation of expandable polyurethane foam under the building slab for structural support, which materials and labor were incorporated into

the construction of the restaurant building on the property owned by the Defendant ARC CAFEUSA001, and occupied by the tenant Churpeyes II, Inc., and Plaintiff thereby conferred a benefit upon the Defendant ARC CAFEUSA001, LLC and Defendant Churpeyes II, Inc.

15. That the materials and labor so furnished by the Plaintiff were of a reasonable value of \$36,800.00 and that such materials were appreciated by the Defendants ARC CAFEUSA001, LLC, and Defendant Churpeyes II, Inc., and utilized in such construction, and the Defendants thereby realized the value of such materials and labor.

16. That Defendants accepted the materials so furnished and retained those materials and improvements and under the circumstances of this case it would be inequitable for it to retain such benefit without paying the reasonable value thereof.

WHEREFORE, THE PLAINTIFF PRAYS JUDGMENT:

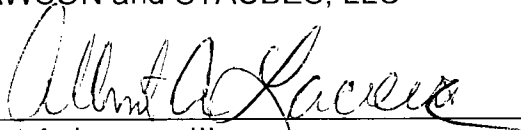
(a) against the Defendant Hamilton Management Services Company, Inc. for the sum of \$36,800.00 together with the costs and disbursements of this action, for breach of contract;

(b) against the Defendants ARC CAFEUSA001, LLC, and Churpeyes II, Inc. for foreclosure of the above Mechanic's Lien in the amount of \$36,800.00 together with reasonable attorney's fees and other costs and disbursements of this action and interest on the amount so due, and further, directing that the property be sold and the proceeds thereof applied to payment and satisfaction of the debt; or

(c) in the alternative, against the Defendants, ARC CAFEUSA001, LLC, and

Churpeyes II, Inc., in the amount of \$36,800.00 together with the costs and disbursements of this action for quantum meruit.

CLAWSON and STAUBES, LLC



Albert A. Lacour, III

Bar No.: 3099

126 Seven Farms Drive, Suite 200

Charleston, South Carolina 29492-8144

Phone: (843) 577-2026

Fax: (843) 722-2867

Email: alacour@clawsonandstaubes.com

Attorney for Marsh Waterproofing, Inc.

Charleston, South Carolina

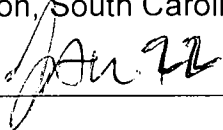
 2018.

EXHIBIT A

All that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Charleston County, City of North Charleston, State of South Carolina, being as shown an ALTA/ACSM Land Title Survey prepared for Churpeyes Real Estate Limited Partnership, by Cox and Dinkins, Inc., dated May 21, 1990, and recorded June 28, 1991 in the Office of the RMC for Charleston County in Plat Book CD at Page 91. The aforesaid plat is incorporated by reference herein.

TMS: 408-10-00-229

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

MARSH WATERPROOFING, INC.,
Plaintiff

vs.

ARC CAFEUSA001, LLC,
Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

STATEMENT FOR MECHANIC'S LIEN



PGS:
5

NOTICE IS HEREBY GIVEN that Marsh Waterproofing, Inc., (License Number: not required for scope of work), is due the sum of Thirty-Six Thousand Eight Hundred and No/100 Dollars, (\$36,800.00) from State Acquisitions, LLC, a statement of a just and true account of said indebtedness being attached hereto and made a part hereof.

That said debt is due to the Plaintiff for materials and labor furnished and actually used in the improvement of the real estate herein described and owned by ARC CAFEUSA001, LLC, by virtue of an agreement with, or by the consent of such owner(s) or a person or persons authorized by or rightly acting for said owner(s), or the debt is due because such improvements have been authorized by such owner(s). That as shown by the attached statement the Plaintiff furnished materials and labor for such buildings, structures, or improvements within ninety (90) days of the date hereon, or or after August 19, 2017.

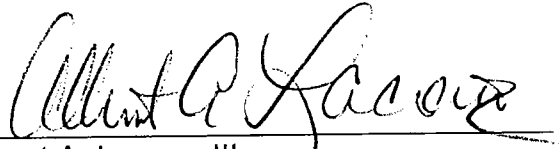
That by virtue thereof, by the service and filing of this Notice and Affidavit, pursuant to the provisions of the statutes in such cases made and provided, the undersigned has and claims a lien to secure the payment of the debt so due and the

costs of enforcing said lien including reasonable attorney's fees all as provided by law upon the buildings or structures hereinafter mentioned and upon the following described real estate:

All that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Charleston County, City of North Charleston, State of South Carolina, being as shown on an ALTA/ACSM Land Title Survey prepared for Churpeyes Real Estate Limited Partnership, by Cox and Dinkins, Inc., dated May 21, 1990, and recorded June 28, 1991 in the Office of the RMC for Charleston County in Plat Book CD at Page 91. The aforesaid plat is incorporated by reference herein.

TMS: 408-10-00-229

CLAWSON and STAUBES, LLC



Albert A. Lacour, III

Bar No.: 3099

126 Seven Farms Drive, Suite 200

Charleston, South Carolina 29492-8144

Phone: (843) 577-2026

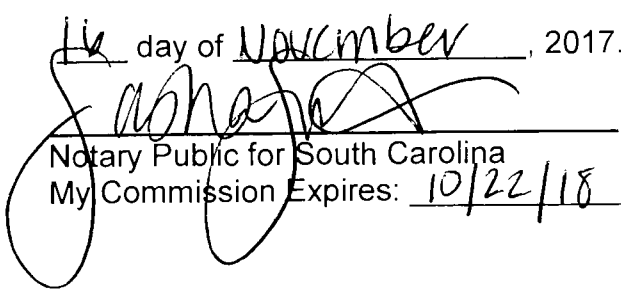
Fax: (843) 722-2867

Email: alacour@clawsonandstaubes.com

Attorney for Plaintiff

Sworn and subscribed before me this

14 day of November, 2017.



Notary Public for South Carolina

My Commission Expires: 10/22/18

VERIFICATION

PERSONALLY appeared before me Tim Marsh,
who, being duly sworn, deposes and says that he/she is the
Owner of Marsh Waterproofing, Inc., the Plaintiff, in the
foregoing action; that has read the foregoing Statement for Mechanic's Lien and the
allegations contained therein are true and correct of own knowledge, save and except
those matters alleged upon information and belief, and as to those matters believes the
same to be true.

Marsh Waterproofing, Inc.

By: Tim Marsh
Tim Marsh
(print name)

Its: Owner
(print title)

Sworn and subscribed before me this
15th day of November, 2017.

Misti Smith
Notary Public for Texas
My Commission Expires: 5/10/19



STATE OF TEXAS

COUNTY OF JEFFERSON

)
) VERIFIED STATEMENT OF ACCOUNT
)

Personally appeared before me, Tim Marsh, who
being sworn, deposes and says that he/she is the Owner of
Marsh Waterproofing, Inc., the Plaintiff, and authorized to make the within Statement of
Account.

That from State Acquisitions, LLC, the sum of Thirty-Six Thousand Eight
Hundred and No/100 Dollars, (\$36,800.00) is currently due and owing upon the
following invoices:

INVOICE DATE	INVOICE NUMBER	AMOUNT
9/5/17	6530	\$36,800.00
Total Balance Due and Owing:		\$36,800.00

That the foregoing statement is a true and just account of all sums due and
owing and no part thereof has been paid by discount or otherwise.

Marsh Waterproofing, Inc.

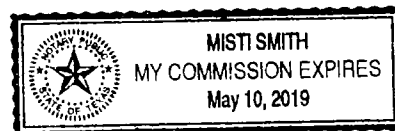
By: Tim Marsh
Tim Marsh
(print name)

Its: Owner
(print title)

Sworn and subscribed before me this

15th day of November, 2017.

Misti Smith
Notary Public for Texas
My Commission Expires: 5/10/19



RECORDER'S PAGE



NOTE: This page **MUST** remain
with the original document

Filed By:

CLAWSON & STAUBES
126 SEVEN FARMS DR.
SUITE 200
CHARLESTON SC 29492 (BOX)

RECORDED

Date: November 16, 2017

Time: 2:14:29 PM

Book

0680

Page

340

DocType

Mech/Lien

Elaine H. Bozman, Register
Charleston County, SC

MAKER:

ARC CAFEUSA001 LLC

of Sats:

of Pages: 5

of References:

RECIPIENT:

MARSH WATERPROOFING INC

Note:

Recording Fee \$ 10.00

Extra Reference Cost \$ -

Extra Pages \$ -

Postage \$ -

Chattel \$ -

TOTAL \$ 10.00

Original Book:

Original Page:

DRAWER **Drawer 2**
CLERK **JBA**



0680
Book



340
Page



11/16/2017
Recorded Date



5
Pgs



Original Book



Original Page



D
Doc Type



14:14:29
Recorded Time

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

MARSH WATERPROOFING, INC.,

Plaintiff

vs.

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.

Defendants.

10:41a
3/12
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-00262

SECOND AMENDED LIS PENDENS

FILED
2018 MAR 12 AM 10:40
JULIE J. ARISTON
CLERK OF COURT

NOTICE is hereby given that an action has been commenced and is pending in this Court upon the Complaint for Foreclosure of Mechanic's Lien of the above named Plaintiff against the above named Defendant(s).

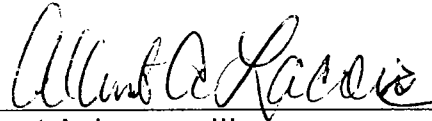
The premises affected by this action is at the time of the filing hereof located in the County of Charleston, State of South Carolina and legally described as follows:

The leasehold interest of Defendant in and to:

All that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Charleston County, City of North Charleston, State of South Carolina, being as shown on an ALTA/ACSM Land Title Survey prepared for Churpeyes Real Estate Limited Partnership, by Cox and Dinkins, Inc., dated May 21, 1990, and recorded June 28, 1991 in the Office of the RMC for Charleston County in Plat Book CD at Page 91. The aforesaid plat is incorporated by reference herein.

TMS: 408-10-00-229

CLAWSON and STAUBES, LLC



Albert A. Lacour, III

Bar No.: 3099

126 Seven Farms Drive, Suite 200

Charleston, South Carolina 29492-8144

Phone: (843) 577-2026

Fax: (843) 722-2867

Email: alacour@clawsonandstaubes.com

Attorney for Marsh Waterproofing, Inc.

Charleston, South Carolina

March 9, 2018

ROA000049

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,

Plaintiff,

vs.

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.

Defendant(s).

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-00262

**AMENDED SUMMONS FOR
MECHANIC'S LIEN**

**(Contract, Mechanic's Lien, Quantum
Meruit)**

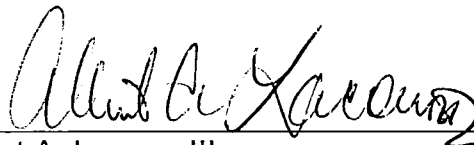
JURY TRIAL DEMANDED

FILED
2018 MAR 12 AM 10:39
CLERK OF COURT
JULIE J. ARISTIDES

TO: THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and **REQUIRED** to answer the Amended Complaint for Foreclosure of Mechanic's Lien of the Plaintiff in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Amended Complaint for Foreclosure of Mechanic's Lien on the subscriber at office at CLAWSON and STAUBES, LLC, 126 Seven Farms Drive, Suite 200, Charleston, South Carolina 29492-8144, within thirty (30) days after the service hereof, exclusive of the day of such service; and, if you fail to answer the Amended Complaint for Foreclosure of Mechanic's Lien within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the said Amended Complaint for Foreclosure of Mechanic's Lien.

CLAWSON and STAUBES, LLC



Albert A. Lacour, III
Bar No.: 3099

ROA000050

126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Phone: (843) 577-2026
Fax: (843) 722-2867
Email: alacour@clawsonandstaubes.com
Attorney for Plaintiff

Charleston, South Carolina

March 9, 2018.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,
Plaintiff,

vs.

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.,
Defendant(s).

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-00262

**AMENDED COMPLAINT FOR
FORECLOSURE MECHANIC'S LIEN
(Breach of Contract; Mechanic's Lien;
Quantum Meruit)**

JURY TRIAL DEMANDED

2018 APR 10 PM 10:39
CLERK OF COURT

The Plaintiff, Marsh Waterproofing, Inc., complaining of the Defendants would allege and show unto this Honorable Court as follows:

FOR A FIRST CAUSE OF ACTION:
(Breach of Contract)

1. That the Plaintiff is a corporation duly organized and existing pursuant to the laws of the State of Texas and having its principal place of business in that State.
2. That upon information and belief ARC CAFEUSA001, LLC, is a limited liability company organized under the laws of the State of Delaware; the Defendant Hamilton Management Services Company, Inc. is, upon information and belief a corporation organized under the laws of the State of Delaware; Churpeyes II, Inc. is a domestic corporation organized under the law of the State of South Carolina; and Defendant Steeple Dorchester Ltd. is organized pursuant to the law of the state of Delaware, and is the leasee, tenant and operator of the restaurant on the property.
3. That upon information and belief, ARC CAFEUSA001, LLC, is the record owner

of the real property more particularly described in Exhibit "A", which is attached hereto and made a part hereof which property is located in the County of Charleston, State of South Carolina, and Churpeyes II, Inc. is the tenant of record under the lease agreement; and the Defendant Steeple Dorchester Ltd. is the tenant and operator of the restaurant on the property, in fact.

4. That the Plaintiff and the Defendant, Hamilton Management Services Company, Inc., entered into an agreement for the Plaintiff to provide materials and labor for improvements which include but are not limited to the installation of expandable polyurethane foam under the building slab for structural support on the property which is described above.

5. That the Plaintiff furnished such labor and materials under the agreement with Hamilton Management Services Company, Inc. who had authority from or acted rightly for the tenant Steeple Dorchester Ltd. Upon information and belief they are both under common control.

6. That the Defendant and tenant Steeple Dorchester Ltd. knew and was aware of the work being performed by the Plaintiff.

7. That despite due demand for payment, the Defendant Hamilton Management Services Company, Inc. has failed and refused to pay the Plaintiff pursuant to the agreement between the parties and such failure to pay constitutes a material breach of the terms of the agreement and has caused damage to the Plaintiff Marsh Waterproofing, Inc. in the sum of \$36,800.00.

FOR A SECOND CAUSE OF ACTION:
(Mechanic's Lien)

8. That the Plaintiff would reallege the allegations contained in paragraphs 1 through 7 above, as fully as if the same were set forth here verbatim.

9. That the Plaintiff performed all of the work required and furnished all materials required by the Defendant, Hamilton Management Services Company, Inc., in a workmanlike manner and no complaints have been made to the Plaintiff regarding the work performed or the quality or the quantity of materials furnished.

10. That the Plaintiff timely recorded a Statement for Mechanic's Lien in the Office of the RMC for Charleston County in Book 0680 at Page 340 and served a copy of the same on the Owner, ARC CAFEUSA001, LLC, and the tenant of record Churpeyes II, Inc. and a copy of the same is attached hereto as Exhibit "B" and made a part hereof by reference.

11. That six months has not expired since the last day that work was performed or labor and materials furnished by the Plaintiff.

12. That there is a balance due and owing to the Plaintiff upon the agreement in the amount of \$36,800.00 together with a reasonable attorney's fee and the other costs and disbursements of this action, and interest on the amount so due, and despite due demand the Defendants have failed to pay same to the Plaintiff.

FOR A THIRD CAUSE OF ACTION:
(Quantum Meruit)

13. That the Plaintiff would reallege the allegations contained in paragraphs 1, 2, 3,

5, 6, 7 and 9, above as fully as if the same were set forth here verbatim.

14. That the Plaintiff furnished materials and labor for improvements which include but are not limited to the installation of expandable polyurethane foam under the building slab for structural support, which materials and labor were incorporated into the construction of the restaurant building on the property leased in fact and occupied by Steeple Dorchester Ltd., and managed by Hamilton Management Services Company, Inc., and Plaintiff thereby conferred a benefit upon the Defendants.

15. That the materials and labor so furnished by the Plaintiff were of a reasonable value of \$36,800.00 and that such materials were appreciated by the Defendants and utilized in such construction, and the Defendants thereby realized the value of such materials and labor.

16. That Defendants accepted the materials so furnished and retained those materials and improvements and under the circumstances of this case it would be inequitable for it to retain such benefit without paying the reasonable value thereof.

WHEREFORE, THE PLAINTIFF PRAYS JUDGMENT:

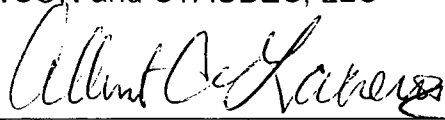
(a) against the Defendants Hamilton Management Services Company, Inc. and Steeple Dorchester Ltd. for the sum of \$36,800.00 together with the costs and disbursements of this action, for breach of contract;

(b) against the leasehold interest of the Defendant Steeple Dorchester Ltd. for foreclosure of the above Mechanic's Lien in the amount of \$36,800.00 together with reasonable attorney's fees and other costs and disbursements of this action and interest on the amount so due, and further, directing that the property be sold and the proceeds

thereof applied to payment and satisfaction of the debt; or

(c) in the alternative, against the Defendants, Steeple Dorchester Ltd. and Hamilton Management Services Company, Inc., in the amount of \$36,800.00 together with the costs and disbursements of this action for quantum meruit.

CLAWSON and STAUBES, LLC



Albert A. Lacour, III

Bar No.: 3099

126 Seven Farms Drive, Suite 200

Charleston, South Carolina 29492-8144

Phone: (843) 577-2026

Fax: (843) 722-2867

Email: alacour@clawsonandstaubes.com

Attorney for Marsh Waterproofing, Inc.

Charleston, South Carolina

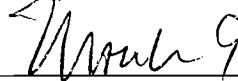
 9, 20 18.

EXHIBIT A

The leasehold interest of Defendant in and to:

All that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Charleston County, City of North Charleston, State of South Carolina, being as shown an ALTA/ACSM Land Title Survey prepared for Churpeyes Real Estate Limited Partnership, by Cox and Dinkins, Inc., dated May 21, 1990, and recorded June 28, 1991 in the Office of the RMC for Charleston County in Plat Book CD at Page 91. The aforesaid plat is incorporated by reference herein.

TMS: 408-10-00-229

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

MARSH WATERPROOFING, INC.,
Plaintiff

vs.

ARC CAFEUSA001, LLC,
Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

STATEMENT FOR MECHANIC'S LIEN



BP0680340

PGS:

5

NOTICE IS HEREBY GIVEN that Marsh Waterproofing, Inc., (License Number: not required for scope of work), is due the sum of Thirty-Six Thousand Eight Hundred and No/100 Dollars, (\$36,800.00) from State Acquisitions, LLC, a statement of a just and true account of said indebtedness being attached hereto and made a part hereof.

That said debt is due to the Plaintiff for materials and labor furnished and actually used in the improvement of the real estate herein described and owned by ARC CAFEUSA001, LLC, by virtue of an agreement with, or by the consent of such owner(s) or a person or persons authorized by or rightly acting for said owner(s), or the debt is due because such improvements have been authorized by such owner(s). That as shown by the attached statement the Plaintiff furnished materials and labor for such buildings, structures, or improvements within ninety (90) days of the date hereon, or or after August 19, 2017.

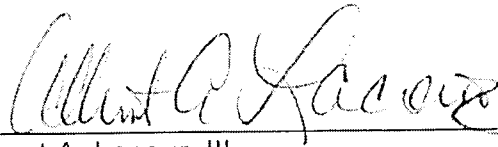
That by virtue thereof, by the service and filing of this Notice and Affidavit, pursuant to the provisions of the statutes in such cases made and provided, the undersigned has and claims a lien to secure the payment of the debt so due and the

costs of enforcing said lien including reasonable attorney's fees all as provided by law upon the buildings or structures hereinafter mentioned and upon the following described real estate:

All that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Charleston County, City of North Charleston, State of South Carolina, being as shown on an ALTA/ACSM Land Title Survey prepared for Churpeyes Real Estate Limited Partnership, by Cox and Dinkins, Inc., dated May 21, 1990, and recorded June 28, 1991 in the Office of the RMC for Charleston County in Plat Book CD at Page 91. The aforesaid plat is incorporated by reference herein.

TMS: 408-10-00-229

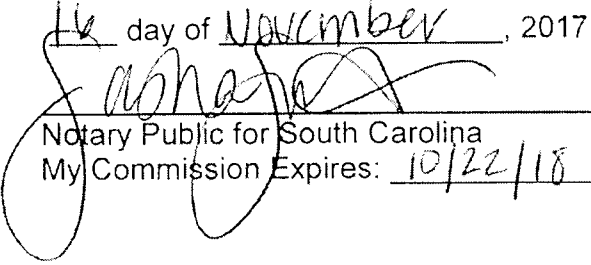
CLAWSON and STAUBES, LLC



Albert A. Lacour, III
Bar No.: 3099
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Phone: (843) 577-2026
Fax: (843) 722-2867
Email: alacour@clawsonandstaubes.com
Attorney for Plaintiff

Sworn and subscribed before me this

14 day of November, 2017.



Notary Public for South Carolina

My Commission Expires: 10/22/18

VERIFICATION

PERSONALLY appeared before me Tim Marsh,
who, being duly sworn, deposes and says that he/she is the
Owner of Marsh Waterproofing, Inc., the Plaintiff, in the
foregoing action; that has read the foregoing Statement for Mechanic's Lien and the
allegations contained therein are true and correct of own knowledge, save and except
those matters alleged upon information and belief, and as to those matters believes the
same to be true.

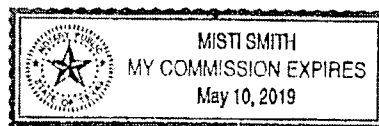
Marsh Waterproofing, Inc.

By: Tim Marsh
Tim Marsh
(print name)

Its: owner
(print title)

Sworn and subscribed before me this
15th day of November, 2017.

Misti Smith
Notary Public for Texas
My Commission Expires: 5/10/19



STATE OF TEXAS

COUNTY OF JEFFERSON

)
) VERIFIED STATEMENT OF ACCOUNT
)

Personally appeared before me, Tim Marsh, who
being sworn, deposes and says that he/she is the Owner of
Marsh Waterproofing, Inc., the Plaintiff, and authorized to make the within Statement of
Account.

That from State Acquisitions, LLC, the sum of Thirty-Six Thousand Eight
Hundred and No/100 Dollars, (\$36,800.00) is currently due and owing upon the
following invoices:

INVOICE DATE	INVOICE NUMBER	AMOUNT
9/5/17	6530	\$36,800.00
Total Balance Due and Owing:		\$36,800.00

That the foregoing statement is a true and just account of all sums due and
owing and no part thereof has been paid by discount or otherwise.

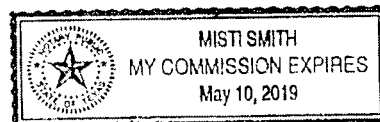
Marsh Waterproofing, Inc.

By: Tim Marsh
Tim Marsh
(print name)

Its: Owner
(print title)

Sworn and subscribed before me this
15th day of November, 2017.

Misti Smith
Notary Public for Texas
My Commission Expires: 5/10/19



RECORDER'S PAGE

NOTE: This page MUST remain
with the original document

**Filed By:**

CLAWSON & STAUBES
126 SEVEN FARMS DR.
SUITE 200
CHARLESTON SC 29492 (BOX)

RECORDED

Date: November 16, 2017

Time: 2:14:29 PM

Book

Page

DocType

0680

340

Mech/Lien

Elaine H. Bozman, Register
Charleston County, SC

MAKER:

ARC CAFEUSA001 LLC

of Sats:

of Pages: 5

of References:

RECIPIENT:

MARSH WATERPROOFING INC

Note:

Recording Fee \$ 10.00

Extra Reference Cost \$ -

Extra Pages \$ -

Postage \$ -

Chattel \$ -

TOTAL \$ 10.00

Original Book:

Original Page:

DRAWER 2 Drawer 2
CLERK JBA



0680
Book



340
Page



11/16/2017
Recorded Date



5
Pgs



Original Book



Original Page



D
Doc Type



14:14:29
Recorded Time

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
)
)
MARSH WATERPROOFING, INC.,)
)
Plaintiff,)
)
vs.)
)
STEEPLE DORCHESTER, LTD. AND)
HAMILTON MANAGEMENT)
SERVICES COMPANY, INC.)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2018-CP-10-00262

ANSWER AND COUNTERCLAIM

TO: ALBERT A. LACOUR, III, ESQUIRE, ATTORNEY FOR MARSH
WATERPROOFING, INC.

1. All Paragraphs not specifically admitted shall be construed as strictly denied.
2. The allegations contained in Paragraph 1 are admitted, upon information and belief.
3. The allegations contained in Paragraph 2 refer to several entities, at least two of which are not parties to this lawsuit. With regard to allegations made about these Defendants, Steeple Dorchester Ltd is a Delaware Corporation. ("Steeple") Hamilton Management Services Company, Inc. ("Hamilton") is a Delaware Corporation.
4. The allegations contained in Paragraph 3 make claims against parties other than the Defendants and these allegations are not denied nor admitted. With regard to allegations contained and made against Steeple, these are strictly denied as will be further discussed in Steeple's Counterclaim.
5. The allegations contained in Paragraph 4 must be denied as phrased and this Defendant craves reference to the terms of the agreement referenced.
6. The allegations contained in Paragraph 5 are denied as to the use of the term "agreement." Without waiving the Paragraph's denial, the Defendants would admit that they are related entities, having a related origin and nexus.

FILED
2019 FEB 28 PM 4:55
JULIE J. ARMSTRONG
CLERK OF COURT

7. The Defendant Steeple admits only that part of Paragraph 6 which implies that it was aware the Plaintiff was providing certain services and labor for an unnamed entity for which the Defendant Steeple was forced to acquiesce. All other assertions are denied.
8. The allegations contained in Paragraph 7 are denied and the Defendant would assert special objection to the terms “agreement” and “due demand for payment” as will be further elaborated upon in affirmative defenses and counterclaims.
9. The Defendant denies the allegations contained in Paragraphs 8 through 12 and demands strict proof of each.
10. Paragraph 13 is a reiteration of the previous 12 paragraphs and, therefore, makes no new allegations which need to be answered. To the extent that it does require a response, each are denied.
11. The Defendants deny those allegations contained in Paragraphs 13-16 and demand strict proof of each.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

12. The allegations contained in the Complaint fail to state a claim from which relief can be granted.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

13. The Plaintiff lacks standing to bring this lawsuit.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

14. The Defendants assert that the Plaintiff’s claims against the Defendants are barred by the doctrine of laches.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

15. The Defendants assert that the Plaintiff’s claims against the Defendants are barred as a result of the misrepresentations made by the Plaintiff to the Defendant or by an unnamed party to the Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

16. Plaintiff’s claims against the Defendants **are barred** by S.C. Code 40-11-30 because the Plaintiff is required to be but is not properly licensed or registered with the South Carolina Department of Labor, Licensing and Regulation.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

17. Plaintiff's claims against the Defendants are barred under the doctrine of illegality as discussed in *W & N Constr. Co. v. Williams*, 322 S.C. 472 S.E.2d 622 (1996).

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

18. Plaintiff's claims are barred by the doctrine of unclean hands.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

19. Plaintiff's claims are barred pursuant to the statute of frauds.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

20. The Plaintiff's cause of action for the foreclosure of a mechanic's lien must be dismissed due to the Plaintiff's status as an **unlicensed contractor** and due to the fact that the mechanic's lien was not perfected within **90 days of the last day of work**.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

21. The Defendants are entitled to a reduction in amounts owed, if any based on any agreement to dismiss a known party to this lawsuit, ARC CAFE001. The Defendants should also be entitled to a reduction to amounts owed, if any, based on the dismissed party's status as the landlord and ultimate beneficiary of the labor and work provided, to the extent any exists.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

22. The case should be dismissed based on the Plaintiff's failure to name necessary parties, including the property owner pursuant to Rule 19, SCRCP.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

23. The case should be dismissed as all claims are contractual in nature and seek to enforce a contract which was entered into and performed in direct violation of the common law and statute in the following particulars:
- a. Marsh's status as an unlicensed contractor is confirmed by the LLR citation and cease and desist order. (See Exhibit "B")
 - b. Marsh failed to pull a building permit.
 - c. Marsh did not register to do business as a non-resident entity in further violation of statute.¹

¹ Marsh Waterproofing filed with the secretary of state's office, an application for authority as a foreign entity. See Exhibit C.

24. The Defendants Hamilton Management and Steeple Dorchester LTD reserve the right to assert further affirmative defenses

FURTHER ANSWERING AND AS A COUNTERCLAIM
(Tortious interference with contract as to Defendant Steeple Dorchester LTD)

25. The Defendant Steeple Dorchester Ltd. reasserts Paragraphs 1-24 and further alleges the following as a counterclaim.
26. Steeple Dorchester Ltd. is the entity which owns franchisee rights to that Church's Chicken located on Dorchester Road in Charleston, SC.
27. The real property is more specifically identified in the mechanics lien. ("Property")
28. On November 23, 2014, Defendant Steeple Dorchester Ltd. assumed, by assignment, the rights and obligations of a lease which was entered into on December 22nd 2006 between non-parties GE Capital Franchise Finance Corporation² and Churpeyes, Inc.
29. The property was sold to the current owner, ARC CAFEUSA001, LLC prior to the 2014 assignment.
30. The 2014 assignment created a landlord tenant relationship between the Defendant Steeple Dorchester Ltd. And ARC CAFEUSA001, LLC.
31. It is well established that the landlord tenant relationship is a contractual relationship.
32. The Plaintiff had direct knowledge that the Defendants leased the premises from another entity.
33. The Plaintiff also had direct knowledge that it was an unlicensed contractor as defined by South Carolina by virtue of its acknowledge lack of licensure and subsequent contacts with the SC LLR.
34. The filing of a mechanics lien by an entity which does not procure or maintain a license is an unjustified and improper act as defined by the SC Code and numerous case citations.
35. The filing was an intentional act.
36. Despite this knowledge, on or about November 17th 2017, the Plaintiff filed or caused to be filed that certain mechanics lien located at Book 53, Page 298 in the Charleston County, South Carolina Register of Deeds office.

² GE sold its interest in the premises to ARC CAFEUSA001

37. The filing of the lien and later service of the lien on ARC CAFEUSA001 was an overt act, performed precisely and with only the intent to injure the contractual relationship shared between Steeple Dorchester and ARC CAFEUSA001.

38. As a result of the actions of Marsh, an unlicensed contractor filing a mechanics lien without any legal authority, the lease was deemed in default and terminated.

39. As a result of the lease being terminated, the Defendant's affiliated companies State Acquisitions LLC, Hamilton Management Group and the Defendant were deemed in breach of the franchise agreement with Cajun Operating Company and the franchise agreement was subsequently terminated.

40. The termination of the lease and franchise agreement has caused the Defendant and its affiliated monetary damages which are still being determined.

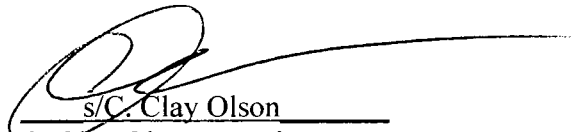
41. The actions of the Plaintiff were the proximate or legal cause of the lease termination and franchise termination.

42. The lease and franchise agreement constituted valuable assets which cannot be recovered or regained as a result of the unlawful publication of the mechanics lien.

WHEREFORE, having fully answered the Complaint the Defendant would ask that same be dismissed for reasons stated above in addition to the Defendants being awarded attorneys fees as the prevailing party in the mechanics lien portion of this lawsuit.

WHEREFORE, having asserted a cause of action for tortious breach/interference with contractual relations, the Defendants would ask for monetary damages as will be supported by the record. Such damages will include the total loss of the Defendant's leasehold rights, as well as for damages equaling the value of the Defendant's interest in the Church's franchise.

Respectfully submitted:


s/C. Clay Olson
C. Clay Olson, Esquire
164 Market Street Suite 139
Charleston, SC 29401
843-224-6676
clay@harperwhitwell.com

Charleston, SC
February 27, 2019

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,

Plaintiff,

vs.

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.,

Defendant(s).

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-00262

REPLY TO COUNTERCLAIMS

**(Breach of Contract; Mechanic's Lien;
Quantum Meruit)**

JURY TRIAL DEMANDED

FILED
2019 MAR -6 PM 3:06
JULIE J. AUSTIN
CLERK OF COURT

The Plaintiff, Marsh Waterproofing, Inc., (Hereinafter "Marsh") for its Reply to the Counterclaim of Defendants would allege and show unto this Honorable Court:

1. That Marsh is not required to admit or deny the truth of the allegations of paragraphs 1 through 24 because, upon information and belief, such constitute the Answer and affirmative defenses of Defendants and are not intended to state claims.
2. That answering the allegations of paragraph 25 Marsh would reallege its answers to the allegations of paragraphs 1 through 24 above, as fully as if the same were here set forth verbatim.
3. That Marsh is without sufficient information to form a belief as to the truth of the allegations of paragraph 26 and therefore denies same.
4. That Marsh admits the allegations of paragraph 27 upon information and belief.
5. That Marsh is without sufficient information to form a belief as to the truth of the allegations of paragraph 28, and therefore denies same because no assignment to the Defendant Steeple of any leasehold rights has ever been recorded.

6. That Marsh is without sufficient information to admit or deny the allegations paragraph 29, because no assignment to the Defendant Steeple of any leasehold rights has ever been recorded.

7. That Marsh is without sufficient information to form a belief as to the truth of the allegations of paragraph 30 because no assignment to the Defendant Steeple of any leasehold rights has ever been recorded.

8. That the allegations of paragraph 31 constitute a conclusion of law which Marsh is not required to admit or deny. To the extent the allegations of paragraph 31 are factual, the same are denied, upon information and belief.

9. That Marsh denies the allegations of paragraph 32 and would further show that the record reflects Defendant's predecessor in interest has the leasehold rights.

10. That Marsh denies the allegations of paragraph 33, upon the grounds *inter alia*: that no work classification existed at the time for the scope of work of Marsh; or alternatively, Defendant had hired another to act as general contractor and in either event no license was required of Marsh.

11. That Marsh denies allegations of paragraph 34 and would further show that such filing was justified, the exercise of a statutory right, and enjoys an absolute, unqualified privilege.

12. That Marsh admits the allegations of paragraph 35 and would further show that such filing was justified, the exercise of a statutory right, and enjoys an absolute, unqualified privilege.

13. That Marsh admits so much of paragraph 36 as alleges that it caused its mechanics lien to be filed in the appropriate offices in Charleston County, but would crave

reference to the filed lien itself for the specifics thereof and deny each and every allegation of paragraph 36 inconsistent therewith.

14. That Marsh denies the allegations of paragraph 37 and would further show that such filing was justified, the exercise of a statutory right, and enjoys an absolute, unqualified privilege.

15. That Marsh denies the allegations of paragraph 38, upon information and belief.

16. That Marsh is without sufficient information to form a belief as to the truth of the allegations of paragraph 39, 40, 41 and 42 and therefore denies same. Further answering, Marsh would show that Defendants' failure to pay the bills incurred by Defendants was the cause of Defendants losses, if any.

17. That Marsh denies each and every allegation of the Counterclaims not specifically admitted or qualified above.

FOR A FIRST AFFIRMATIVE DEFENSE
(No Procurement of Breach by Third party)

18. That Marsh did not procure the breach by a third-party of any contract to which Defendants were a party, but rather it was Defendants themselves who were deemed to be in breach of the agreement and the absence of any act to procure the breach by a third-party constitutes a complete defense to any claim for intentional interference with contractual relations.

FOR A SECOND AFFIRMATIVE DEFENSE
(Justification)

19. That Marsh has a statutory right to enforce a mechanics lien to secure its right to payment for labor and material provided for the improvement of real property and therefore the filing of the Mechanics Lien, Lis Pendens, Summons and Complaint is

entirely justified and such justification constitutes a complete defense to any claim for intentional interference with contractual relations.

FOR A THIRD AFFIRMATIVE DEFENSE
(Pleadings Enjoy Absolute, Unqualified Privilege)

20. That the filing of a Mechanics Lien, Lis Pendens, Summons and Complaint to enforce the right to be paid for labor and material provided for the improvement of real property is authorized by statute and such pleadings enjoy an absolute, unqualified privilege and may not be the basis of any claim by Defendants.

FOR A FOURTH AFFIRMATIVE DEFENSE
(Defendants are the Authors of Their Own Injuries)

21. That Defendants procured the labor and material and services provided by Plaintiff and thereafter failed to pay for same, and such failure to pay resulted in Defendants being held in breach of their lease and franchise agreement and Defendants are therefore the authors of their own injury, if any, and such constitutes a complete defense to all counterclaims.

FOR A FIFTH AFFIRMATIVE DEFENSE
(Incorporation of Prior Allegations)

22. That Marsh would incorporate and reallege herein all allegations set forth in the Complaint as fully as if the same were here set forth verbatim in further reply to the counterclaims of Defendants.

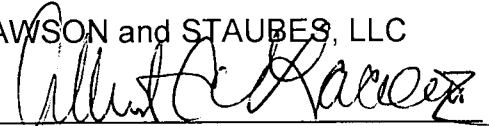
Wherefore having fully set forth its Reply to the Counterclaims of Defendants, Marsh prays Judgment:

(a) against the Defendants Hamilton Management Services Company, Inc. and Steeple Dorchester Ltd. for the sum of \$36,800.00 together with the costs and disbursements of this action, for breach of contract;

(b) against the leasehold interest of Defendant Steeple Dorchester Ltd. for foreclosure of the above Mechanic's Lien in the amount of \$36,800.00 together with reasonable attorney's fees and other costs and disbursements of this action and interest on the amount so due, and further, directing that the property be sold and the proceeds thereof applied to payment and satisfaction of the debt; or

(c) in the alternative, against the Defendants, Hamilton Management Services Company, Inc. and Steeple Dorchester Ltd., in the amount of \$36,800.00 together with the costs and disbursements of this action for quantum meruit.

CLAWSON and STAUBES, LLC



Albert A. Lacour, III

Bar No.: 3099

126 Seven Farms Drive, Suite 200

Charleston, South Carolina 29492-8144

Phone: (843) 577-2026

Fax: (843) 722-2867

Email: alacour@clawsonandstaubes.com

Attorney for Marsh Waterproofing, Inc.

Charleston, South Carolina

March 4, 2019.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
Marsh Waterproofing, Inc.,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 2018-CP-10-00262
	)	
vs.	)	
	)	DEFENDANTS' PRE-TRIAL BRIEF
Steeple Dorchester Ltd and	)	
Hamilton Management Services	)	
Company, Inc.	)	
	)	
Defendants.	)	

COME NOW the Defendants, Steeple Dorchester Ltd and Hamilton Management Services Company, Inc. ("Defendants") by and through their undersigned attorneys, submit this Pre-Trial Brief for consideration.

1.0 Concise Facts

This lawsuit stems from work performed by the Plaintiff at a Church's Chicken located in Charleston County, South Carolina. ("The Project") The Plaintiff, Marsh Waterproofing, Inc., is a Texas contractor. The Defendant Steeple Dorchester Ltd. is a Delaware Limited Liability Company registered to do business in the State of South Carolina which, at all times pertinent, operated the Church's Chicken located on Dorchester Drive in North Charleston, South Carolina. The Defendant Hamilton Management Services Company, Inc. is an entity which provided certain management services to Steeple Dorchester as well as other Church's Chicken locations in South Carolina and Georgia.

The Plaintiff was initially contacted by representatives from Cajun Operating Company ("Church's") for purposes of performing remedial work on Church's restaurants located in Alabama, Tennessee, North Carolina, and South Carolina. The Plaintiff was aware that the Church's crawl spaces needed to be repaired and renovated as a result of a catastrophic event which occurred at a Church's in Livingston, Texas. The Livingston tragedy involved a floor collapse in the kitchen area at a Church's which trapped employees and caused substantial permanent injuries due to contact with boiling grease from the deep fryers. It is uncontradicted

testimony that the Plaintiff performed unlicensed work in South Carolina, Alabama, Georgia, and Tennessee on behalf of Church's.

Marsh Waterproofing's scope of work at the Dorchester Road Church's was provided by Davis Patrikios Criswell, an engineering firm retained by Church's to inspect crawl spaces at locations around the region. In their own words, Davis Patrikios was retained to:

"provide a visual observation of the crawl space / basement to identify observed structural deficiencies in the building's ground floor slab structural system. Repair recommendations will be made on an as needed basis in order to maintain life safety and structural integrity of the floor system."

The Davis Patrikos Criswell report and recommendations noted structural deficiencies at the building which could lead to another tragic floor collapse. Specifically, the Report states that "failure of the floor system is imminent. Any additional localized failure of the floor system could result in catastrophic collapse of the entire structure. We recommend that Church's Chicken provide immediate continuous structural support of the floor decking and beams in order to protect both life safety and Church's capital assets. We recommend this store location be repaired immediately."

The Notice and Certificate of Mechanics Lien was filed on November 17, 2017 in the Charleston RMC.

On January 25, 2018, the Plaintiff filed the lawsuit which is currently pending. In its lawsuit, the Plaintiff has alleged the following causes of action:

1. Breach of Contract
2. Mechanic's Lien
3. Quantum Meruit

The Defendants would assert that they are entitled to judgment and a verdict as to all causes of action due to the Plaintiff's status as an "unlicensed contractor."¹ Pursuant to S.C. Code 40-11-370(C), "an entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract." *S.C. Code Ann. § 40-11-370* The statute acts as a "door closer" and, therefore, the Defendants are entitled to summary judgment in this matter.

¹ "an entity performing or overseeing general or mechanical construction without a license." See *C-Sculptures, LLC v. Brown*, 394 S.C. 519, 524, 716 S.E.2d 678, 681 (Ct. App. 2011)

2.0 Facts in Controversy

None. While the Plaintiff will attempt to provide the Court with arguments that it was under the belief, or impression, that it was not required to have a SC Contractor's license, this is irrelevant given the statute relied upon by the Defendants, as well as implausible given the evidence.

There may be some controversy as to the Plaintiff's alleged mental impression as to whether or not it was working for a general contractor at the time of construction. This has been alluded to in the Plaintiff's Memorandum in Opposition to Summary Judgment. The Defendants would point out that this argument is of no relevance given the statute. Furthermore, the argument was never alluded to in the Complaint, Amended Complaint, Correspondence to the LLR, or during the deposition of Tim Marsh.²

The Plaintiff might also argue that the work it performed was not within the purview of the LLR's licensing requirements. The Defendants would allege that, according to the LLR in its Conclusions of Law, the Plaintiff's work constituted "General Construction" and, thus, required a license.

3.0 Legal Issues

Defendants Steeple Dorchester Ltd. and Hamilton Management Services Company, Inc. ("Defendants") would show uncontroverted evidence that Marsh Waterproofing is an unlicensed contractor. The Defendants are entitled to judgment as a matter of law pursuant to S.C. 40-11-30 and S.C. 40-11-370, which serve as "door closing" mechanisms, prohibiting unlicensed contractors from enforcing contracts in South Carolina courts. The precedent barring unlicensed contractors from pursuing such claims is well settled, having been the subject of multiple appellate court decisions. See S.C. Code 40-11-370

The Defendants assert that the Court only has to make two determinations in order to rule in their favor. The first finding is that Marsh performed "General Construction" without a license in this state.

S.C. Code 40-11-20

(8) "General construction" means the installation, replacement, or repair of a building, structure, highway, sewer, grading, asphalt or concrete paving, or improvement of any kind to real property.

² At his deposition, Tim Marsh denied that his company was a subcontractor on the project. The LLR proceeding, which the Defendants were not a party to, reveals Marsh made a representation that he believed his company was being supervised by a general contractor.

The second finding that the court must make is that the work performed by Marsh exceed \$5,000.00. This is evident by the amount of its invoice and the damages sought, which are approximately \$40,000.

The Court need look no further upon these findings as 40-11-370(c) bars this lawsuit. Our Supreme Court has held as recently as 2013 that 40-11-370(c) is not subject to statutory interpretation. "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id. C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 361 (2013)

In the C-Sculptures decision, the Supreme Court found an arbitrator's decision to deny a motion to dismiss involving an *improperly licensed*, yet licensed contractor to be a manifest disregard of clear precedent and thus, reversed. The Court held in its analysis of 40-11-370(c) that "the governing law ignored by the arbitrator [is] well defined, explicit, and clearly applicable[.]" and consequently, the manifest disregard standard has been met." *Id.*

Even if the Courts had discretion to make exceptions for the Plaintiff's failure to obtain a license - a notion quickly and swiftly cut down by C-Sculptures – the Plaintiff's excuses in this case are hardly compelling or supported by evidence. The Plaintiff's argument that it assumed there might have been a general contractor on the project is not even applicable if it was to be believed as the slight exception allowed for regarding unlicensed contractors requires that a licensed contractor supervise the unlicensed contractor's work. To Mr. Marsh and his building superintendent's credit, neither have tried to argue that their company was under the direction and supervision of anyone.

It should also be made clear that, should the court find that Marsh was being supervised by a licensed contractor at the project, this fact would only have traction in an action brought by Marsh against the supervising contractor for non-payment and not a member of the non-contractor public. The Court has explained this narrow exception in a matter which involved Lander University and construction payment issues which arose between the prime contractor and one of its subcontractors. "The purpose of protecting the public interest by denying enforceability does not exist when dealing with claims between contractors." *Teseniar v. Profl Plastering & Stucco, Inc.*, 407 S.C. 83, 97, 754 S.E.2d 267, 274 (Ct. App. 2014); see also *Kennoy*

v. Graves, 300 S.W.2d 568, 570 (Ky. Ct. App. 1957) ("The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. The reason for the rule denying enforceability does not exist when persons engaged in the same business or profession are dealing at arm[']s length with each other. Miller Constr. Co., LLC v. PC Constr. of Greenwood, Inc., 418 S.C. 186, 203, 791 S.E.2d 321, 331 (Ct. App. 2016)

4.0 Exhibits

See List of Exhibits.

5.0 ADR

The parties have mutually agreed that mediation would be fruitless in this matter.

6.0 Additional Issues

The Defendants will seek several rulings in limine and anticipate that the Plaintiff will seek similar rulings. As to one of the Motions in Limine involving the LLR Hearing Officer Report and Conclusions, the Defendants will seek limitations of that Order as it makes findings of fact which will have an indirect affect on the Defendants in this case. Because the Defendants were not a party to the regulatory matter or invited to provide testimony under oath or otherwise, there are certain items in the record which the Defendants would object to. Having said that, the legal holdings and findings regarding the Plaintiff's failure to obtain a license and status as an unlicensed contractor are congruent to the position advocated by Defendants. The Defendants take no issue with the legal conclusions regarding Plaintiff's work falling under SC 40-11-20(8) and will ask that the Court adopt the same finding, despite our disagreement with several factual conclusions.

Attorney for the Defendants

/s/ C. Clay Olson
C. CLAY OLSON

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,

Plaintiff,

vs.

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.,

Defendant(s).

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-00262

**POST-TRIAL MEMORANDUM OF
PLAINTIFF**

This memorandum is submitted to respond the primary arguments set forth in the Defendants Pre-Trial Brief, which is undated, but which was provided on February 6, 2020, via email, after the close of the trial record.

Marsh was not the general contractor.

Title 40, Chapter 11 of the South Carolina Code is the statutory regulatory scheme for general and mechanical contractors. A "general contractor" is one who performs or supervises or offers to perform or supervise "general construction". S.C. Code §40-11-20(9). "General construction" is installation, replacement or repair of a building or structure. S.C. Code §40-11-20(8). The facts in the record establish that Marsh Waterproofing, Inc. does not fall within that definition. These definitions reflect the history that general contractors are defined essentially by either the nature of the work performed or the scope of the work performed.

Analyzing this case by the nature of the work, subparagraph (8) would require us to build a building or structure, or replace a building or structure, or repair a building or

structure. The record reflects Marsh made absolutely no repairs or modifications to the structural elements of the building other than to mix up a couple of bags of concrete to close up the opening in the slab. That in no way amounts to \$5000 worth of work to the existing structural elements. The foam was installed in the open air space between grade and the bottom of the steel deck. It does not attach to any of the structural elements and does not modify or change any of the structural elements. The foam simply occupies the airspace to prevent the slab from moving downward if the slab fails.

The scope of work outlined by the engineering report does not specify any repairs to any existing structural elements. Marsh made no repairs to any footings, CMU walls, brick masonry walls, steel girders, steel joists, steel decking or the existing slab. None were called for by the engineering report. The installation of foam for supplemental support is not a classification of work identified in the statutory scheme as being the work of a general contractor in code section S.C. Code §40-11-410. (Exhibit 14).

Analyzing this case by the scope of the work, general contractors are sometimes identified by the fact that they contract to perform all of the work required to complete the project. Marsh clearly did not do this. Marsh was not the only contractor on the project. Others performed the preparatory work and others provided the typical general contractor responsibilities set forth below. Marsh only arrived last, in the order of the work, to install the foam in the airspace above grade and below the slab.

The scope of the general contractor's work generally includes providing permitting, temporary utilities, temporary facilities, scheduling of the trades, sequencing of the trades, supervision of the trades, and general overall responsibility to see all of

the work gets fully and properly executed. None of the foregoing are within the scope of work defined by the proposal of Marsh. (Exhibit 6).

The representations of the Defendants to Marsh that they had a “contractor” working one step ahead of Marsh to do the preparatory work outlined in the engineers report reasonably led Marsh to believe a general contractor was working ahead of him on the project. The prep work involved multiple trades, all of which required separate trade licenses, and would have required someone to pull a building permit before Marsh ever set foot on the project. To the extent that Marsh could observe whether these “general contractor” obligations were being met by others, they appeared to be furnished by someone, and it was not Marsh.

The statement in Defendant’s Pretrial Brief to the effect that Marsh “performed unlicensed work in South Carolina, Alabama, Georgia and Tennessee on behalf of Church’s” is a cute half-truth. Defendants provided no evidence that any of those states required a license for the installation of the foam. On the testimony in the record, only the state of Louisiana did require a license for that work.

The cases denying recovery to general contractors are distinguishable.

The C-Sculptures case reflects in the very first paragraph of the syllabus that it arises from a construction contract by which “a general contractor agreed to build a home...”. C-Sculptures, LLC v. Brown 403 SC 53, 55, 742 SE2d 359, 360, (2013). Indeed, all of the cases cited by Defendants in memoranda, motions and arguments throughout this litigation have uniformly involved contractors who were either admittedly

general contractors, or were adjudged to be general contractors based upon either the nature of the work or the scope of the work.

The Defendants did not rely on the existence or non-existence of a license.

Marsh made no representation to Defendants that it was licensed in the correspondence or the proposal or the discussions of the parties. The Teseniar case stands for the proposition that “where the reason for the rule ends, so ends the rule”. On the facts in the record the parties discussed licensing before the work started and Tim Marsh told Mr. Burns that he was not licensed in South Carolina and asked if Mr. Burns thought he needed to be. Mr. Burns promised to check on it. We don’t know with whom he checked or whether he checked, but he responded, and the parties proceeded with the work. Mr. Burns could not rely upon the existence of a license for the qualifications of the contractor if he knew none existed.

In addition, Mr. Burns was referred to Marsh by Church’s, and aware of the past record of Marsh for making repairs for the Church’s franchise in multiple states at numerous stores, and so was fully aware of the extensive experience and the ability of Marsh to install the foam. He was not relying upon the existence of a license to know the contractor’s qualifications to do the work. He was fully aware of the experience and the qualifications and the track record of the contractor and was relying upon that knowledge, rather than the existence of a license in deciding whether to engage the contractor. “The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. ... In the case before us, [Defendant] was in a position to know, and did know, the

qualifications of [Marsh]. No reliance was placed upon the existence of a license, as presumptively would be the case if [Marsh] was dealing with the general public.” Teseniar v. Professional Plastering & Stucco, Inc. 407 SC 83, 97, 754 SE2d 267, 274 (Ct. App. 2014). In the present case, the testimony reflects that there was never any complaint made about the quality of the work or the quantity of the work of Marsh.

CLAWSON and STAUBES, LLC

s/Albert A. Lacour, III

Albert A. Lacour, III

Bar No.: 3099

126 Seven Farms Drive, Suite 200

Charleston, South Carolina 29492-8144

Phone: (843) 577-2026

Fax: (843) 722-2867

Email: alacour@clawsonandstaubes.com

Attorney for Marsh Waterproofing, Inc.

Charleston, South Carolina

February 10, 2020.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
	)	
MARSH WATERPROOFING, INC.,	)	CIVIL ACTION NO. 2018-CP-10-00262
	)	
Plaintiff,	)	SUPPLEMENTAL BRIEF OF
	)	DEFENDANTS STEEPLE DORCHESTER, LTD.
vs.	)	AND HAMILTON MANAGEMENT SERVICES
	)	COMPANY, INC.
STEEPLE DORCHESTER, LTD. AND	)	
HAMILTON MANAGEMENT SERVICES	)	
COMPANY, INC.	)	
	)	
Defendants.	)	
	)	

Misapplication Of Law

The Plaintiff continues to misunderstand the law in South Carolina on one issue. Specifically, the Plaintiff states that it was not the “general contractor” on the job as we would normally use the term. We agree. The State of South Carolina, however, defines General contractor" means an entity which *performs* or supervises or *offers to perform* or supervise general construction.” *SC 40-11-20(9)* There is no requirement of supervisory duties or management of trades, as laypeople use the term. The state goes on to define “General Construction” as “the installation, replacement, or repair of a building, structure, highway, sewer, grading, asphalt or concrete paving, or improvement of any kind to real property.” *S.C. 40-11-20(8)* The LLR Order found that Marsh performed work which required a license when it determined that Marsh fell under the classification of “general construction.”

See LLR Order Paragraph 3:

“As such, the hearing officer determined that the scope of work for the use of this foam underneath the crawlspace for the project(s) was structural in nature and required a general contractor’s license pursuant to S.C. Code 40-11-20(8).”

Note that the LLR’s finding was based on 40-11-20(8), which defines the term “general construction.” In other words, a contractor’s license is required if you are serving to perform general construction or supervise general construction. In either event, you are a “General Contractor” in the eyes of the LLR, which is further supported in the LLR Order.

Credibility and Contradictions

There is a critical contradiction in Marsh’s trial testimony and affidavits submitted to the LLR and this Court. The contradiction involves Marsh’s statement to the LLR which states that Tim Marsh asked Alex Burns directly whether or not he needed a license for the work. It is

significant that Burns' testimony is directly contradictory to Marsh's recollection. It is even more compelling, however, that Tim Marsh has contradicted himself on the very issue.

Marsh has had three opportunities to provide testimony about the exchange. In his original affidavit, Marsh states that Mr. Burns asked him if he was licensed. In the LLR Order, it states Marsh testified that he, himself, asked Burns if a license was required. At trial, Marsh went back to his original testimony that Burns made the inquiry to him.

With regard to Marsh's testimony as to what Burns told him about the need for licensing, Marsh testified in his affidavit and to the LLR that Burns told him a license was not required. At trial, Marsh testified that Burns told him he was not sure, he would check. And most significantly, at trial, Marsh followed up by stating that they never discussed it again. In three opportunities, Marsh provides contradictory testimony.

Marsh Affidavit

"That in discussion with Alexander Burns of Hamilton Management Services Company, Inc., prior to the beginning of work, he asked me whether I was licensed in South Carolina. I asked him whether I needed to be licensed in South Carolina and he told me he would check with someone and get back to me. He subsequently did respond to me and tell me that there did not seem to be a need to be licensed to do our work in South Carolina. He did not tell me with whom he checked, but I took him at his word."

LLR Final Order

"Mr. Marsh testified that he inquired about licensing with Hamilton, and Hamilton told him licensing was not necessary."

Trial Testimony

(Paraphrasing) Marsh testified that Burns asked him if he was licensed. Marsh stated that he was not and inquired whether he need be licensed. Mr. Burns told Marsh that he was not sure but he would check. When asked about further communications, Marsh stated that he did not receive a response.

Although Marsh is unable to testify in a uniform manner on the issue, taking Marsh in a light most favorable to him would still mute the issue. *The LLR Order holds that "It is the responsibility of the Respondent (Marsh) to determine whether a license was required in South Carolina."*

The Defendants also ask that the Court take notice that Burns' alleged statements were only recently brought to the table. The Plaintiff's Complaint, Amended Complaint, and Correspondence to LLR (Bill Ritchey) never mentioned this convenient bit of information. It would seem to me that Marsh's attorney's correspondence to LLR would have mentioned that, "the project owner notified us that we did not need a license", if it was a conversation which, in fact, happened.

The Issue of Licensing Never Came Up

The Court rightly takes issue with a scenario in which Marsh provided information to the Defendants affirmatively stating that it was not licensed and, despite being aware of this fact, the

Defendants are relying on licensing “as a means to avoid paying” the Plaintiff, as it was stated by Plaintiffs’ Counsel in Court.

I would present to you that this issue never was raised by Tim Marsh or by Alex Burns. The conversation did not occur at all. I would support this contention with the conflicting testimony provided by Marsh, coupled with Mr. Burns testimony which was uniform and unwavering in his deposition, and the affidavit I have attached which was provided during November 2019.

At trial, Marsh testified that Mr. Burns asked him if his company (Marsh) was licensed. Mr. Marsh responded by asking whether or not he needed to be. Mr. Burns indicated that he didn’t know and would get back to him. Marsh testified that Mr. Burns neither got back to him, nor did he, Tim Marsh, inquire further.

These two statements are directly inconsistent to one another as Marsh has provided information to the LLR, outside of our presence, which stated that Marsh asked about licensing and Burns affirmatively responded that one was not required. Marsh’s trial testimony was completely contradictory by stating that Marsh did not bring it up to Burns, but vice versa. Of critical importance, Marsh testified at trial that when asked, Burns said he did not know if a license was necessary and the two never spoke about it again. The latter scenario is much different than the situation as portrayed to the LLR which is one where Burns allegedly instructed Marsh that a license was not needed and is now relying on a statute which hangs on licensure.

Note that the LLR Order also provides that “it is the responsibility of the contractor to determine whether or not a license is required in South Carolina to perform this work.”

In closing, we would offer that the law in South Carolina is well settled on the issue of an unlicensed contractor seeking to enforce a contract in our courts. “Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Id.*

“It is undisputed that Respondent is a "general contractor" that performs "general construction" within the meaning of section 40-11-20(8) and (9) of the South Carolina Code. Section 40-11-30 states:

No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting . . . without a license issued in accordance with this chapter.

C-Sculptures, LLC v. Brown, 403 S.C. 53, 56-57, 742 S.E.2d 359, 361 (2013)

It is worth noting that the C-Sculptures case was interpreting SC 40-11-20(8) and SC 40-11-20(9) in the context of 40-11-370 when it stated that an arbitrator’s ruling should be overturned as it failed to grant an owner’s motion to dismiss.

“The arbitrator erred in failing to grant the owners' motion to dismiss based on the affirmative defense of § 40-11-370. The governing law ignored by the arbitrator was well defined, explicit, and clearly applicable, and consequently, the manifest disregard standard was met.” ID.

Undersigned counsel, on behalf of the Defendants, would ask that this memorandum be considered and evaluated in light of the testimony and record at trial. The Defendants have established via testimony of the Plaintiff that it was not a licensed contractor. Further, the LLR Order is clear and unequivocal in its holding that the work performed required a license and was therefore performed in violation of Chapter 40.

HARPER LITTLE PLLC

S/C. Clay Olson

C. Clay Olson
164 Market Street Suite 139
Charleston SC 29401
843-224-6676
Clay@harperlittlelaw.com

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,
Plaintiff,

vs.

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.,
Defendant(s).

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-00262

**MOTION TO MODIFY JUDGMENT TO
ADD AWARD OF ATTORNEY'S FEES
AND COSTS PURSUANT TO THE
MECHANIC'S LIEN STATUTE**

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Marsh Waterproofing, Inc., ("Marsh") will move before the Honorable Frank R. Addy, Jr., Circuit Judge, on the 10th day after service hereof, or at such other time and place as is convenient to the Court and counsel, for modification of the Judgment on such terms as may be proper to award attorney's fees and costs to Marsh as the prevailing party pursuant to the Mechanic's Lien Statute.

APPLICABLE LAW

Both statutes, §29-5-10(a) and §29-5-20(A) provide for an award of attorney's fees and costs of the action to the prevailing party.

In South Carolina, an award of fees and costs is limited by the terms of the statutes to no more than the face amount of the lien. Id.; Mozingo and Wallace Architects, LLP v. Patricia Grand Ltd. Partnership 379 S.C. 478, 666 S.E.2d 267 (Ct. App.2008).

Both statutes provide for the parties to make offers of settlement in advance of the trial. §29-5-10(b) and §29-5-20(C). If the Plaintiff makes no offer, the prayer in the complaint is considered Plaintiff's offer for the purpose of determining the "prevailing

party" under the statute, and if the Defendant makes no offer, and asserts no counterclaim, his offer is considered to be zero.

A counterclaim is a claim presented by a defendant in opposition to or deduction from the claim of the Plaintiff, which tends to defeat or diminish the Plaintiffs demand. Black's Law Dictionary, 4th Ed. Rev.

In South Carolina, mechanics' liens are purely statutory and may be acquired and enforced only in accordance with the terms and conditions set forth in the statutes creating them. Multiplex Bldg. Corp. v. Lyles, 268 S.C. 577, 235 S.E.2d 133 (1977); accord Skiba v. Gessner, 374 S.C. 208, 212, 648 S.E.2d 605, 606 (2007) (stating "one's right to a mechanic's lien is wholly dependent upon the language of the statute creating it"); Butler Contracting, Inc. v. Court St., L.L.C., 369 S.C. 121, 130, 631 S.E.2d 252, 257 (2006) (observing mechanics' lien statutes "must be strictly followed"). The statutory process encompasses several steps, including the (1) creation, (2) perfection, and (3) enforcement of the lien. See generally, S.C. Code §29-5-10 to §29-5-440 governing mechanics' liens.

The six factors to be considered in determining an award of attorney's fees are 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. Blumberg v. Nealco, Inc. 310 S.C. 492, 427 S.E.2d 659 (1993).

The charges by paralegal staff are allowable in South Carolina. Spriggs Group PC v. Slivka 402 S.C. 42, 738 S.E.2d 495 (Ct. App. 2013).

ARGUMENT

Following a bench trial on February 5, 2020, the court awarded Marsh the full amount of the prayer, \$36,800. The Defendant plead a counterclaim, but withdrew the counterclaim at trial and presented no witnesses or evidence in support of it. Neither party made a written offer of settlement under the statute.

The fees incurred in connection with this specific case are set forth in Exhibit A to this Motion which contains all time entries for all cases and is color coded to identify the fees related to this case.

The costs incurred in connection with this specific case are set forth in Exhibit B to this Motion which reflects all costs incurred for all cases and is color coded to identify the costs related to this case.

The basis for the factual findings for the six factors necessary under the Bloomberg case are set forth in the Affidavit In Support which is attached as Exhibit C to this Motion.

The total of the calculated fee and cost components applicable to the Charleston lien is less than the face amount of the Mechanic's Lien at the time it was filed.

CONCLUSION

The judgment previously entered by the court in the amount of \$36,800 should be amended to add \$29,894, which is comprised of attorney's fees of \$28,852 and costs of \$1,042 so that the full judgment may be entered for further proceedings thereon. For the foregoing reasons, Marsh respectfully submits that it is entitled to an award of attorney's fees and costs as the prevailing party on the mechanics lien claim in the within action.

CLAWSON and STAUBES, LLC

s/ Albert A. Lacour, III

Albert A. Lacour, III

Bar No.: 3099

126 Seven Farms Drive, Suite 200

Charleston, South Carolina 29492-8144

Phone: (843) 577-2026

Fax: (843) 722-2867

Email: alacour@clawsonandstaubes.com

Attorney for Marsh Waterproofing, Inc.

Charleston, South Carolina.

February 21, 2020.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
)
)

MARSH WATERPROOFING, INC.,

)

Plaintiff,

)

vs.

)

STEEPLE DORCHESTER, LTD. AND
HAMILTON MANAGEMENT SERVICES
COMPANY, INC.

)

) DEFENDANTS' NOTICE OF MOTION AND MOTION
) TO AMEND JUDGMENT OR FOR A NEW TRIAL IN
) THE ALTERNATIVE (RULE 59)
)

Defendants.

)

)

PLEASE TAKE NOTICE that Defendants STEEPLE DORCHESTER LTD. AND HAMILTON MANAGEMENT SERVICES COMPANY, INC. ("Defendants"), by and through the undersigned counsel, and pursuant to Rules 59(a) and (e), SCRCP, move this court for an order to alter or amend its judgment of February 12th, 2020 to find for the Defendants. Specifically, the Defendants ask that the Court direct the entry of a new judgment pursuant to SCRCP 59(a)(2). In the alternative, the Defendants would move for a new trial based on the grounds and arguments below.

In addition to requesting that the Court's judgment be amended in favor of the Defendants, the moving Defendants also seek for Steeple Dorchester, Ltd. be deemed the "prevailing party" and awarded reasonable attorney's fees and costs pursuant to the South Carolina mechanic's lien statutes as it is rightly the "prevailing party" pursuant to S.C. Code Ann. § 29-5-20(A).

As a third alternative and pursuant to Rule 52, the Defendants seek further clarification as to the Court's ruling dated February 12th, 2020. This motion is timely, pursuant to Rule 6, SCRCP as the tenth day falls on a Saturday and, therefore, runs until Monday, February 24th, 2020.

PROCEDURAL HISTORY

This lawsuit stems from work performed by the Plaintiff at the Church's Chicken located on Dorchester Road in Charleston County, South Carolina. ("The Project") Plaintiff Marsh Waterproofing, Inc. is a Texas contractor who performed work in South Carolina at several Church's Chicken locations during August 2017.

On January 22nd, 2018, the Plaintiffs initiated this action against ARCAFEUSA, the title owner of the property where Steeple Dorchester operated a Church's Chicken franchise.¹ On March 12th, 2018, the Plaintiff amended its Complaint. In its amended complaint, the Plaintiff removed the record property owner and added Defendant Steeple Dorchester, Ltd. as a Defendant more than six months after the Plaintiff's work was performed. *See Amended Summons and Complaint*

On February 5th, 2020, a bench trial was conducted by the Honorable Frank Addy in Charleston, South Carolina. After the Plaintiff called two witnesses, the Defendants moved for a directed verdict which was denied. At the close of arguments, Judge Addy indicated that he would provide a ruling in a few days. On February 12th, 2020, the Court ruled in favor of the Plaintiff in the amount of \$36,800.00 holding specifically, as follows:

"The Court finds the mechanics lien dated November 16, 2018 in the amount of \$36,800.00 is valid and duly enforceable."

There was no ruling as to the Plaintiff's causes of action for breach of contract or quantum meruit. Furthermore, the Order does not set forth any findings of fact and instructs the Plaintiffs to submit a more formal Order within 30 days of receipt. The Defendants are not able to determine whether or not a more formal order will be submitted. Nevertheless, the Defendants hereby seek a new trial or, in the alternative, an amendment of the Court's February 12th Order. In addition, the Defendants seek clarification pursuant to Rule 52(a), which provides "on the n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." *See Rule 52(a) SCRPC.*

South Carolina Case Law and Statutory Scheme on Unlicensed Contractors

The Defendants respectfully request that this Court alter and amend its judgment pursuant to SCRPC 59(a) as the trial court failed to consider S.C. Code Ann. 40-11- 370, which acts as a door closing statute for unlicensed contractors seeking to enforce contractual obligations in South Carolina courts. The Defendants will focus the majority of their efforts on the controlling statute and case law following the statute. According to S.C. Code Ann. 40-11- 370, "an entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract." *S.C. Code 40-11-370(c)* This statute should have barred not only the mechanic's lien claim, but all claims due to its plain meaning.

Pursuant to South Carolina law, contractors must be properly licensed to perform construction work. Specifically, S.C. Code §40-11-30 states:

¹ ARCAFE was inexplicably dismissed as a party before appearing, despite the fact was, at all times relevant, the record title holder to the property.

No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total costs of construction is greater than \$5,000 for general contracting or greater than \$5,000 for mechanical contracting without a license issued in accordance with this chapter.

S.C. Code Ann. §40-11-370(c) and S.C. Code Ann. §40-11-30 operate in tandem to bar lawsuits by unlicensed contractors in South Carolina. The statutes are all well-settled and, when raised as an affirmative defense, our courts have consistently barred unlicensed contractors from prevailing in lawsuits.

In a 2013 decision by the South Carolina Supreme Court, S.C. Code Ann. §40-11-370(c) was found to be “clear, defined, explicit, and unquestionably applicable” to bar the claims of an improperly licensed contractor who prevailed in an arbitration proceeding prior to having that decision overturned. *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56-57, 742 S.E.2d 359, 361 (2013)

The court in *C-Sculptures* provides a thorough analysis of S.C. Code Ann. §40-11-30 and S.C. Code Ann. §40-11-370(c) and, in doing so, deemed the latter to be subject to strict construction and outside the discretion of an arbitrator. The court held, “Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning.” *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56-57, 742 S.E.2d 359, 361 (2013) The *C-Sculptures* opinion is the key to Defendants’ Rule 59 arguments because there is no way it can be reconciled with the Court’s findings in this case.

C-Sculptures was cited on directed verdict. If anything, the facts in the case at bar are even less hazy than the issues presented by *C-Sculptures*, which held that an arbitrator’s decision to deny a property owner’s motion to dismiss claims brought by an *improperly* licensed contractor, pursuant to 40-11-370, constituted “manifest disregard” of a “well-defined, explicit, and clearly applicable” legal maxim. The Defendants would respectfully ask that the Court reconsider and amend its previous Order in favor of the Plaintiff and find for the Defendants based on the record and arguments.

The Defendants are of the opinion that the Court placed far too much weight on statements and arguments made in the record by counsel for the Plaintiff regarding the nature and scope of work performed by the Plaintiff. In closing arguments, Defendants sought to confuse the Court with an alternate interpretation of the phrase “general contracting” as it is used in S.C. Code Ann. §40-11-30. The statute holds as follows:

“No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for **general contracting** or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.” S.C. Code Ann. § 40-11-30 (Emphasis Added)

The Plaintiff's argument(s) were well articulated, albeit wrong. The Defendants are of the belief that Plaintiff's improper and unfounded arguments only served to confuse the Court and "muddy the waters." Specifically, the Plaintiff argued that it was not subject to the door closing effect of S.C. Code Ann. § 40-11-370(c) because it was not the *general contractor* on the job. As Defendants argued in rebuttal, the phrase "*general contracting*" must be read in context of the Chapter regulating contractors in the South Carolina Code. Specifically, the Code defines "General contractor" as "an entity which performs or supervises or offers to perform or supervise general construction." S.C. Code Ann. § 40-11-20(8) The key language in the provision is "performs or supervises" which clearly and unequivocally provides that a contractor need not be a supervising prime, or general contractor to be included in the definition of "general contractor" pursuant to the prevailing Code provisions. In addition, "General construction" means the installation, replacement, or repair of a building, structure, highway, sewer, grading, asphalt or concrete paving, or improvement of any kind to real property. S.C. Code Ann. § 40-11-20(9) Therefore, an entity is required to be licensed so long as it is performing general construction at a cost of more than \$5,000.00 to be subject to the licensing requirement.

The Defendants understand that is quite easy to get lost in the minutia of S.C. 40-11-10 et seq. The Contractors Licensing Board clearly understood the requirements of its own commission, however, when it found that Marsh was in violation:

As such, the hearing officer determined that the scope of work for the use of this foam underneath the crawlspace of the project(s) was structural in nature and required a general contractor's license pursuant to S.C. Code Ann §§ 40-11-20(8) and 40-11-410(1) (1976, as amended) See the third conclusion of law in the Order issued by the Contractor's Licensing Board.

Finally, the Contractors Licensing Board could not have concluded its opinion any clearer than in its final paragraph where its ruling should be all that is required to bar Marsh's claims in this matter:

"The Respondent is cautioned that the scope of the work on the project(s) does require a general contracting license in South Carolina if the Respondent is not supervised by a licensee in the required license group and classification."

The Order has served to clarify and contradict every one of the Plaintiff's arguments and, despite the muddy water, this Court should have applied the law as it is written, not as interpreted by the Plaintiff. For these reasons, the Defendants would respectfully request that judgment be amended in its favor. Alternatively, the Defendants would ask for a new trial.

Should the court fail to find that the Defendants are entitled to an amendment of its original judgment and, further, hold that the Defendants are not entitled to a new trial, the Defendants seek clarification as to the Court's holding that the mechanics lien was "valid and enforceable." The Defendants note that Rule 52(a) is applicable to non-jury matters and instructs the trial court to find the

facts specially and state separately its conclusions of law thereon in support of a judgment. Rule 52(b) allows a court to also amend its findings or make additional findings and may amend the judgment accordingly.

The Judgment's Validation of the Mechanic's Lien was Improper

The Court's judgment in this case declares that the Plaintiff's mechanics lien was "valid and enforceable." *See Order*. This holding goes against the weight of established and well-developed South Carolina statutory and case law as has been discussed throughout this memorandum.

In order for the Court to find that the mechanics lien was valid and enforceable, the Court would have to find that either: (a) Marsh Waterproofing possessed a valid general contractor's license in the State of South Carolina; (b) a license was not required; or (c) that Marsh Waterproofing was working under the supervision of a licensed contractor. Both (a) and (c) are immediately ruled out via Tim Marsh's trial testimony. Thus, the holding can only be based on the Court's implied holding that a license was not required.

The Court Failed to Consider Evidence in the Contractor's Licensing Board Order

It is clear that the Court did not place any weight on the South Carolina LLR Contractor's Licensing Board Opinion² which held, in pertinent part, as follows:

- a. "The hearing officer determined that the scope of work for the use of this foam underneath the crawlspace of the project(s) was structural in nature and required a general contractor's license pursuant to S.C. Code Ann §§ 40-11-20(8) and 40-11-410(1) (1976, as amended)." *See LLR Order*, Page 5.
- b. "The hearing officer finds that Respondent violated S.C. Code Ann. § 40-11-110(A)(5) in that Respondent engaged in contracting work in South Carolina when not properly licensed or supervised by a licensee licensed in the required license group and classification." *See LLR Order*, Page 5.

The LLR's Contractor's Licensing Board is the established agency charged with the regulation of licensing within the industry. As the Order found that the scope of work fell within that which a license was required and further found that the Plaintiff violated South Carolina law by engaging in contracting work in South Carolina while not being properly licensed, a new trial or amendment of the Order is paramount to the furtherance of justice.

In considering the LLR Order, the court should have considered the great weight previous courts have afforded agency administrative orders. "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987); see also *Nucor Steel v. Pub. Serv. Comm'n of S.C.*, 310 S.C. 539, 543, 426 S.E.2d 319, 321

² The Order is attached as Exhibit B.

(1992) ("Where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason."). There is no cogent reason to ignore or overrule a decision made by the Contractors Licensing Board in this case. The Board Order represents legal and factual findings in an ex parte regulatory proceeding in which the Defendants were not able to testify or present evidence.

The Court was Prejudiced by Plaintiff's Presentation of SEC Materials

The Defendants have included a final exhibit, which is an affidavit prepared by Alexander C. Burns, principal of Hamilton Management. The full weight of Burns' testimony should be considered in light of the court's consideration of irrelevant, yet untrue assertions made by the Plaintiff. Specifically, the Plaintiff repeatedly contended that Burns and the Defendants were aware of Marsh's status as an unlicensed contractor. S.C. Code Ann. 40-11-370 does not allow for exceptions, whether they be invented or actual, and the presentation of Burns testimony should not be necessary in light of the Plaintiff's status as an unlicensed contractor. Regardless, Burns' testimony should be considered by the Court to the extent the Court's judgment of the Defendants was hampered by Plaintiff's shameless presentation of the inflammatory materials.

WHEREFORE, the Defendants seek consideration of this memorandum and exhibits and amend its judgment accordingly to find in favor of the Defendants. Alternatively, this Court should grant a new trial absolute to the Plaintiffs.

HARPER LITTLE PLLC

S/ C. Clay Olson

C. Clay Olson, Esquire
SC Bar 17007
164 Market Street Ste 139
Charleston, SC 29464
clay@harperlittlelaw.com

February 24, 2020

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018 CP-10- 00262

Marsh Waterproofing, Inc.,

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: COURT

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

This matter came before the Court on February 5, 2020 for a bench trial. Having reviewed applicable law, pre and post-trial memorandums submitted to the Court, and considered the arguments of counsel, the Court finds the mechanics lien dated November 16, 2018 in the amount of \$36,800.00 is valid and duly enforceable. Counsel shall confer on the issue of attorney's fees, and if the parties cannot agree, the matter can be submitted to the court via brief.

Counsel for Plaintiff is requested to submit a more formal order within thirty (30) days.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

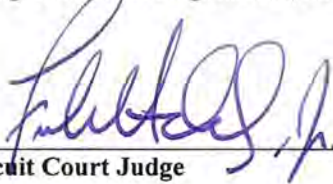
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

Marsh Waterproofing	Steeple Dorchester Ltd.; Hamilton Management Services Co., Inc.	\$36,800.00 plus applicable interest and attorney's fees
		\$
		\$
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.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2159

Judge Code

02/11/2020

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:

Albert A. Lacour, III

ATTORNEY(S) FOR THE PLAINTIFF(S)

Christopher Clay Olson

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: K. Nicole Carney

**SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING AND REGULATION
BEFORE THE SOUTH CAROLINA CONTRACTORS' LICENSING BOARD**

In the Matter of:

MARSH WATERPROOFING INC.
License No: Unlicensed

Case/Citation Number 2017-354

**FINAL ORDER
(Private)**

This matter came before Daniel Lehman, a hearing officer duly appointed by the South Carolina Contractor's Licensing Board ("Board"), for a final order hearing on June 21, 2019 as a result of the Notice of Citation Appeal hearing served upon the Respondent and filed with the Board. The hearing was held pursuant to and the provisions of the Administrative Procedures Act, S.C. Code Ann. § 1-23-10 *et seq.* (2005, as amended), to determine whether the citation issued to the Respondent on April 5, 2018, should be affirmed and the proposed penalty imposed upon the Respondent. Respondent timely requested this hearing after receipt of the citation and cease and desist order. Erin Baldwin, Esq., of the Office of Disciplinary Counsel represented the State. Timothy Karl Marsh, Secretary/Treasurer of Marsh Waterproofing, Inc., was present and was represented by Albert A. Lacour, III, Esq. The parties entered into a Stipulation of Facts (SOF) in which the parties stipulated to the facts and exhibits in the SOF, but the Respondent did not admit to misconduct in violation of S.C. Code Ann. § 40-11-110(A)(5) (1976, as amended).

EXHIBITS AND WITNESSES

State's Exhibit:

Exhibit A: Stipulation of Facts with ten (10) exhibits

Respondent's Exhibits:

Exhibit A: Request dated October 31, 2017 from Hamilton Management Services Co. to the Contractor's Board to determine licensure status of Marsh Waterproofing Inc.

Exhibit B: *Teseniar v Prof'l Plastering & Stucco, Inc.* 407 S.C. 83, 754 S.E.2d 267 (2014)

State's Witnesses: None

Respondent's Witness: Timothy Karl Marsh

FINDINGS OF FACT

Based upon the preponderance of the evidence in the record before the hearing officer, including the admitted facts in the SOF and the attached exhibits, and mitigating testimony presented by Timothy Karl Marsh, the hearing officer makes the following findings of fact:

1. On or about April 5, 2018, Respondent was issued a Citation for violating S.C. Code Ann. § 40-11-110(A)(5). Additionally, on or about April 11, 2018, a Cease and Desist Order was issued

to Respondent. On or about April 12, 2018, Respondent, through Counsel, appealed the citation and penalty.

2. At all times relevant to this matter, Respondent was not licensed with the State of South Carolina to perform any general or mechanical contracting work.

3. Respondent admits that the Board has personal jurisdiction over Respondent and subject matter jurisdiction over the facts herein.

4. Prior to Respondent's involvement in this matter, the crawlspaces/basements of various locations of Church's Chicken ("Church's") commercial restaurants were inspected to determine whether any structural deficiencies existed in the buildings' ground floor structural systems. Following the inspections, the engineer recommended "immediate structural support be provided for all structural members in the crawlspace." The engineer recommended that Alchemy Polymers AP Lift 430—a "high density expanding closed cell structural foam system"—be installed in the crawlspace. AP Lift 430 is a two-component, structural polyurethane foam. The engineer did not recommend any repairs to existing structural elements. The parties agree that there were substantially similar reports issued for other Church's restaurants located in South Carolina.

5. On or about July 10, 2017, Respondent submitted a proposal to Hamilton Management Services Company, Inc. (hereinafter "Hamilton") to spray AP Lift 430 foam into the crawlspace of six separate commercial restaurants throughout the State of South Carolina for a cost of \$36,800.00 per location. The proposal specifically excludes all preparatory work including plumbing, electrical and water removal. On its face, the proposal contains no project general conditions. It provides for no supervision of other trades or the preparatory work. It provides for no sequencing or scheduling and, to the contrary, provides a crew rate for any time the Respondent's crew is delayed waiting for the completion of the preparatory work. The proposal did not include any repairs to existing structural elements.

6. Respondent observed that general conditions, scheduling, and sequencing were provided by others. Any supervision for the other trades was provided by others. Respondent made no repairs or modifications to any standing water, plumbing, electrical, brick masonry walls, cracks in concrete slabs, steel joists, steel girders, block piers, or concrete footings. Respondent has experience in other states installing the foam material under floor slabs in Church's restaurants.

7. Respondent was told in writing by Hamilton that Hamilton had a contractor to do the work of the multiple trades before Respondent arrived, so Respondent believed that Hamilton had a general contractor. Hamilton represented to Respondent during the course of the correspondence exchanged by them on July 21, 2017 that another contractor was performing the preparation work ahead of Respondent. The work involved multiple trades, appeared to require multiple permits, and was to be completed before Respondent's arrival.

8. Hamilton hired another contractor to do the preparatory work.

9. The crawlspaces were sprayed with AP Lift 430 by Respondent. Hamilton never complained about the quality of Respondent's work. On or about September 5, 2017, Respondent billed Hamilton a total of \$36,800.00 per location. After the work was completed, Hamilton failed to pay Respondent. The parties agree that there were substantially similar invoices issued for other Church's restaurants located in South Carolina.

10. On or about November 15, 2017, Respondent's counsel, Bill Richey, emailed Roger Lowe, Administrator for the Board, inquiring as to whether Respondent required a license for the work performed. Mr. Lowe informed Mr. Richey that based on the information provided, a license was not required.

11. On or about November 15, 2017, Respondent filed mechanic's liens against six locations where work was performed and completed, based on Hamilton's failure to pay the invoices issued by Respondent.

12. On or about November 20, 2017, a complaint was filed against Respondent with the South Carolina Department of Labor, Licensing and Regulation (hereinafter "LLR"). LLR assigned Investigator Maurice Smith to investigate the allegations within the complaint. On or about February 20, 2018, Investigator Smith mailed Respondent a notice of complaint. Respondent, through Counsel, responded to the notice of complaint.

13. Hamilton filed in each of the mechanic's lien cases a Motion to Dismiss, and relies on the Citation and Cease and Desist Order. Hamilton, in effect, alleges that Respondent acted as an unlicensed general contractor, after representing to Respondent that Hamilton had engaged another contractor to do all preparatory work involving multiple trades. This litigation is still ongoing, and the issue of licensure is still of critical importance to the parties in the civil litigation.

14. The State averred that S.C. Code Ann § 40-11-30 requires that any entity or individual be licensed when performing contracting work when the cost exceeds \$5,000.00. Furthermore, S.C. Code Ann. § 40-11-20(8) defines general construction as "the installation, replacement, or repair of a building, structure...or improvement of any kind to real property." Additionally, S.C. Code Ann. § 40-11-410(1) notes the license classification of General Contractors—Building includes commercial, industrial, institutional, modular, and all other types of building construction. The State's position was that the installation of AP Lift 430 in order to provide immediate structural support in an effort to prevent the floor system from imminent failure was squarely within the definition of S.C. Code Ann § 40-11-20(8). As a result, Respondent was performing general construction work over \$5,000.00 and therefore was required to obtain a general contractor's license as defined in S.C. Code Ann. § 40-11-410(1).

15. The State further averred that Respondent's information provided to Mr. Lowe did not state that the AP Lift 430 was being used to provide immediate structural support to prevent the floor system from imminent failure. The State submitted that if Mr. Lowe was given this information, he would have advised that a general contractor's license was required. The State also noted that Respondent only sought the advice of Mr. Lowe after the work was performed, invoiced, and payment declined by Hamilton.

16. Respondent averred in the SOF and Mr. Marsh testified that his point of contact was Hamilton and that Respondent was expected to comply with Hamilton's schedule of multiple trade subcontractors and all of the direction received from Hamilton for the multiple projects. Respondent believed that either Hamilton or someone else was the general contractor. Respondent testified that Hamilton knew at all times that Respondent was not licensed in South Carolina. There was never an issue with the quality of Respondent's work on any of the projects. Respondent's unlicensed status only became an issue for Hamilton when payment for the multiple projects became due.

17. Respondent averred in the SOF and Mr. Marsh testified that he did not know whether Hamilton simply engaged multiple trade subcontractors to accomplish the work, or actually did engage

a general contractor. All preparatory work was completed before Respondent's arrival, and all those other people had moved on to the next building ahead of Respondent. Someone other than Respondent was sequencing and scheduling the work. Someone other than Respondent was providing general conditions such as dumpsters, portable facilities, water, power, equipment and supervision for all trades, including Respondent. In short, Respondent believed that the execution of the plumbing and electrical work would require permits to be pulled, and therefore, someone other than Respondent was acting as the general contractor for the project.

18. Respondent averred in the SOF and Mr. Marsh testified that the work Respondent did on the projects did not meet the definition of "general construction" defined as: "installation, replacement, or repair of a building, structure ... or improvement of any kind to real property." S.C. Code § 40-11-20(8). Respondent made no changes or modifications to existing exterior brick veneer walls, concrete slabs, perimeter retaining walls, steel decking under the slab, steel joists under the decking, steel girders at the perimeter, masonry piers, footings or foundations for the piers or walls, or the dirt at grade. Each and every structural element was left in exactly the same condition by Respondent as it was found. There was no modification, change, repair or activity of any kind by Respondent addressing any structural element. In short, there was no structural repair made to the existing structure or building. The work which was done was to install the expandable polyurethane foam in the open air space between the top of the dirt and the bottom of the slab. The foam is not affixed to the land in any way. The foam was only installed in the open void or airspace under the slab and above the ground exactly as the email from personal counsel in Texas described. The foam provided support for the slab as indicated in the email. No building or structure was installed. No structural component of the existing building or structure was repaired or replaced. No permanent improvement to real estate occurred because the foam is in no way attached to the real estate or to the structural elements of the existing building. The foam simply filled the open void under the slab. Once it cured, it lent support to the slab.

19. Respondent averred in the SOF and Mr. Marsh testified that he inquired about licensing with Hamilton, and Hamilton told him licensing was not necessary; he inquired with the Board Administrator before proceeding with filing the mechanics lien and was told licensure was not required; he was told Hamilton had a contractor and he reasonably believed, based on Hamilton's representations, that someone else was providing general contracting services for the project; he observed that general conditions were apparently being provided by others; and he made no modification or repair to any structural element of the building. The Board's statute and South Carolina case law allow an unlicensed subcontractor to work on a job where a general contractor is supervising the work and Respondent believed that was the situation he was working under.

20. Respondent averred in the SOF and Mr. Marsh testified that his company is highly experienced and qualified at performing the particular work at issue: installing the foam material in the open spaces under building slabs. Respondent performed the same work using the same product, process, building design, and followed the design of the same engineering team in at least six different states. Respondent performed the same process for dozens of restaurants in those states. The project was manned by an experienced team employed by an experienced contractor.

21. The Respondent averred in the SOF and Mr. Marsh testified that there was no complaint made as to the quality of the work or the quantity of the work performed by Respondent. Hamilton did not present any observations to that effect, and the engineers that designed the process have presented no information to that effect. The project was completed successfully and the client received both the quality and quantity of the work contracted for. Hamilton had reason to know, and did know, the qualifications, experience level, and ability of Respondent to perform the work, and no

reliance was placed upon the existence (or lack of) a license. There was no harm to anyone in this case via substandard work. Respondent averred in the SOF and Mr. Marsh testified that sanctions are not appropriate where Hamilton's obvious motive was to use an unlicensed practice citation as a defense to avoid payment of half a million dollars for professional work.

CONCLUSIONS OF LAW

Based upon careful consideration of the facts in this case, it is found and concluded as a matter of law that:

1. The Board has jurisdiction in this matter pursuant to S.C. Code Ann. §§ 40-11-100(E) and 40-1-70(6) (1976, as amended).

2. The hearing officer can affirm, dismiss or amend the citation and penalty issued on April 5, 2018. S.C. Code Ann. § 40-11-100(E) (1976, as amended) and the cease and desist order issued on April 11, 2018.

3. Based on a review of the evidence presented, the hearing officer determined that the Engineer's report recommended the Alchemy Polymers AP Lift 430 product used by the Respondent to provide full continuous support to the structural members in the crawlspace of the project(s). The Engineer described the high density expanding closed cell structural foam system as providing the compressive strength to adequately support the superstructure. As such, the hearing officer determined that the scope of work for the use of this foam underneath the crawlspace of the project(s) was structural in nature and required a general contractor's license pursuant to S.C. Code Ann §§ 40-11-20(8) and 40-11-410(1) (1976, as amended).

4. It is the responsibility of the Respondent to determine whether a license was required in South Carolina to perform this work; however, Hamilton was fully aware that Respondent was not licensed in South Carolina throughout Respondent's performance of his scope of work on the project(s). There is nothing in the Respondent's scope of work document that indicated licensing and the Respondent's scope of work document references other work of sub-contractors involved in Hamilton project(s) that was to be completed prior to Respondent's performance of its scope of work. The hearing officer accepted the Respondent's mitigation that Respondent was told by Hamilton and the Board Administrator that a license was not needed in South Carolina for this work.¹ Further, Respondent was not supervising any work on the project(s) and believed that Hamilton was either the licensed general contractor hiring, organizing, and supervising subcontractors, or that Hamilton had hired a licensed general contractor to organize and supervise subcontractors. If this was the case, Respondent was not required to be licensed as a sub-contractor pursuant to S.C. Code Ann. § 40-11-270(E) (1976, as amended). Furthermore, Hamilton never alleged there was substandard work or unprofessional conduct by Respondent, so there was no harm to Hamilton's project(s) from the scope of work performed by Respondent.

5. The hearing officer finds that Respondent violated S.C. Code Ann. § 40-11-110(A)(5) in that Respondent engaged in contracting work in South Carolina when not properly licensed or supervised by a licensee licensed in the required license group and classification. However, based on the mitigating information in the SOF and Mr. Marsh's testimony and the fact that there was no

¹ The hearing officer determined that the information provided to the Board Administrator on November 15, 2017 by Respondent's attorney Bill Richey was very specific regarding the product Respondent used that was recommended by an engineer for the purpose of providing support. Mr. Richey was told Respondent did not need a license unless the foam was installed with the intent to provide the benefit of its insulation properties, which required an Interior Renovation license.

substandard work or harm to any member of the public, the hearing officer does not believe that the Respondent's misconduct rises to the level of warranting a citation and penalty.

6. The action by the hearing officer is consistent with the purpose of these proceedings, and has been made after weighing the public interest and the need for the continued services of general contractors against the countervailing concern that society be protected from professional ineptitude and misconduct.

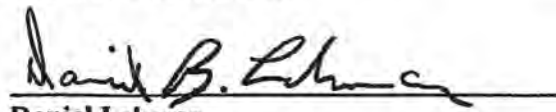
7. The action by the hearing officer is designed to protect the welfare of the public.

NOW THEREFORE, IT IS ORDERED that:

1. The citation issued on April 5, 2018 and the accompanying penalty of \$500.00 shall be dismissed.
2. The cease and desist order issued on April 11, 2018 shall be withdrawn.
3. The Respondent is cautioned that the scope of the work on the project(s) does require a general contracting license in South Carolina if the Respondent is not supervised by a licensee in the required license group and classification.

AND IT IS SO ORDERED.

**SOUTH CAROLINA CONTRACTOR'S
LICENSING BOARD**


Daniel Lehman
Hearing Officer

July 23, 2019

South Carolina Department of Labor, Licensing and Regulation

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

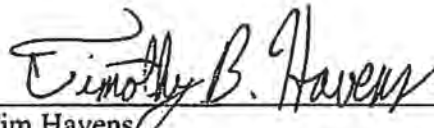
In the Matter of:
Marsh Waterproofing Inc.

CERTIFICATE OF SERVICE BY MAIL

This is to certify that the undersigned has this date, July 23, 2019, served the Private Final Order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, addressed to the party(ies) or their attorney(s) to the following address:

MARSH WATERPROOFING INC.
240 S MAIN STR STE 2
VIDOR TX 77662

ALBERT A. LACOUR, III, ESQUIRE
126 SEVEN FARMS DRIVE, SUITE 200
CHARLESTON, SC 29492



Tim Havens
Paralegal
SC Department of Labor, Licensing
and Regulation

**STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON**

**IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2018-CP-10000262**

MARSH WATERPROOFING, INC.

Plaintiff,

vs.

STEEPLE DORCHESTER LTD et al

Defendants.

AFFIDAVIT OF ALEXANDER BURNS

PERSONALLY, APPEARED BEFORE ME, ALEXANDER BURNS WHO SWEARS AND IS DULY DEPOSED AS FOLLOWS:

I am 18 years of age or older.

I am competent to make this affidavit which is based on my own personal knowledge.

I am a director of Hamilton Management Services Company, which is a management company that I established in 2014 in Charleston, South Carolina.

Hamilton Management Services Company manages each of the Steeple entities which serve as defendants in the action against Marsh Waterproofing, Inc.

I am not individually a party to this action and have previously provided testimony in the form of a deposition and a written affidavit dated September 26th, 2019.

In my capacity as Director of Hamilton Management Services Company, I have direct knowledge of the facts and circumstances which give rise to this action.

There was never a contract between Steeple Dorchester Ltd. or Hamilton Management Services Company and Marsh Waterproofing. The only written contract regarding the subject matter was a written proposal between State Acquisitions, LLC, the parent company of Steeple Dorchester Ltd and Marsh Waterproofing. I executed the proposal on behalf of State Acquisitions, LLC, to whom it is addressed, who is not a party to this action.

I reiterate the testimony from page two of my prior affidavit that "Hamilton does not owe any obligation to Marsh as it was the management company for the Steeple entities and not the client of Marsh".

There is currently no leasehold interest for which Marsh Waterproofing can foreclose. The leasehold interest held by Steeple Dorchester Ltd. was terminated by the landlord, ARC CAFÉ 001, LLC on March 5th, 2018, effective November 30, 2017, a copy of which was filed

with the Charleston Register of Deeds. The termination by the landlord was pursuant to the tenant, Steeple Dorchester Ltd, breach of the forbearance agreement, pursuant to the lease, which precluded the filing of any Mechanics' Liens on the property. The Mechanics' Lien was filed by the Marsh Waterproofing on November 16, 2017 and the landlord terminated the lease effective November 30, 2017.

Insofar as the leasehold interest held by Steeple Dorchester Ltd. no longer exists, it is impossible to foreclose upon the interest and impossible to sell the property that is subject to the leasehold interest as it no longer exists. Marsh Waterproofing has elected to voluntarily dismiss the landlord from this action and has not named Cajun Global, LLC d/b/a Church's Chicken, which I understand to be the current tenant of the property. Cajun Global, LLC, is the Franchisor of Church's Chicken, who introduced the me to Marsh Waterproofing, and with whom I understand that Marsh Waterproofing maintains a longstanding and profitable business relationship.

On page four of the Post-Trial Memorandum, the attorney for Marsh Waterproofing states, "Mr. Burns could not rely upon the existence of a license for the qualifications of the contractor if he knew none existed". and further "Mr. Burns was fully aware of the experience and qualifications and the track record of the contractor and was relying upon that knowledge rather than the existence of a license when deciding whether to engage the contractor".

To the contrary, on page two of my prior affidavit, which remains my testimony, "At the point at which Hamilton coordinated the Steeple engagement of Marsh Waterproofing, Inc. it was my belief that Marsh Waterproofing, Inc. was adequately licensed, bonded and insured for the work being performed".

Moreover, also on page four of the post-trial Memorandum, the attorney for Marsh Waterproofing states, "On the facts in the record the parties discussed licensing before the work started and Tim Marsh told Mr. Burns that he was not licensed in South Carolina and asked if Mr. Burns thought he needed to be".

Again, on page two of my prior affidavit, which remains my testimony, "At no time did Mr. Marsh, nor any other party from Marsh Waterproofing, discuss the issue of contractor licensing with me or anyone else at Hamilton or the Steeple entities". Subsequently, on page three I stated, "Contrary to the statements made by Mr. Marsh that I knew Marsh Waterproofing was unlicensed at the time of their hiring, as of the authorization of this payment, I still did not know that Marsh Waterproofing was unlicensed in South Carolina."

The attorney for Marsh Waterproofing has mischaracterized the record by repeatedly disregarding my prior testimony in an effort to mislead the court as to my belief.

In the Post Trial Memorandum, counsel for Marsh Waterproofing stated that my "credibility was undermined by the Consent Judgment against him...". Counsel then references the civil Securities & Exchange Commission Complaint upon which it is based as evidence of "misrepresentations and other illicit dealings."

Nothing related to that matter, which dates from 2014 and prior is in any way connected to this action, nor does the Marsh Waterproofing raise any connection except to attack my personal credibility. Moreover, there is no probative value to the prior action as the settlement is predicated upon an agreement whereby I did not either admit nor deny the allegations in the SEC Complaint.

While I am not admitted before the South Carolina Bar, nor any other State or Federal Bar, I did attend Law School in the State of South Carolina and it is my understanding that under the South Carolina Rules of Evidence, in order for the Marsh Waterproofing to introduce EXTRINSIC information, the Plaintiff can only do so in cross-examination (as opposed to in the form of reply to motion); AND would have to seek the Court's PRIOR consent.

I subsequently advised counsel for the Defendants that I was prepared to testify as an individual, ONLY, if the Court ruled that further inquiry into the matter, upon my cross-examination, was inadmissible. It is my understanding that counsel for the Defendants attempted to previously confer with Plaintiff's counsel regarding this matter, informing him that such evidence was improperly included and required the Court's consent to be raised at cross-examination.

It is my understanding that the counsel for the Defendants attempted to raise the issue of excluding the testimony, via a Motion *in limine*, which the Court heard and elected not to rule upon given the lack of a jury.

Given that the Court did not rule on the Defendants' Motion *in limine* to exclude the evidence, I advised the counsel for the Defendants that I would not be voluntarily testifying as I was not prepared to subject myself to questioning, under oath, regarding the prior SEC matter, insofar as I was not individually represented by counsel in this matter – who could object on my behalf, and was concerned that the adequate defense of my credibility could require me to take a position on matters in which I have consented with the Securities & Exchange Commission to neither admit nor deny in any public statement.

It is my belief that the Plaintiff's attorney included the references to the prior SEC matter as a means of prejudicing the Court against me and my testimony as well as creating a situation in which it was untenable for me to testify, knowing that he could use inadmissible information to force me into an adverse line of questioning. It is my understanding that the Defendants were forced to withdraw their counterclaim against the Plaintiff insofar as without my testimony there was no party available to set forth a *prima facie* case against the Plaintiff.

In a new trial, if the Court were to rule that questioning upon cross examination related to my prior civil matter with the Securities & Exchange Commission was inadmissible, I would be prepared to testify on behalf of the Defense regarding the following matters:

1. The background of the Defendant parties and the circumstances which gave rise to this action.
2. The lack of existence of a contract between Steeple Dorchester Ltd OR Hamilton Management Services Company and Marsh Waterproofing.

3. The existence of a written contract covering the relevant scope of work between Marsh Waterproofing and State Acquisitions, LLC, the parent of Steeple Dorchester Ltd, which is not a party to this action.
4. My conversations with Tim Marsh of Marsh Waterproofing, specifically regarding a lack of any discussion regarding Mr. Marsh or Marsh Waterproofing's licensure requirements.
5. The circumstances of my letter on behalf of Hamilton Management Services Company to the LLR.
6. My understanding as to Marsh Waterproofing's licensure at the time of hiring.
7. My continuing belief that Marsh Waterproofing was adequately licensed at the time I a \$40,000 directed payment for the benefit of Marsh Waterproofing.
8. The inaccuracies regarding Hamilton Management Services Company that were stipulated between the South Carolina LLR and Marsh Waterproofing for the purpose of the LLR hearing.
9. My conversations with representatives of Cajun Global, LLC and ARC CAFEUSA001, LLC related to the requirement that a Mechanics' Lien not be filed against the properties as a condition of the restructuring of the lease between ARC CAFEUSA001, LLC and Defendant Steeple Dorchester, Ltd.
10. My belief that Cajun Global, LLC induced Marsh into filing the Mechanics' Liens as a means of forcing the liquidation of Steeple Dorchester Ltd., which ultimately resulted in Cajun Global, LLC obtaining control over the property and the assets at a significant discount to the price paid by Steeple Dorchester Ltd. three years earlier.
11. My conversation with Glen Kindred of ARC CAFEUSA001, LLC in which he informed me that the filing of the Mechanics' Lien was the proximate cause of the termination of the leases.
12. My understanding of the termination of the leases as the proximate cause of the liquidation of the assets of Steeple Dorchester Ltd.
13. The damages suffered by Steeple Dorchester Ltd. as a result of the Marsh Waterproofing filing the Mechanics' Lien.
14. The Defendants rationale for withholding payment on the basis of potential claims and the need to have the work inspected by a licensed South Carolina contractor or engineer prior to releasing payment.

It is my belief that my testimony would provide the Court with significant direct evidence of the misconduct of the Plaintiff as it relates to the Defendants counterclaim and would serve to

directly refute many of the assertions made by the Marsh Waterproofing in their claims, specifically regarding my beliefs and reliance.

I believe that the Defendants were irreparably harmed by my lack of testimony, insofar as I am the only available party with direct knowledge of these matters.

FURTHER AFFIANT SAYETH NOT.

A. Burns

Alexander Burns.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

The foregoing affidavit of Alexander Burns was acknowledged before me this 24 day of February, 2020, by Alexander Burns.

Kate Michele Hengen

Signature of Notary Public

My commission expires: 9.13.21

[SEAL]

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,

Plaintiff,

vs.

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.,

Defendant(s).

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-00262

**NOTICE OF MOTION AND MOTION
TO ALTER OR AMEND JUDGMENT -
RULE 52(b) and 59 (e)**

To: C. Clay Olson, Esq., Attorney for Defendants:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Marsh Waterproofing, Inc., by its undersigned attorney, will move before the Honorable Frank R. Addy, Jr., Presiding Judge of the Ninth Judicial Circuit, in the Charleston County Courthouse on the tenth (10th) day after service hereof, or at such other time and place as is convenient to the Court and counsel, for an Order from the Court granting relief from the Final Order dated March 9, 2020, (copy attached as Exhibit A) pursuant to the provisions of S.C.R.C.P. Rules 52 (b) and/or 59 (e).

The grounds for this Motion are that the undersigned would respectfully suggest that the Court entered an incomplete order by mistake or inadvertence and should alter or amend the order for the reasons that:

1. the order is missing pages 10 through 13; and
2. the order does not contain a specific determination of the amount of the debt, as required by S.C.R.C.P. Rule 71 (a) and (b); and
3. the order does not provide a ruling on the pending post-trial motions of both

parties.

The undersigned is informed and believes that the court inadvertently entered the Final Order dated March 9, 2020, and for the foregoing reasons the undersigned would respectfully request that this Honorable Court reconsider its ruling and Alter or Amend the Order, pursuant to S.C.R.C.P. Rules 52 (b) and/or 59 (e).

CLAWSON and STAUBES, LLC

s/ Albert A. Lacour, III

Albert A. Lacour, III
Bar No.: 3099
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Phone: (843) 577-2026
Fax: (843) 722-2867
Email: alacour@clawsonandstaubes.com
Attorney for Marsh Waterproofing, Inc.

Charleston, South Carolina.

March 10, 2020.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,

Plaintiff,

vs.

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.,

Defendant(s).

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-00262

**AMENDED NOTICE OF MOTION AND
MOTION TO ALTER OR AMEND
JUDGMENT - RULE 52(b) and 59 (e)**

To: C. Clay Olson, Esq., Attorney for Defendants:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Marsh Waterproofing, Inc., by its undersigned attorney, will move before the Honorable Frank R. Addy, Jr., Presiding Judge of the Ninth Judicial Circuit, in the Charleston County Courthouse on the tenth (10th) day after service hereof, or at such other time and place as is convenient to the Court and counsel, for an Order from the Court granting relief from the Final Order dated March 9, 2020, and filed March 11, 2020, (copy attached as Exhibit A), pursuant to the provisions of S.C.R.C.P. Rules 52 (b) and/or 59 (e).

The grounds for this Motion are that the undersigned would respectfully suggest that the Court entered an incomplete order by mistake or inadvertence and should alter or amend the order for the reasons that:

1. the order does not contain a specific determination of the amount of the debt, as required by S.C.R.C.P. Rule 71 (a) and (b); and
2. the order does not provide a ruling on the pending post-trial motions of both parties.

The undersigned is informed and believes that the court inadvertently entered the Final Order dated March 9, 2020, filed March 11, 2020, and for the foregoing reasons the undersigned would respectfully request that this Honorable Court reconsider its ruling and Alter or Amend the Order, pursuant to S.C.R.C.P. Rules 52 (b) and/or 59 (e).

CLAWSON and STAUBES, LLC

s/ Albert A. Lacour, III

Albert A. Lacour, III
Bar No.: 3099
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Phone: (843) 577-2026
Fax: (843) 722-2867
Email: alacour@clawsonandstaubes.com
Attorney for Marsh Waterproofing, Inc.

Charleston, South Carolina.

March 11, 2020.



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,
Plaintiff,

vs.

Steeple Dorchester Ltd. and Hamilton
Management Services Company, Inc.,
Defendant(s).

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-00262

**FINAL ORDER FOR FORECLOSURE
OF MECHANIC'S LIEN
NON-JURY DECISION**

This matter came on before me for a jury trial at the February 3, 2020 term of court and was called for 9:30 AM on Wednesday February 5, 2020. At the outset, the Defendants indicated that the amount of the debt was not disputed, though Plaintiff's entitlement was, and the parties then agreed to waive the right to have the jury decide the facts concerning the amount of the debt and to try the case to the Court alone, whereupon the jury venire was discharged. The hearing was attended by Albert A. Lacour, III, Esq. and witnesses Tim Marsh and Avant Armentrout for the Plaintiff, Marsh Waterproofing, Inc., (or "Marsh"). C. Clay Olson, Esq., appeared for the Defendants. The testimony was taken, and from the testimony and exhibits in evidence, I find and conclude as follows:

FINDINGS OF FACT:

1. The initial Lis Pendens was filed on January 11, 2018.
2. The Amended Lis Pendens, Summons and Complaint were filed on January 22, 2018, and the Second Amended Lis Pendens and Amended Summons and

ROA000116

Amended Complaint were filed March 12, 2018.

3. Service was made upon the Defendant Hamilton Management Services Company, Inc. on January 23, 2018 and on the owner, ARC CAFEUSA001, LLC, on January 24, 2018 as shown by the proof of service filed herein.

4. The Defendants Steeple Dorchester, Ltd. and Hamilton Management Services Company, Inc., answered and asserted a Counterclaim on February 28, 2019 and a Reply to the Counterclaim was filed March 6, 2019.

5. The Defendants ARC CAFEUSA001, LLC, and Churpeyes II, Inc. were removed by the amendments to the pleadings. Paragraph 3 of the Amended Complaint alleges that the Churpeyes entity is the tenant of record, and the Steeple entity is the tenant in fact. Plaintiff is proceeding on its contract against Hamilton Management Services Company, Inc., and Steeple, and on its lien against the leasehold interest of the Defendant Steeple Dorchester, Ltd.

6. I find that the parties hereto and the real property which is the subject of the within action are within the jurisdiction of this Court.

7. I find that all of the correspondence between the Defendant, Hamilton Management Services Company, Inc., and Marsh Waterproofing, Inc., indicates Alexander Burns was acting for Hamilton Management Services Company, Inc. I find that Hamilton Management Services Company, Inc. authorized improvements to the property to be made by Marsh Waterproofing, Inc. and signed the acceptance of Plaintiff's proposal (Exhibit 6), thereby forming a valid and binding agreement supported by valid consideration.



8. I find that Plaintiff fully performed all the work it committed to perform but has not been paid for said work. The testimony reflects that there was never any complaint made about the quality of the work or the quantity of the work of Marsh.

9. I find that the Plaintiff timely filed its Statement for Mechanic's Lien which was introduced into evidence as Exhibit 11. The Statement for Lien was timely served as reflected by the Affidavit of Service, Exhibit 12. I further find that the Plaintiff perfected its lien by the timely filing a Lis Pendens and the commencement of this action to foreclose the lien, as detailed above.

10. When the time came for presentation of the Defendants' case, Defendants withdrew their Counterclaim and elected not to call any witnesses. Defendants rely on the fact that Plaintiff was not licensed in South Carolina as a general contractor and therefore maintain that Plaintiff is not entitled to recover on the contract or the lien.

11. Title 40, Chapter 11 of the South Carolina Code is the statutory regulatory scheme for general and mechanical contractors. A "general contractor" is one who performs or supervises or offers to perform or supervise "general construction", S.C. Code §40-11-20(9). "General construction" is installation, replacement or repair of a building or structure. S.C. Code §40-11-20(8). I find that the facts in the record establish that Marsh Waterproofing, Inc. and the work it performed do not fall within these definitions. The definitions reflect the history and common understanding that general contractors are defined essentially by either the nature of the work performed or the scope of the work performed.

12. Analyzing this case by the nature of the work, S.C. Code §40-11-20(8)

would require Marsh to build a building or structure, or replace a building or structure, or repair a building or structure. I find Marsh made absolutely no repairs or modifications to the structural elements of the building other than to mix up a couple of bags of concrete to close up the access opening in the slab. That work does not amount to \$5,000 worth of work to the existing structural elements. I find the foam was installed by Marsh in the open air space between grade and the bottom of the steel deck. It does not attach to any of the structural elements and does not modify or change any of the structural elements. The foam simply occupies the airspace to prevent the slab from moving downward if the slab fails. The scope of work outlined in the engineering report does not specify any repairs to any existing structural elements. I find that Marsh made no repairs to any footings, CMU walls, brick masonry walls, steel girders, steel joists, steel decking or the existing slab. None were called for by the engineering report. The installation of foam for supplemental support is not a classification of work identified in the statutory scheme as being the work of a general contractor in code section S.C. Code §40-11-410. (Exhibit 14).

13. Analyzing this case by the scope of the work, general contractors are sometimes identified by the fact that they contract to perform all of the work required to complete the project. Marsh clearly did not do this. I find that Marsh was not the only contractor on the project. The other contractor worked ahead of Marsh to perform the preparatory work. Marsh arrived last, in the order of the work, to install the foam in the airspace above grade and below the slab.

14. The scope of the general contractor's work generally includes providing



permitting, temporary utilities, temporary facilities, scheduling of the trades, sequencing of the trades, supervision of the trades, and general overall responsibility to see all of the work gets fully and properly executed. I find that none of the foregoing are within the scope of work defined by the proposal of Marsh. (Exhibit 6). The testimony of the witnesses for Marsh indicates that, to the extent that Marsh employees could observe whether these "general contractor" obligations were being met by others, they appeared to be furnished by someone else.

15. Additionally, I find that the representations of the Defendants to Marsh that they had a "contractor" working one step ahead of Marsh to do the preparatory work outlined in the engineer's report reasonably led Marsh to believe a general contractor was working ahead of Marsh on the project. The preparation work involved multiple trades, all of which required separate trade licenses, and would have required someone to pull a building permit before Marsh ever set foot on the project.

16. Additionally, I find that Defendants did not rely on the existence or non-existence of a license. Marsh made no representation to Defendants that it was licensed in the correspondence, the proposal, or the discussions of the parties. The Teseniar case stands for the proposition that "where the reason for the rule ends, so ends the rule." Teseniar v. Professional Plastering & Stucco, Inc., 407 SC 83, 754 SE2d 267 (Ct. App. 2014). On the facts in the record I find the parties discussed licensing before the work started and Tim Marsh told Mr. Burns that he was not licensed in South Carolina and asked if Mr. Burns thought he needed to be. Mr. Burns promised to check on it. Thereafter the parties proceeded with the work. Mr. Burns could not rely upon the

existence of a license for the qualifications of the contractor if he knew none existed.

17. Additionally, I find that Mr. Burns was referred to Marsh by Church's Chicken and was aware of the past activities of Marsh making repairs for the Church's franchise stores in multiple states at numerous store locations. I find that Defendants were made aware of the extensive experience and the ability of Marsh to install the foam by Marsh and by Church's. I find Defendants were not relying upon the existence of a license to know the contractor's qualifications to do the work. Defendants were made aware of the experience, the qualifications, and the track record of the contractor and were relying upon that knowledge, rather than the existence of a license, in deciding whether to engage the contractor. As the Court observed in Teseniar, "The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. ... In the case before us, [Defendant] was in a position to know, and did know, the qualifications of [Marsh]. No reliance was placed upon the existence of a license, as presumptively would be the case if [Marsh] was dealing with the general public." Teseniar, 407 SC at 97, 754 SE2d at 274.

18. I have reviewed the Affidavit of Counsel and the itemized time and cost entries submitted in support of Plaintiff's request for an award of attorney's fees, and I find that the fees and costs as set forth therein are reasonable. I find that the total fees and costs requested do not exceed the amount of the lien.

19. There are 6 factors to consider in determining an award of attorney's fees:
1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted

to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. Bloomberg v. Nealco, Inc. 310 S.C. 492, 427 SE2d 659 (1993); citing Collins v. Collins 239 S.C. 170, 122 S.E.2d 1 (1961). I find that the litigation has been aggressively defended and involved novel arguments and issues on both sides. I find that counsel was required to prepare for numerous hearings prior to the trial itself. I find that the total attorney's hours devoted to this case exceed 120 hours as detailed in the motion for the award of the fees and costs and supporting documents. I find that counsel for Marsh enjoys high professional standing and has extensive experience in construction litigation. I find the rates charged are reasonable and in line with those customarily charged for similar services and that the results obtained justify the amount awarded.

20. I find that the amount due and owing to the Plaintiff upon its mechanic's lien is \$36,800, together with attorney's fees in the amount of _____ together with costs in the amount of _____ for a total debt of _____.

21. I find that the agreement of the parties is silent as to interest, and in the absence of an agreement on the matter, I decline to award pre-judgment interest. I find Plaintiff shall be entitled to recover interest after the entry of this judgment at the judgment rate as established by the current Order of the South Carolina Supreme Court dated January 6, 2020 in the amount of eight and three-quarters percent (8.75%) per annum upon the total debt set forth above and that such interest should be added to the total debt to determine the total amount secured by Plaintiff's lien through the date to

which such interest is computed. Upon the forgoing findings, I reach the following conclusions of law:

CONCLUSIONS OF LAW

22. I conclude Plaintiff constructed valuable improvements to the subject property leased to Steeple Dorchester Ltd. for which the Plaintiff has not been paid, and the Plaintiff is entitled to claim a Mechanic's Lien to secure the debt due together with costs and attorney's fees.

23. I conclude Plaintiff should have judgment for foreclosure of Plaintiff's mechanic's lien for the Total Amount Due of _____ together with interest from the date of entry of this order at 8.75%, as set forth above, and that the leasehold interest of Steeple Dorchester Ltd. in the subject property shall be sold at public auction after due advertisement.

24. I conclude that Hamilton Management Services Company, Inc. entered into the agreement for the work, and Plaintiff should have judgment against it on the contract claim. The mechanics lien statute preserves the claimant's right to pursue the contract remedy simultaneously in S.C. Code §29-5-420.

25. I conclude that Marsh Waterproofing, Inc. was not the general contractor on the job and was not required to be licensed as a general contractor.

26. I conclude that Hamilton Management Services Company, Inc. did not rely on the licensing of Marsh to determine the qualifications of the contractor; rather, Defendants relied on the information made known to it by Marsh and by the franchisor, Church's Chicken, as to the numerous restaurants upon which Marsh performed similar

work, and the experience, qualifications, and ability of the contractor to perform the work.

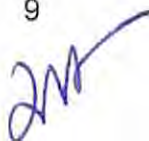
27. I conclude the cases relied upon by Defendants which deny recovery to general contractors are distinguishable from the facts of this case. As an example, the C-Sculptures case cited by Defendants reflects in the very first paragraph of the syllabus that it arises from a construction contract by which "a general contractor agreed to build a home..." C-Sculptures, LLC v. Brown 403 SC 53, 55, 742 SE2d 359, 360, (2013). I conclude that the decided cases cited by Defendants uniformly involve contractors who were either admittedly general contractors, or were adjudged to be general contractors based upon either the nature of the work or the scope of the work; therefore, the cases are inapplicable to these facts.

28. Neither of the parties filed an offer of settlement pursuant to the Mechanic's Lien Statute, and I conclude that the verdict is closer to the prayer in Plaintiff's Complaint, resulting in Plaintiff being the prevailing party.

29. I conclude the Plaintiff filed and served its Statement of Mechanic's Lien within 90 days of the last date of labor or materials furnished and also filed and served its Lis Pendens, Summons and Complaint for foreclosure within six months of the last date of labor or materials furnished.

30. I conclude that since the Plaintiff prevails, this case shall be referred to the Master in Equity so that he may conduct the sale and any additional proceedings incidental thereto.

It is therefore:



assigns in full, quiet and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

The following is a description of the premises herein ordered to be sold:

The leasehold interest of Defendant Steeple Dorchester, Ltd., in and to:

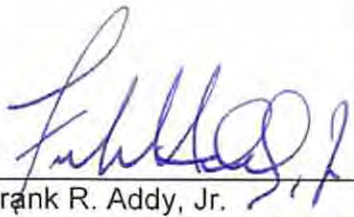
All that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Charleston County, City of North Charleston, State of South Carolina, being as shown on an ALTA/ACSM Land Title Survey prepared for Churpeyes Real Estate Limited Partnership, by Cox and Dinkins, Inc., dated May 21, 1990, and recorded June 28, 1991 in the Office of the RMC for Charleston County in Plat Book CD at Page 91. The aforesaid plat is incorporated by reference herein.

TMS: 408-10-00-229

Present Address: 5343 Dorchester Road, Charleston, SC 29418-5620

Present Derivation: Memorandum of Assignment of lease to Churpeyes II, Inc. dated June 30, 2008 and recorded July 24, 2008 in Book N 655, Page 085 in the RMC Office for Charleston County.

AND IT IS SO ORDERED this 9th day of March, 2020 at Greenwood, South Carolina.



Frank R. Addy, Jr.
Presiding Judge, Ninth Judicial Circuit

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE TENTH JUDICIAL CIRCUIT
	)	
MARSH WATERPROOFING INC.,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO. 2018-CP-10-00262
vs.	)	
STEEPLE DORCHESTER, LTD. AND	)	
HAMILTON MANAGEMENT SERVICES	)	
COMPANY, INC.	)	DEFENDANTS NOTICE OF MOTION TO
	)	TO AMEND JUDGMENT OR IN THE
Defendants.	)	ALTERNATIVE FOR A NEW TRIAL AND
	)	CLARIFICATION UNDER 59(A)(2)

PLEASE TAKE NOTICE that Defendants STEEPLE DORCHESTER LTD. AND HAMILTON MANAGEMENT SERVICES COMPANY, INC. ("Defendants"), by and through the undersigned counsel, and pursuant to Rules 59(a) and (e), SCRCP, move this court for an order to alter or amend its judgment of March 11, 2020 to find for the Defendants. Specifically, the Defendants ask that the Court direct the entry of a new judgment pursuant to SCRCP 59(a)(2). In the alternative, the Defendants would move for a new trial based on the grounds and arguments below.

In addition to requesting that the Court's judgment be amended in favor of the Defendants, the moving Defendants also seek for Steeple Dorchester, Ltd. be deemed the "prevailing party" and awarded reasonable attorneys' fees and costs pursuant to the South Carolina mechanic's lien statutes as it is rightly the "prevailing party" pursuant to S.C. Code Ann. § 29-5-20(A). As a third alternative and pursuant to Rule 52, the Defendants seek further clarification as to the Court's ruling dated March 11, 2020.

PROCEDURAL HISTORY

This lawsuit stems from work performed by the Plaintiff at the Church's Chicken located on Dorchester Road in Charleston County, South Carolina. Plaintiff Marsh Waterproofing, Inc. is a Texas contractor who performed work in South Carolina at several Church's Chicken locations during the month of August, 2017 and Defendant Steeple Dorchester Ltd was a franchisee operating d/b/a Church's Chicken. Defendant Hamilton Management Services Company was a management company providing third-party management to Defendant Steeple Dorchester Ltd. and its parent, State Acquisitions, LLC.

On January 22nd, 2018, the Plaintiffs initiated this action against ARCAFEUSA, the title

owner of the property where Steeple Dorchester operated a Church's Chicken franchise.¹ On March 12th, 2018, the Plaintiff amended its Complaint. In its amended complaint, the Plaintiff removed the record property owner and added Defendant Steeple Dorchester, Ltd. as a Defendant more than six months after the Plaintiff's work was performed. *See Amended Summons and Complaint.*

On February 5th, 2020, a bench trial was conducted by the Honorable Frank Addy in Charleston, South Carolina. The Defendants raised a motion *in limine* regarding the improper inclusion of certain testimony by the Plaintiffs concerning extrinsic evidence of prior acts of one of the anticipated witnesses for the Defendants, which was never ruled upon by the Court. After the Plaintiff called two witnesses, the Defendants moved for a directed verdict which was denied. At the close of arguments, Judge Addy indicated that he would provide a ruling in a few days.

On February 12th, 2020, the Court ruled in favor of the Plaintiff in the amount of \$36,800.00 holding specifically, as follows: "The Court finds the Mechanic's Lien dated November 16, 2018 in the amount of \$36,800.00 is valid and duly enforceable."

On February 24, 2020, the Defendants filed a Motion to Amend Judgment or in the Alternative For A New Trial, which was not considered by the Court.

On March 9, 2020, the Court issued a Final Order For Foreclosure of Mechanic's Lien which was amended on March 11, 2020, at the request of the Plaintiff by its Motion to Alter or Amend the Judgment, which listed the amount of the debt as well as included a sum of the attorneys' fees and costs sought by the Plaintiff.

There was no ruling in the Order as to the Plaintiff's causes of action for breach of contract against Steeple Dorchester Ltd. or a ruling regarding *quantum meruit* against any of the parties.

For the reasons which will be detailed within this memorandum, the Defendants hereby seek a new trial or, in the alternative, an amendment of the Court's Order. In addition, the Defendants seek clarification pursuant to Rule 52(a), which provides "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." *See Rule 52(a) SCRPC.*

¹ ARCCAFE001,LLC was inexplicably dismissed as a party before appearing, despite the fact was, at all times relevant, the record title holder to the property.

ARGUMENT

I. There is No Contract Between Plaintiff and Defendants Hamilton Management Services Company or Defendant Steeple Dorchester, Ltd. and, therefore, any Judgment against Hamilton Management Services Company or Steeple Dorchester, Ltd. Should be Vacated, Amended, or Otherwise Withdrawn

The Defendants respectfully request that this Court alter and amend its judgment pursuant to SCRPC 59(a) as the Court failed to consider that there is no evidence supporting a valid contract between the Plaintiff and either Defendant. While the Defendants focused the thrust of their argument in this action on the lack of licensure on the part of the Plaintiff, this does not alleviate the Plaintiff's burden to establish the existence of a valid contract between the parties in the action in order to prevail upon its claim.

The Order states as a finding of fact, "I find that Hamilton Management Services Company authorized improvements to the property to be made by Marsh Waterproofing, Inc. and signed the acceptance of the Plaintiff's proposal (exhibit 6), thereby forming a valid and binding agreement supported by valid consideration". *Order, Paragraph 7.*

Accepting the scope of work as a contract which was entered into evidence by the Plaintiff, as Exhibit 4 to their *Return to Motion For Summary Judgment*, the document is clearly addressed to (emphasis added) **State Acquisitions, LLC** and addresses multiple crawlspaces across numerous properties operated by subsidiaries of State Acquisitions, LLC across South Carolina. *Exhibit A.*

The document is signed by Alexander Burns, in his capacity as a representative of State Acquisitions, LLC. There is no reference in the proposal to Hamilton Management Services Company authorizing the work, as is stated in the Order, or agreeing to act as guarantor or surety in any capacity. Moreover, there is no reference to Steeple Dorchester Ltd. in the scope of work as a party to the contract, or as guarantor or surety. The agreement for the crawlspace work was entered into between the Plaintiff and State Acquisitions, LLC, which is the parent company of Steeple Dorchester Ltd.

Hamilton testified as a 30(b)(6) witness that the services it provided were, as follows:

**8 Hamilton Management Services Company was
9 contracted by State Acquisitions, on behalf of
10 the Steeple subsidiaries, to provide certain
11 services related to the administrative function
12 of the entities. For example, Hamilton
13 Management Services Company provided all of the
14 accounting services to State Acquisitions and**

15 all of the Steeple subsidiaries. (SEE Deposition of Hamilton Management Services
Company Page 27)

and

17 Hamilton Management Services Company contracted
18 all of the third-party vendors on behalf of the
19 various Steeple entities. It procured bids, it
20 arranged contracts, it provided all the payment
21 and billing services on behalf of the entity,
22 for fees.

(SEE Deposition of Hamilton Management Services Company Page 28)

There should have never been any confusion with regard to the role, or lack thereof, of Hamilton Management Services in the project. The same should be said about State Acquisitions. The Plaintiff understood that their client for contracting purposes to be State Acquisitions, LLC insofar as their invoices, which again were provided to the Court as evidence by the Plaintiff as Exhibit 8 to their *Return to Motion For Summary Judgment*, is addressed “Bill To” (emphasis added) **State Acquisitions, LLC**. The invoice lists work that was performed at a Steeple subsidiary by name and even lists the subsidiary’s name and address as where the work is performed. *Exhibit B*.

Perplexingly, despite the existence of the other contract in evidence and absolutely no evidence of any other written contracts between any of the parties, the Court found as a conclusion of law, “Hamilton Management Services Company, Inc. entered into an agreement for the work, and Plaintiff should have judgment against it on the contract claim.” *See Order, Paragraph 23*.

The Court cannot find as a conclusion of fact or law that a valid contract exists between either Steeple Dorchester Ltd. or Hamilton Management Services Company and the Plaintiff, when the Plaintiff itself tendered into evidence a contract covering the subject matter of this action with another party.² Notwithstanding that the party may be an affiliate of Steeple Dorchester Ltd., the basic elements of contract law require that an action for breach of contract be tendered against the party to the contract. The Defendants properly raised in their answer an affirmative defense of the Statute of Frauds. *See Answer, Paragraph 19*.

The South Carolina Statute of Frauds, as codified under SC Code Ann 32-3-10 states that, “No action shall be brought whereby: (2) To charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person;”. Moreover, Section 32-3-20 states that “No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or

² The proposal was directed to State Acquisitions.

given concerning or relating to the character, conduct, credit, ability, trade or dealings of any person to the intent or purpose that such other person may obtain credit, money or goods thereon unless such representation or assurance be made in writing, signed by the party to be charged therewith or by some person thereunto by him legally authorized.”

The Defendants have failed to name State Acquisitions, LLC as a party to this action and have provided absolutely no claims or evidence to suggest why or how Steeple Dorchester Ltd. or Hamilton Management Services Company should be liable for a contract explicitly entered into between the Plaintiff and State Acquisitions, LLC. This basic defect ought to be enough for the Court to amend its judgment regarding the breach of contract claim against both Steeple Dorchester Ltd. and Hamilton Management Services Company.

This fatal flaw renders it impossible for the Court to find for the Plaintiff under any theory save quantum meruit. However, the findings of fact and law do not otherwise support that Hamilton Management Services Company was unjustly enriched at the expense of the Plaintiff as it did not receive any benefits conferred by the Plaintiff as a result of the work performed. *See Affidavit of Alexander Burns* The same holds true for all defendants.

Given that there can be no surviving claims against Defendant Hamilton Management Services Company, Defendant Hamilton Management Services Company respectfully requests that the court find for Hamilton Management Services Company on the Plaintiffs actions for breach of contract, foreclosure of a mechanics lien, and quantum meruit.

Additionally, Defendants respectfully request pursuant to SCRPC Rule 52(a) a determination by the Court as to whether it considered the existence of a contract covering the scope of work between the Plaintiff and State Acquisitions, LLC, at the peril of Hamilton Management Services, Inc. and if not, the grounds by which it disregarded this evidence by substituting the contracting party for Hamilton Management Services.

II. The Court Cannot Award Attorneys’ Fees or Costs in Any Claim Against Hamilton Management Services Company

Defendant Hamilton Management Services Company respectfully request that this Court alter and amend its judgment pursuant to SCRPC 59(a) as the Court failed to consider whether there was any statutory or contractual authority by which it could award the attorneys’ fees and costs against Hamilton Management Services Company. Notwithstanding the other impediments to the Plaintiff prevailing on any cause of action as raised herein, even if the Plaintiff were to prevail on a claim against Defendant Hamilton Management Services Company for either breach of contract or *quantum meruit*, there is no applicable statute or provision of contract by which Defendant Hamilton Management Services Company

could be subject to an award of attorneys' fees and costs insofar as it has at no time held any interest in the subject property, whether as an owner or tenant. As such, Defendant Hamilton Management Services Company respectfully requests the Court alter the judgment to relieve Defendant Hamilton Management Services Company from the Plaintiff's attorneys' fees and costs.

Additionally, Defendant Hamilton Management Services Company respectfully requests pursuant to SCRCF Rule 52(a) a determination by the Court as to the contractual or statutory grounds under which it awarded the Plaintiff's attorneys' fees and costs as judgment against Defendant Hamilton Management Services Company.

III. The Order Explicitly Contradicts the Testimony of the Defendants' Witness

Defendants respectfully request that this Court alter and amend its judgment pursuant to SCRCF 59(a) as the trial court failed to consider the written or deposition testimony of Alexander Burns, a director of Defendant Hamilton Management Services Company and its Rule 30(b)(6) designee, which directly contradicts the Court's findings of fact in the Order as they relate to Mr. Burns' own reliance.

The Court found that, "Additionally, I find that Defendants did not rely on the existence or non-existence of a license." *See Order, Paragraph 16*. This is in stark contrast to Mr. Burns' affidavit which states, "...it was my belief that Marsh Waterproofing, Inc was adequately licensed, bonded and insured for the work being performed." *Exhibit C, Page 2*. See also the following deposition testimony from Mr. Burns which asserts reliance:

Q. Well, at what point did you decide you didn't
19 intend to pay because you didn't think he could
20 file a lien?
21 MR. OLSON: Objection.
22 A. No. At the point at which we became aware that
23 a contractor **that had previously sent us**
24 **documents in which they stated they were**
25 **licensed**, bonded, and insured, we found out was
1 not licensed in South Carolina, and we were
2 unclear as to whether we were going to have to
3 have the work removed and redone by a licensed
4 contractor. (*Emphasis Added*) (*See Deposition of Alexander*
Burns Page 98-99)³

Mr. Burns further testified that, "It would have been antithetical to the interests of Hamilton Management Services Company or the Steeple entities for me to engage the services of an unlicensed contractor and a potentially negligent act to knowingly do so. Moreover, I am unaware of any benefit that

³ Mr. Burns deposition testimony was given as a 30(b)(6) designee for Hamilton Management Services.

any of the entities would have received by doing so...as of the authorization of this payment, I still did not know that Marsh Waterproofing was unlicensed in South Carolina. Had I have known that Marsh Waterproofing was unlicensed in late September of 2017, I would not have authorized the Forty Thousand Dollar Payment.” *Exhibit C, Page 3.*

The Court’s Order attempts to substantiate its decision by further finding fact which is contradicted by the Plaintiff. “Marsh made no representation to Defendants that it was licensed in the correspondence, the proposal or the discussions of the parties.” *See Order, Paragraph 16.* While it would likely bear no significance as to what representations were made by Marsh due to the strict nature of the statute barring unlicensed contractors, the Defendants would urge the Court to consider the evidence should it be persuasive.

The Plaintiff’s “reliance” argument has no precedent. Plaintiff attempts to graft the holding from *Teseniar v. Profl Plastering & Stucco, Inc.* to somehow create a “lack of reliance” exception to S.C. 40-11-370(c). This exception does not exist at common law. Furthermore, the exception certainly is not supported by *Teseniar*. In that case, the court found that a prime contractor was able to retain the services of an unlicensed subcontractor so long as it supervised the subcontractor and was licensed in the trades being performed by the subcontractor. The Court in *Teseniar* stated, verbatim, as follows:

“Moreover, we note the pertinent licensing statutes are intended to protect the public interest. S.C. Code Ann. § 40-1-10(A)-(B) (2011). The purpose of protecting the public interest by denying enforceability does not exist when dealing with claims between contractors. See Kennoy v. Graves, 300 S.W.2d 568 (Ky. App. 1957) (“The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. The reason for the rule denying enforceability does not exist when persons engaged in the same business or profession are dealing at arm[’s] length with each other. In the case before us, appellant was in a position to know, and did know, the qualifications of appellee. No reliance was placed upon the existence of a license, as presumptively would be the case if appellee was dealing with the general public.”). Teseniar v. Profl Plastering & Stucco, Inc., 407 S.C. 83, 97, 754 S.E.2d 267, 274 (Ct. App. 2014)

It would be in error for this Court to adopt the Teseniar holdings as a justification for Marsh’s lack of licensure. *Teseniar* holds that the requirement that a contractor be licensed is excused in situations where one contractor sues another contractor. The distinction drawn by that Court is sensibly reasoned upon the fact that the parties in *Tseniar* were both contractors and members of the contracting industry do not need the protections afforded to the non-contractor public as the situation before this court which is the identical situation envisioned by SC 40-11-370.

To find for the Plaintiff in the face of an explicit statute requiring licensure, the Court must have found as an evidentiary matter that the Defendants truly *were* “in a position to know, and did know, the qualifications of [Marsh]. No reliance was placed upon the existence of a license, as presumptively there would be in the case if [Marsh] was dealing with the general public.” *Order, Paragraph 17*. If the only person in a position to know the Defendants’ knowledge of Marsh’s qualifications explicitly testified in writing that he was not aware that Marsh was unlicensed until long after the work was completed, the Court must either find this to be a defect to the Plaintiff’s reliance upon Teseniar or state why the Court chose to wholly disregard the written testimony of Mr. Burns, as appeared in the record.

And while an evidentiary finding would be without merit, as there is no testimony to indicate that the Defendants were aware of the Plaintiff’s unlicensed status, to hold that a non-contracting entity like any of the Defendants is not owed the protection of 40-11-370 would be akin to drafting new legislation entirely.

Therefore, the Defendants respectfully request pursuant to SCRPC Rule 52(a) a determination by the Court as to whether it considered the deposition testimony or the affidavit of Alexander Burns of November 8, 2019, and if not, the grounds by which it disregarded this evidence which appeared in the record as well as the basis by which the Court determined that the Defendants are not afforded the status of the general public insofar as there is no evidence in the record to suggest that either entity has any construction industry experience, licensure, or familiarity and should be afforded a special status beyond that of the general public.

III. The LLR Found The Work Performed Required A General Contractor’s License

In order for the Court to find that the Mechanic’s Lien was valid and enforceable, the Court would have to find that either: (a) Marsh Waterproofing possessed a valid general contractor’s license in the State of South Carolina; (b) a license was not required; or (c) that Marsh Waterproofing was working under the supervision of a licensed contractor. Both (a) and (c) are immediately ruled out via Tim Marsh’s trial testimony, and as set forth below. Thus, the holding can only be based on the Court’s implied holding that a license was not required.

It is clear that the Court did not place any weight on the South Carolina LLR Contractor’s Licensing Board Opinion (“LLR Final Order”) which found that the Plaintiff violated South Carolina law while acting as an unlicensed general contractor and performing work that serves as the basis for this action, which required a general contractor’s license in South Carolina.

The Court found in its order (emphasis added) “General Construction is installation, replacement or repair of a building or structure. **S.C. Code §40-11-20(8)**. I find that the facts in

the record establish that Marsh Waterproofing, Inc. and the work it performed do not fall within these definitions". *See Order, Paragraph 11.*

This ruling was based upon the Court "analyzing this case by the nature of the work" and "analyzing this case by the scope of work" as opposed to deferring to conclusions of fact and law of the Contractor's Licensing Board, which provided a written final ruling relative to the Plaintiff's specific conduct in this matter. The LLR Final Order reached the exact opposite conclusion having considered the technical specs for the structural foam and the recommendations of the engineering report.

The LLR's Contractor's Licensing Board is the established agency charged with the regulation of licensing within the industry. As the LLR Final Order found that the scope of work fell within that which a license was required and further found that the Plaintiff violated South Carolina law by engaging in contracting work in South Carolina while not being properly licensed, a new trial or amendment of the Court's Order is paramount to the furtherance of justice.

The LLR Final Order held, in pertinent part, as follows (emphasis added): "The hearing officer determined that the scope of work for the use of this foam underneath the crawlspace of the project(s) was structural in nature and **required a general contractor's license** pursuant to **S.C. Code Ann §§ 40-11-20(8)** and 40-11-410(1) (1976, as amended)." *See Exhibit D, Page 5.*

It should not escape the Court's notice that LLR cited the exact same statute as violated by the Plaintiff that the Order states the Plaintiff did not violate. The Court need not extrapolate the LLR Final Order as it directly calls out the statute contemplated by the Court.

With regard to whether the Plaintiff violated South Carolina law, in the eyes of the statutory board established to regulate such violations of law, (emphasis added) "The hearing officer finds that **[Marsh Waterproofing] violated S.C. Code Ann. § 40-11-110(A)(5)** in that [Marsh Waterproofing] engaged in contracting work in South Carolina **when not properly licensed or supervised by a licensee** licensed in the required license group and classification." *See Exhibit D, Page 5.*

In considering the LLR Final Order, the Court ought to have considered the great weight previous courts have afforded similar agency administrative orders. "The construction of a

statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Dunton v. S.C. Bd. of Exam'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987); see also Nucor Steel v. Pub. Serv. Comm'n of S.C., 310 S.C. 539, 543, 426 S.E.2d 319, 321(1992) ("Where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason.").

There is no cogent reason to ignore or overrule a decision made by the Contractors Licensing Board in this case. The Board Order represents legal and factual findings in an *ex parte* regulatory proceeding in which the Defendants were not able to testify or present evidence and the Plaintiff was afforded great latitude by which to stipulate to facts that were otherwise contradicted in the record in this case.

The determination of LLR that the Plaintiff was acting as a general contractor should also be considered in light of the Court's holding which distinguishes of the facts in the C-Sculptures case from the action at bar. The Order states, "I conclude that the decided cases cited by Defendants uniformly involve contractors who were either admittedly general contractors, or were adjudged to be general contractors based upon either the nature of the work or the scope of the work; therefore, the cases are inapplicable to these facts." *See Order, Paragraph 27.*

If the LLR concluded as a matter of law that the Plaintiff was acting as an unlicensed general contractor based upon their review of the scope of work performed by the Plaintiff, it would stand to reason that the Court would find that the Plaintiff was adjudged to be a general contractor based upon the scope of work by the government agency with the singular authority to make such determinations on behalf of the State of South Carolina; which is exactly analogous to the fact pattern of C-Sculptures.

The Defendants respectfully request that the Court adopt the findings of the LLR and find that the work performed by the Plaintiff required a general contracting license and find that this serves as a complete bar to the Plaintiff's recover and render judgment in favor of the Defendants on all causes of action, and thus declare the Defendants the prevailing party.

In the alternative, the Defendants request a new trial in order to seek further testimony before the Court from the LLR regarding the requirement for licensure to the extent the Court is unresolved regarding the sufficiency of their written order.

Additionally, Defendants respectfully request pursuant to SCRCF Rule 52(a) a determination by the Court as to whether it considered the LLR's conclusion of law as dispositive of whether the work performed by the Plaintiff requires a general contracting license in South Carolina, and if not, the grounds by which it disregarded this evidence, which appeared in the record.

IV. The Plaintiff Was Not Working Beneath or Supervised by a South Carolina Licensed Contractor

While the Order does state that the Court finds that Marsh "reasonably believed that a general contractor was working ahead of Marsh on the project" there is no evidence in the record to suggest that the Plaintiff even believed that it was **supervised by** a licensed South Carolina general contractor. As set forth above, the LLR hearing officer found that (emphasis added), "[Marsh Waterproofing was] **not properly licensed or supervised by a licensee licensed in the required license group and classification.**" See *Exhibit D, Page 6*.

Given that Plaintiff could not identify any general contractors involved in the project that it had agreed to work under, conceded in the deposition of Tim Marsh that it was not: (i) supervised by a general contractor; (ii) scheduled by a general contractor; (iii) contracted with a general contractor; (iv) and did seeking payment from a general contractor, the Court cannot have found that it was working under a licensed South Carolina general contractor that it did not know or see.

The Plaintiff cannot prevail on the reliance upon the conceptual existence and licensure of another contractor when the Plaintiff was not directly supervised by the licensed contractor. Given no justifiable reliance and the lack of direct licensure by the Plaintiff, the Defendants respectfully request the Court render judgment in favor of the Defendants on all causes of action and declare the Defendants to be the prevailing party.

Additionally, Defendants respectfully request pursuant to SCRCF Rule 52(a) a determination by the Court as to whether it found that the Plaintiff was working under a licensed South Carolina general contractor, and if so, which licensed South Carolina general contractor in particular and the facts the Court considered to establish their privity.

V. The Offer To Perform Contracting Work By The Plaintiff Was Illegal At Time of Formation

The Defendants respectfully request that this Court alter and amend its judgment pursuant to SCRCF 59(a) as the trial court failed to consider whether the Plaintiff could have even made the offer to perform the services under South Carolina law.

SC Code Ann 40-11-30 states (emphasis added) “No entity or individual may...or **offering** to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting...”

For a claim of breach of contract or *quantum meruit* the Court would have to find that the offer to perform services could have been lawfully entered into by the Plaintiff **at the time of formation**. Similarly, for the Court to determine that a Mechanic’s Lien was valid at the time of filing would require that the Court determine that the Plaintiff could have initially offered to perform the work.

The LLR makes clear in its final order that (emphasis added), “[Marsh Waterproofing] is cautioned that the scope of work on the project(s) **does require a general contracting license in South Carolina** if [Marsh Waterproofing] **is not supervised by** a licensee in the required license group or classification”. See *Exhibit D, Page 6*.

Per LLR, given the exact same facts and circumstances, if the Plaintiff were to seek to do the exact same thing today, it could not even make the offer to do so without either obtaining a license or be **supervised by** a licensed South Carolina general contractor, or it would be violating Section 40-11-30.

As set forth above, there is absolutely no evidence in the record to suggest that the Plaintiff was **supervised by** a licensed South Carolina general contractor for purposes of availing itself of that contractors’ license at the time of offer and thus could not have lawfully made an offer to perform the work.

“If the offer of a contract itself violates statutory law, then the contract cannot be seen as having been ratified as an enforceable contract.” See *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004) (holding the general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution).

The Plaintiff was obviously not **supervised by** a licensed South Carolina general contractor at any time and the LLR Final Order establishes that the work does require either a valid general construction license or to be **supervised by** one; therefore insofar as no party has ever attempted to argue that the Plaintiff was a South Carolina licensed general contractor, the Court cannot have found that it was already supervised by a licensed South Carolina general contractor at the time at which it offered to perform \$36,800 in contracting work on July 10, 2017.

To the extent that the Plaintiff’s solicitation was illegal at the time of offer, by statute, it cannot maintain any of its causes of action and therefore the Defendants respectfully request judgment in favor of the Defendants on all causes of action and that they be deemed the prevailing party.

VI. The Testimony of Tim Marsh is Inconsistent

The Defendants respectfully request that this Court alter and amend its judgment pursuant to SCRCP 59(a) as the trial court failed to consider the inconsistencies in the statements made by Tim Marsh in his affidavit of April 30, 2018 versus his testimony at trial, as it appears in the Order. Paragraph 2 of the affidavit states “I asked him [Burns] whether I needed to be licensed in South Carolina and he told me he would check with someone and get back to me. He subsequently did respond to me and tell me there did not seem to be a need to be licensed to do our work in South Carolina.” *See Exhibit E.*

As a Finding of Fact, the Order states in paragraph 16, “On the facts in the record I find the parties discussed licensing before the work started and Tim Marsh told Mr. Burns that he was not licensed in South Carolina and asked if Mr. Burns thought he needed to be. Mr. Burns promised to check on it. Thereafter the parties proceeded with the work. Mr. Burns could not rely upon the existence of a license for the qualifications of the contractor if he knew none existed.” This is in concert with Mr. Marsh’s trial testimony in which he alleged that no follow up conversation took place regarding the need for licensure.

Despite the inconsistencies in Mr. Marsh’s statements regarding the alleged conversations regarding licensure, the Order makes no reference to the testimony of Mr. Burns, which was entered into the record in the form of an affidavit stating in relevant part “At no time did Mr. Marsh, or any other party from Marsh Waterproofing, discuss the issue of contractor licensing with me or anyone else at Hamilton or the Steeple entities.” *See Exhibit C, Page 2.*

To the extent that the testimony of Tim Marsh is inconsistent and cannot be relied upon as definitively refuting the testimony of Mr. Burns, the Defendants respectfully request judgment in favor of the Defendants on all causes of action and that they be deemed the prevailing party or in the alternative a new trial which permits Mr. Burns to testify about his conversations with Mr. Marsh to the extent the Court requires further clarity on his testimony, Mr. Burns’ testimony was effectively precluded by the improper acts of the Plaintiff, for reasons set forth below.

Additionally, Defendants respectfully request pursuant to SCRCP Rule 52(a) a determination by the Court as to whether it found the testimony of Mr. Marsh was sufficiently consistent to definitively establish the substance of the conversation between Mr. Marsh and Mr. Burns relative to licensure and whether the Court considered the written testimony of Mr. Burns regarding his recollection of the conversation, and if not, the grounds by which it disregarded this evidence which appeared in the record.

VII. The Order Materially Misstates Mr. Burns’ Testimony

Insofar as the Order sets forth Mr. Burns’ testimony relative to the Defendants in a way that is not supported by the *actual* testimony of Mr. Burns, as it appears in the record, the Defendants respectfully request that the Order be amended to reflect Mr. Burns’ actual record testimony, as set forth in his

affidavit of November 8, 2019 regarding his discussions with Mr. Marsh, his belief as to the Plaintiff's status as a licensed contractor, his reliance upon their licensure as a condition for State Acquisitions, LLC to contract services, and by extension respectfully request judgment in favor of the Defendants on all causes of action and that they be deemed the prevailing party or in the alternative a new trial which permits Mr. Burns to testify about his conversations with Mr. Marsh to the extent the Court requires further clarity on his testimony, Mr. Burns' testimony was effectively precluded by the improper acts of the Plaintiff, for reasons set forth below.

Additionally, Defendants respectfully request pursuant to SCRPC Rule 52(a) a determination by the Court as to whether the Court considered the written testimony of Mr. Burns as contained in his affidavit, and if not, the grounds by which it disregarded this evidence which appeared in the record.

IIIX. Judgment on the Mechanic's Lien Is Not A Judiciable Matter

As testified by Mr. Burns, "Following Marsh's filing of the mechanic's liens, on or about December 18, 2017, the landlord terminated all of the leases to the Steeple entities pursuant to a breach of the forbearance agreement, which specifically prohibited the filing of any Mechanic's Liens on the properties." *See Exhibit C, Page 5.*

As noted above, Plaintiff dismissed the landlord from the action in 2017 with no indication of any consideration received, which would serve to otherwise off-set the Plaintiff's claim. As such, the Plaintiff cannot foreclose on the real estate itself but only on Defendant Steeple Dorchester Ltd. leasehold interest, which has not existed since 2017.

The Court instructs the "case be referred to the Master in Equity so that he may conduct the sale" despite the fact that there is nothing to be sold. *See Order, Paragraph 30.*

If there is no leasehold interest, by virtue of the termination of the lease, then there is nothing upon which the Plaintiff may foreclose the Mechanic's Lien upon. If there is no possibility of recovery under the foreclosure, then it cannot serve justice for the Court to have consider the merits of the Mechanic's Lien as a distinct cause of action from the breach of contract and the *quantum meruit* claims.

The Plaintiff was made aware of the termination of the leases since the inception of this lawsuit. The counterclaim was raised specifically upon the grounds that the harm caused by the Plaintiff was as a result of the termination of the leases.

The Plaintiff has effectively wasted the Defendants' and the Court's time and resources maintaining a cause of action that the Defendants have attempted to dispose of through a motion to dismiss and a motion for summary judgment as well as directed verdict. While the Defendants concede they have been focused upon the determination that the Plaintiff was acting as an unlicensed contractor,

which would resolve all of the causes of action together, it remains the burden of the Plaintiff to ensure that the causes of action they seek to maintain represent a judicable controversy for which relief can be granted by the courts and are not brought for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation, as required by SCRCF Rule 11(b)(1).

The termination of the leases has appeared in the record and been well known to the Plaintiff for over two years and yet they have maintained this cause of action, which cannot advance their interest financially or otherwise, to the detriment of the Defendants.

The clear motivation for the Plaintiff to maintain the illusory cause of action related to the foreclosure of the Mechanic's Lien is the imposition of their attorneys' fees & costs, which would not otherwise be available to them. It cannot be an appropriate remedy to foreclose a lien which does not secure anything solely to recover expenses that cannot otherwise be recovered.

The Defendants respectfully request that the Court render judgment in favor of the Defendants on the foreclosure mechanic's lien, and to be deemed the prevailing party, or in the alternative impose a sanction in favor of the Defendants in the amount of their attorneys' fees and costs associated with defending the action for foreclosure of the Mechanic's Lien, pursuant to the Court's inherent authority under Rule 11(b)(3).

Additionally, Defendants respectfully request pursuant to SCRCF Rule 52(a) a determination by the Court as to whether there is even currently a lien on the property, its leasehold interest, and clarification as to what exactly is to be sold by the Master in Equity.

IX. The Court Was Prejudiced By Plaintiff's Improper Presentation of Extrinsic Information Regarding a Critical Witness For Defendants.

The Defendants have included a final exhibit, which is an affidavit dated February 24, 2020 prepared by Alexander Burns, Director of Hamilton Management Services Company. The full weight of Mr. Burns' testimony should be considered in light of improper inclusion of extrinsic information to attack the credibility of a witness without seeking the Court's permission as is required by Rule 608(b) of the South Carolina Rules of Evidence, and only then introducing it upon cross examination of a witness at trial.

Mr. Burns provides a detailed statement regarding the chilling effect the Plaintiff's procedural misconduct had regarding his willingness to testify and the Defendants were clearly prejudiced by his lack of live testimony at trial. *See Exhibit F.*

The complete lack of reference to Mr. Burns' prior written testimony in the Order makes clear that the Court either did not consider Mr. Burns' testimony or found it to be entirely discredited. Given that Mr. Burns was in a position to have direct knowledge of the facts and

circumstances regarding the Defendants' knowledge and justification, as well as the evidentiary support for their counterclaim, his testimony's exclusion cannot go unconsidered by the Court.

WHEREFORE, the Defendants seek consideration of this motion and exhibits and respectfully request the Court amend its judgment accordingly to find in favor of the Defendants, and deem them the prevailing party. Alternatively, this Court should grant a new trial absolute to the Defendants providing the Court with the opportunity to consider additional testimony, including that of Mr. Burns and LLR.

HARPER LITTLE PLLC

/s/ C. Clay Olson
C. Clay Olson, Esquire
SC Bar 17007
164 Market Street, Ste 139
Charleston, SC 29403
clay@harperlittlelaw.com

March 22, 2020

EXHIBIT A

Marsh Waterproofing, Inc.

Specializing in Building Restoration

Physical Address:
240 South Main St. Suite #2
Vidor, TX 77662



Ph# 409-769-0459
Toll free: 1-866-251-0234
Fax# 409-769-1682

Mailing Address:
P.O. Drawer 968
Vidor, TX 77670-0968

Email: mwaterproofing@aol.com

July 10, 2017

**Churchs Chicken
State Acquisitions, LLC
259 Seven Farms DR
Suite #301
Charleston SC 29492**

Attn: Alexander Burns

Scope of Work: Foam Underneath Crawlspace at Churchs Chicken

- Crawl space must be clean and free of standing water
- All plumbing and electrical must be repaired and secured by others
- This quote is based on 1200 square feet by 3 feet deep crawlspace
- Apply alchemy polymers 430 foam to fill crawlspace
- This quote is based using 10 sets of alchemy polymers foam
- Remove access door and fill with 4 inches of concrete after completion

Price: \$41,800.00 plus all applicable taxes.

Price for multiple stores: \$36,800.00 plus all applicable taxes.

***NOTE: Approximately 2 working days per store**

***If crawlspace is not prepared \$875.00 per day will be charged while we are waiting on electrical, plumbing and cleaning to be finished.**

Terms: Payment due upon completion.

**Respectfully Submitted,
Tim Marsh
Marsh Waterproofing Inc.
409-782-3527**

Acceptance of Propsal: AB Date: 7/21/2017

EXHIBIT B

Marsh Waterproofing Inc
Vidor, TX 77670-0968
P.O. Box 968

Invoice

Date	Invoice #
9/5/2017	6533

Bill To
State Acquisitions, LLC 259 Seven Farms DR Suite #301 Charleston SC 29492

P.O. No.	Terms	Project

Description	Qty	Rate	Amount
Installation of foam injection system under crawlspace. Steeple Two Notch Ltd Churchs Chicken #0904 7116 Two Notch RD Columbia SC 29223		36,800.00	36,800.00
Subtotal			\$36,800.00

Sales Tax (0.0%) \$0.00

Total \$36,800.00

Payments/Credits \$0.00

Balance Due \$36,800.00

ELECTRONICALLY FILED - 2019 Nov 07 11:58 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1000262

EXHIBIT C

**) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT**

•

2

1

:

1

;

1

1

2

1

2

1

2

1

2

2

Steeple entities, which was built using the same design. Church's provided Hamilton with a list of contractors and made an introduction to Marsh Waterproofing.

Prior to the commencement of work, I asked Mr. Marsh about the payment terms and whether he would require any deposit for the work to be performed. Mr. Marsh indicated that he would not require any deposit and would invoice the entities on NET terms, following the completion of the work. Mr. Marsh did not ask any questions regarding the financial condition of any of the Steeple entities, nor did he inquire as to the nature of the arrangement between Hamilton Management Services Company and the Steeple entities. Mr. Marsh's deposition states that he believes that in his discussions with Church's Chicken they indicated that "they [the Steeple entities] was financially stable." To the contrary, Church's Chicken was intimately familiar with the precarious nature of the Steeple entities and was actively engaged in negotiations regarding a restructuring of the Steeple entities including the closure of multiple restaurants.

Mr. Marsh indicated in our telephone conversation that he would "handle everything" with regard to the project with the exception of pumping out the crawl spaces (which he described as a dirty and messy business and something he did not want to get involved with) as well as indicated that the Steeple entities needed to have any broken piping or electrical work fixed prior to as they would become inaccessible upon the addition of the structural foam.

There was never any discussion of Hamilton Management Services Company acting as the general contractor of the structural foam or any other project. Mr. Marsh never inquired as to whether Hamilton Management Services Company was licensed as a general contractor (it is not) nor did he indicated that he believed there was a general contractor involved.

I advised Mr. Marsh that Mr. Rikki Vaughn, the president of operations of the Steeple Entities as well as K.C. Jenkins, his administrative assistant, would be coordinating the access to the space and ensuring that the spaces were pumped out. It was my understanding that this coordination was the action of a client providing space access and in preparation for the work of Marsh as its general contractor.

The only discussion of scheduling I had with Mr. Marsh was to ask him his requirements. Mr. Marsh indicated that he had no preferences for scheduling and that we were free to create a sequence of stores at our leisure, except that he wanted to have all of the properties in the same cities completed sequentially, so as to avoid additional travel.

At no time did Mr. Marsh, nor any other party from Marsh Waterproofing, discuss the issue of contractor licensing with me or anyone else at Hamilton or the Steeple entities. At the point at which Hamilton coordinated the Steeple engagement of Marsh Waterproofing, Inc. it was my belief that Marsh Waterproofing, Inc. was adequately licensed, bonded and insured for the work being performed.

Mr. Marsh's statement in his deposition that Texas has no licensing requirements is in contrast to the statement on his website in the "About Us" section that Marsh Waterproofing is a licensed contractor in Texas, which I reviewed prior to Hamilton hiring Marsh Waterproofing on behalf of the Steeple entities.

My basis for the belief that Marsh was licensed and bonded is the inclusion of the words "Licensed and bonded" in Marsh's logo and on their website, as well as his referral to me by Church's Chicken, who indicated that they had engaged him for work throughout the country and my understanding that Church's has a full time construction management department staffed with knowledgeable construction professionals who are aware of the licensure requirements as well as multiple attorneys in their general counsel's office. Given that Church's Chicken was in the midst of tens of millions of dollars of litigation over the damage caused by the crawl space that previously failed, I reasonably believed that they had exercised diligence in their recommendation of a contractor. Mr. Marsh's testimony that he and I discussed his or Marsh Waterproofing's licensure is false.

Mr. Marsh's testimony regarding my statement that a license was not required is false. There was no discussion between Mr. Marsh and I regarding whether he required a license in the State of South Carolina. It would have been antithetical to the interests of Hamilton Management Services Company and the Steeple entities for me to engage the services of an unlicensed contractor and a potentially negligent act to knowingly do so. Moreover, I am unaware of any benefit that any of the entities would have received by doing so.

I received a copy of the invoices in September, 2017 via e-mail. On or about September 21, 2017, I authorized payment in the amount of Forty Thousand Dollars (\$40,000) to Marsh Waterproofing via funds held by Church's Chicken for the benefit of the Steeple entities. It is my understanding that Church's Chicken immediately tendered this payment to Marsh Waterproofing.

Contrary to the statements made by Mr. Marsh that I knew Marsh Waterproofing was unlicensed at the time of their hiring, as of the authorization of this payment, I still did not know that Marsh Waterproofing was unlicensed in South Carolina.

Had I have known that Marsh Waterproofing was unlicensed in late September of 2017, I would not have authorized the Forty Thousand Dollar payment.

Following the completion of the work, the only correspondence I received from Marsh Waterproofing was the e-mail regarding where to send the invoices and the copy of the invoices.

Mr. Marsh did not subsequently contact me via telephone, e-mail, fax or send me any letters. I am unaware of any missed calls from Mr. Marsh or anyone at Marsh Waterproofing. I did not receive any voicemails from Mr. Marsh or anyone at Marsh Waterproofing. Neither Tim Marsh, anyone else from Marsh Waterproofing, nor their attorneys contact me or anyone else at or affiliated with Hamilton or the Steeple entities regarding non-payment prior to the filing of the mechanics liens.

As part of the restructuring of the lease obligations with the landlord, the Steeple entities were required to make certain representations regarding the completion of the remediation of the work. As part of Hamilton's diligence in preparation for these representations, I sought to confirm that Marsh was adequately licensed for the work performed, as is standard practice prior to making such representations. In doing so, I attempted to search for their license in the South

Carolina LLR online contractor licensing database. Based upon my preliminary search results which yielded no results, I suspended any further payments and made written inquiry to LLR on or about October 31, 2017 to determine the licensure status of Marsh Waterproofing.

Upon confirmation from LLR that Marsh Waterproofing was not licensed in the State of South Carolina, I subsequently declined to exercise any payment to Marsh on the basis that such payment could not be compelled at law and equity and to do so would be to make a gratuitous distribution of the respective companies' assets. I believed at the time, and continue to believe, that such a distribution would constitute a breach of Hamilton Management Services Company, and by extension my own fiduciary obligations to the Steeple entities and their stakeholders.

A second reason for the declination to tender any payment was my concern over the risks related to the work being performed by an unlicensed contractor *vis a vie* any exclusions to our property and liability insurance coverage or coverage under Marsh Waterproofing's insurance for any defects in the work. Given that the nature of the work was inherently structural, and the circumstances giving rise to the work was the grave injury of Church's Chicken employees at another site and the engineer's report warning of the imminent risk of structural collapse, I was concerned that the Steeple entities may have to have the work redone or incur additional expense to certify that it met South Carolina building standards, or potentially purchase some other insurance coverage to mitigate the risk.

I was advised by counsel that if Marsh Waterproofing was unlicensed to perform the work then the Steeple entities could potentially be liable for any worker's compensation claims tendered by any of *his* employees for injuries sustained while working on the Steeple sites. Similarly, if Marsh Waterproofing did not pay their employees who performed work on the site, there was a potential exposure that the Marsh employees could have sued the Steeple entities for unpaid wages under the South Carolina Payment of Wages Act, under a belief that they were working for the Steeple entities, since Marsh Waterproofing was not a licensed contractor.

On or about November 8, 2017, I attended a meeting at Church's Chicken corporate headquarters in Atlanta, Georgia. Present at the meeting were representatives from Church's Chicken, the landlord, the lender to the Steeple entities, and a restructuring advisor hired by the Steeple entities at the request of Church's Chicken, as well as counsel for the respective parties. During this meeting, we reconfirmed the terms of a forbearance agreement with the landlord, who indicated that they were willing to proceed and even move forward with a series of new restructured leases, which would permit the Steeple entities to restructure and continue operating as going concerns, with the specific caveat that at no time could the properties become encumbered with any mechanic's liens, which they considered to be a non-negotiable as they created an encumbrance on their properties.

At this meeting, I advised the attendees that I believed that Marsh Waterproofing was not licensed and had made inquiries of LLR. Moreover, I advised that it was my understanding that the extent that Marsh Waterproofing was not licensed, that the Steeple entities had no lawful obligations to Marsh Waterproofing and that Marsh Waterproofing would be unable to file any mechanics liens without a license. I subsequently received written confirmation in the form of a "License Search Affidavit" dated November 9, 2017, which confirmed that neither Marsh

Waterproofing, Inc nor Mr. Tim Marsh were licensed with LLR and that no entity nor individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than \$5,000 without a license issued by LLR.

Based upon Mr. Marsh's testimony that Church's Chicken told Mr. Marsh to file the mechanics liens and that they recommended it, Church's Chicken knew that the filing of the mechanics liens (even if improper) would set off an unrecoverable chain of events for the Steeple entities leading to Church's Chicken being able to purchase the restaurants for a fraction of the cost they would have otherwise had to pay in an orderly sale.

Had Mr. Marsh or any other representative of Marsh Waterproofing contacted Hamilton or the Steeple entities at the time and indicated that they were contemplating taking legal action against the Steeple entities and specifically sought to file mechanics liens, I would have advised them of the November 9th, 2017 affidavit and our basis for withholding payment and further advised them of their inability to file a mechanics lien, and moreover the damages that would have resulted from their filing of a mechanics lien. I would have suggested that to the extent they still believed they were entitled to payment, they ought to have considered bringing suit in the ordinary course or would have likely suggested that they compel arbitration, which we would have consented to.

Following Marsh's filing of the mechanic's liens, on or about December 18, 2017, the landlord terminated all of their leases to the Steeple entities pursuant to the breach of the forbearance agreement, which specifically prohibited the filing of any mechanics liens on the properties. In my contemporaneous telephone discussions with Glenn Kindred, a representative of the landlord, Mr. Kindred advised me specifically that the precipitating factor was the filing of the mechanics liens and used the phrase "the straw that broke the camel's back." It is my understanding that the proximate cause of the lease terminations and the subsequent *fire sale* of the Steeple entity assets to Church's Chicken was the improper filing of the mechanics liens by Marsh Waterproofing and their attorneys.

Marsh Waterproofing named the Steeple entities, Hamilton and the landlord in the complain and then appears to have immediately dismissed the landlord from the complaint. I do not have any information as to whether the landlord made any payment to Marsh as consideration from this dismissal. To the extent that there was a payment in settlement, this would presumably inure to the benefits of the Steeple entities and would have reduced Marsh's purported claim. The landlord, which owns the properties, is the party who stood to benefit the most from any repairs insofar as they continue to own the building and enjoy the rents from what are considered to be repaired restaurants. The Steeple entities operated the restaurants for around sixty days following Marsh's completion of the work and the termination of the leases. It is my belief that Marsh dismissed the landlord from the complaint for an ulterior purpose as, if their claims against the Steeple entities are proven at trial, my understanding is that they stood to recover from the landlord receiving the benefit as well. The landlord is a multi-billion dollar, publicly traded real estate investment trust, and would have made a suitable cop-defendant if they believed that they were entitled to the recovery.

Upon the filing of the mechanics liens, and subsequent termination of the leases for breach pursuant to the filing of the mechanics liens, Church's Chicken acquired all of the restaurant assets of the Steeple entities and currently operates all of the restaurants in question. Mr. Marsh testified that Church's Chicken, who knew it was an express condition of the forbearance agreement of the leases, encouraged them to file the lines. Prior to reviewing Mr. Marsh's deposition, I was unaware that Church's Chicken had any correspondence with Marsh Waterproofing and had previously advised Church's that all correspondence with Marsh related to our matter should be handled through our attorney as soon as we became aware of the licensure issue at the end of October, 2017.

I was present at the LLR hearing on June 21, 2019 in Columbia, South Carolina. I was a visitor and was not permitted to speak or provide any testimony. Following the ruling by LLR and Marsh Waterproofing filing an appeal, I was not contacted by LLR to provide any testimony nor was permitted to submit any subsequent documentation, which would have been in contravention to many of the facts stipulated to by LLR.

The stipulation as to the facts between LLR and Marsh Waterproofing contained numerous errors in fact that remained uncorrected throughout the appeal. Specifically, Mr. Marsh testified that he believed he was working under a subcontractor and that Hamilton had advised in writing that it had a general contractor (or potentially was the general contractor, as was alleged by Marsh's attorney at the hearing) when in his deposition he stated that he was not hired by a contractor and was not aware of anyone else involved. The LLR appeal stated that Hamilton knew at all times that Respondent was not licensed in South Carolina, when Hamilton had no knowledge of Marsh's licensure status until it searched for the license in October of 2017, was unable to find it, and requested a copy from LLR as well as confirmation that a license was required.

The LLR ruling further states that Respondent's unlicensed status only became an issue for Hamilton when payment for the multiple projects became due. Hamilton Management Services Company is a management company and was never liable for the payments to Marsh Waterproofing, it simply serves as the manager of the Steeple entities contracting vendors on their behalf. Hamilton also tendered payment in the amount of \$40,000 on behalf of the Steeple entities through an authorization of Steeple entity funds held by the franchisor. The franchisor was not otherwise authorized to release these funds, which were due to the Steeple entities, without the consent of Hamilton, as manager of the Steeple entities.

The LLR ruling states that someone other than Respondent was providing general conditions such as dumpsters, portable facilities, water, power, equipment and supervision for all trades including Marsh Waterproofing. This is a false statement as no party provided portable facilities, there were no dumpsters for construction debris (only commercial dumpsters for the restaurant), all water and power was the water and power in-service of the restaurant as opposed to provided by a contractor and Mr. Marsh testified that Marsh Waterproofing brought all of its own equipment, including a \$100,000 trailer and supervised the work of his employees.

Mr. Marsh also stated in the LLR hearing that I advised him that no licensure was required, which remains a false statement. Finally, Mr. Marsh testified that there was no complaint made

as to the quality of the work. This is a false statement of fact as I previously indicated that Rikki Vaughn had indicated to Mr. Marsh that there was an issue with the concrete at one of the sites.

LLR claims that no reliance was placed upon the existence (or lack of) a license. Hamilton would have never authorized Marsh Waterproofing to engage in any work on behalf of the Steeple entities if it were aware that it was unlicensed and specifically to the contrary expressly relied upon the representations made by Marsh on its website that it was both "LICENSED AND BONDED".

The LLR ruling places great emphasis on the statement that the project was completed successfully, and the client received both the quality and quantity of work contracted for. To the contrary, Hamilton and the Steeple entities are without any information as to the quality and/or sufficiency of the work performed by Marsh Waterproofing and specifically cautions that because it is no longer in possession of any of the properties, and has not been for quite some time, it is without the ability to make inquiry as to the standard of work completed.

LLR places great deference upon Mr. Marsh's experience and skill, however Mr. Marsh was never on-site at any of the restaurants in South Carolina and instead delegated all of the work to individuals of presumably lesser skill without ever inspecting their work himself. No testimony was ever entered by any of the Marsh employees who were action ally on-site in which they certified the quality or even completion of the work, the sole source of determination that the work was successfully completed was the fact that the workers were no longer on site, the apparent inclusion of foam (although the site of the foam is obscured by a concrete encapsulation), and the invoices tendered by Marsh.

LLR found as a conclusion of law that Marsh Waterproofing was not supervising any work on the project which is contradicted by the statements in the deposition of Tim Marsh where he states that Hamilton and the Steeple entities "did not have any representative or inspecting or anything like that or supervising the work." Mr. Marsh also testified in his deposition that Mr. Avant, an employee of Marsh Waterproofing, serves as the supervisor for the company and was on site with Mr. Hollier, who performed the work.

Hamilton was never afforded the opportunity to engage in a review by any qualified third-party as the exigent circumstances of the mechanic's liens precipitated immediate default under the leases, substantive litigation by multiple parties (cross defaults by the lender and Church's Chicken as franchisor) against the Steeple entities, including me personally, and takeover of the restaurants by Church's Chicken without the ability to run any sale process.

LLR stated that Hamilton's obvious motive was to use an unlicensed practice citation as a defense to avoid payment of half a million dollars of professional work. The total invoices presented by Marsh, including the payments made on behalf of the Steeple entities represent a fraction of the amount stipulated to and make no reference to the \$40,000 payment made to Marsh Waterproofing.

The LLR states as a conclusion of law that the declination of a citation and penalty was based upon the mitigating information, which is contested by both my testimony and the deposition of

Mr. Marsh, and the fact that there was no substandard work, a fact that remains in dispute, and no harm to any member of the public. The only uncontested matter in their findings is that there has yet to be any harm to the public.

Hamilton does not owe any obligation to Marsh as it was the management company for the Steeple entities and not the client of Marsh. Moreover, Hamilton had no other means of determining whether the work would be covered under any of the insurance coverage of the Steeple entities or Marsh Waterproofing in the event of a failure without a definitive determination by LLR.

It is my belief that had the LLR appeals board had the benefit of reviewing Mr. Marsh's deposition as well as my testimony, including the transcript of my 30(b)(6) deposition, they could not have reached the same conclusions of fact and would have found no mitigating circumstances.

FURTHER AFFIANT SAYETH NOT.



Alexander Burns

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

The foregoing affidavit of Alexander Burns was acknowledged before me this 8th day of November, 2019 by Alexander Burns.

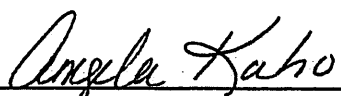

Signature of Notary Public
My commission expires: Nov. 1, 2027



EXHIBIT D

**SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING AND REGULATION
BEFORE THE SOUTH CAROLINA CONTRACTORS' LICENSING BOARD**

In the Matter of:

**MARSH WATERPROOFING INC.
License No: Unlicensed**

Case/Citation Number 2017-354

**FINAL ORDER
(Private)**

This matter came before Daniel Lehman, a hearing officer duly appointed by the South Carolina Contractor's Licensing Board ("Board"), for a final order hearing on June 21, 2019 as a result of the Notice of Citation Appeal hearing served upon the Respondent and filed with the Board. The hearing was held pursuant to and the provisions of the Administrative Procedures Act, S.C. Code Ann. § 1-23-10 *et seq.* (2005, as amended), to determine whether the citation issued to the Respondent on April 5, 2018, should be affirmed and the proposed penalty imposed upon the Respondent. Respondent timely requested this hearing after receipt of the citation and cease and desist order. Erin Baldwin, Esq., of the Office of Disciplinary Counsel represented the State. Timothy Karl Marsh, Secretary/Treasurer of Marsh Waterproofing, Inc., was present and was represented by Albert A. Lacour, III, Esq. The parties entered into a Stipulation of Facts (SOF) in which the parties stipulated to the facts and exhibits in the SOF, but the Respondent did not admit to misconduct in violation of S.C. Code Ann. § 40-11-110(A)(5) (1976, as amended).

EXHIBITS AND WITNESSES

State's Exhibit:

Exhibit A: Stipulation of Facts with ten (10) exhibits

Respondent's Exhibits:

Exhibit A: Request dated October 31, 2017 from Hamilton Management Services Co. to the Contractor's Board to determine licensure status of Marsh Waterproofing Inc.

Exhibit B: *Teseniar v Prof'l Plastering & Stucco, Inc.* 407 S.C. 83, 754 S.E.2d 267 (2014)

State's Witnesses: None

Respondent's Witness: Timothy Karl Marsh

FINDINGS OF FACT

Based upon the preponderance of the evidence in the record before the hearing officer, including the admitted facts in the SOF and the attached exhibits, and mitigating testimony presented by Timothy Karl Marsh, the hearing officer makes the following findings of fact:

1. On or about April 5, 2018, Respondent was issued a Citation for violating S.C. Code Ann. § 40-11-110(A)(5). Additionally, on or about April 11, 2018, a Cease and Desist Order was issued

10. On or about November 15, 2017, Respondent's counsel, Bill Richey, emailed Roger Lowe, Administrator for the Board, inquiring as to whether Respondent required a license for the work performed. Mr. Lowe informed Mr. Richey that based on the information provided, a license was not required.

11. On or about November 15, 2017, Respondent filed mechanic's liens against six locations where work was performed and completed, based on Hamilton's failure to pay the invoices issued by Respondent.

12. On or about November 20, 2017, a complaint was filed against Respondent with the South Carolina Department of Labor, Licensing and Regulation (hereinafter "LLR"). LLR assigned Investigator Maurice Smith to investigate the allegations within the complaint. On or about February 20, 2018, Investigator Smith mailed Respondent a notice of complaint. Respondent, through Counsel, responded to the notice of complaint.

13. Hamilton filed in each of the mechanic's lien cases a Motion to Dismiss, and relies on the Citation and Cease and Desist Order. Hamilton, in effect, alleges that Respondent acted as an unlicensed general contractor, after representing to Respondent that Hamilton had engaged another contractor to do all preparatory work involving multiple trades. This litigation is still ongoing, and the issue of licensure is still of critical importance to the parties in the civil litigation.

14. The State averred that S.C. Code Ann § 40-11-30 requires that any entity or individual be licensed when performing contracting work when the cost exceeds \$5,000.00. Furthermore, S.C. Code Ann. § 40-11-20(8) defines general construction as "the installation, replacement, or repair of a building, structure...or improvement of any kind to real property." Additionally, S.C. Code Ann. § 40-11-410(1) notes the license classification of General Contractors—Building includes commercial, industrial, institutional, modular, and all other types of building construction. The State's position was that the installation of AP Lift 430 in order to provide immediate structural support in an effort to prevent the floor system from imminent failure was squarely within the definition of S.C. Code Ann § 40-11-20(8). As a result, Respondent was performing general construction work over \$5,000.00 and therefore was required to obtain a general contractor's license as defined in S.C. Code Ann. § 40-11-410(1).

15. The State further averred that Respondent's information provided to Mr. Lowe did not state that the AP Lift 430 was being used to provide immediate structural support to prevent the floor system from imminent failure. The State submitted that if Mr. Lowe was given this information, he would have advised that a general contractor's license was required. The State also noted that Respondent only sought the advice of Mr. Lowe after the work was performed, invoiced, and payment declined by Hamilton.

16. Respondent averred in the SOF and Mr. Marsh testified that his point of contact was Hamilton and that Respondent was expected to comply with Hamilton's schedule of multiple trade subcontractors and all of the direction received from Hamilton for the multiple projects. Respondent believed that either Hamilton or someone else was the general contractor. Respondent testified that Hamilton knew at all times that Respondent was not licensed in South Carolina. There was never an issue with the quality of Respondent's work on any of the projects. Respondent's unlicensed status only became an issue for Hamilton when payment for the multiple projects became due.

17. Respondent averred in the SOF and Mr. Marsh testified that he did not know whether Hamilton simply engaged multiple trade subcontractors to accomplish the work, or actually did engage

a general contractor. All preparatory work was completed before Respondent's arrival, and all those other people had moved on to the next building ahead of Respondent. Someone other than Respondent was sequencing and scheduling the work. Someone other than Respondent was providing general conditions such as dumpsters, portable facilities, water, power, equipment and supervision for all trades, including Respondent. In short, Respondent believed that the execution of the plumbing and electrical work would require permits to be pulled, and therefore, someone other than Respondent was acting as the general contractor for the project.

18. Respondent averred in the SOF and Mr. Marsh testified that the work Respondent did on the projects did not meet the definition of "general construction" defined as: "installation, replacement, or repair of a building, structure ... or improvement of any kind to real property." S.C. Code § 40-11-20(8). Respondent made no changes or modifications to existing exterior brick veneer walls, concrete slabs, perimeter retaining walls, steel decking under the slab, steel joists under the decking, steel girders at the perimeter, masonry piers, footings or foundations for the piers or walls, or the dirt at grade. Each and every structural element was left in exactly the same condition by Respondent as it was found. There was no modification, change, repair or activity of any kind by Respondent addressing any structural element. In short, there was no structural repair made to the existing structure or building. The work which was done was to install the expandable polyurethane foam in the open air space between the top of the dirt and the bottom of the slab. The foam is not affixed to the land in any way. The foam was only installed in the open void or airspace under the slab and above the ground exactly as the email from personal counsel in Texas described. The foam provided support for the slab as indicated in the email. No building or structure was installed. No structural component of the existing building or structure was repaired or replaced. No permanent improvement to real estate occurred because the foam is in no way attached to the real estate or to the structural elements of the existing building. The foam simply filled the open void under the slab. Once it cured, it lent support to the slab.

19. Respondent averred in the SOF and Mr. Marsh testified that he inquired about licensing with Hamilton, and Hamilton told him licensing was not necessary; he inquired with the Board Administrator before proceeding with filing the mechanics lien and was told licensure was not required; he was told Hamilton had a contractor and he reasonably believed, based on Hamilton's representations, that someone else was providing general contracting services for the project; he observed that general conditions were apparently being provided by others; and he made no modification or repair to any structural element of the building. The Board's statute and South Carolina case law allow an unlicensed subcontractor to work on a job where a general contractor is supervising the work and Respondent believed that was the situation he was working under.

20. Respondent averred in the SOF and Mr. Marsh testified that his company is highly experienced and qualified at performing the particular work at issue: installing the foam material in the open spaces under building slabs. Respondent performed the same work using the same product, process, building design, and followed the design of the same engineering team in at least six different states. Respondent performed the same process for dozens of restaurants in those states. The project was manned by an experienced team employed by an experienced contractor.

21. The Respondent averred in the SOF and Mr. Marsh testified that there was no complaint made as to the quality of the work or the quantity of the work performed by Respondent. Hamilton did not present any observations to that effect, and the engineers that designed the process have presented no information to that effect. The project was completed successfully and the client received both the quality and quantity of the work contracted for. Hamilton had reason to know, and did know, the qualifications, experience level, and ability of Respondent to perform the work, and no

reliance was placed upon the existence (or lack of) a license. There was no harm to anyone in this case via substandard work. Respondent averred in the SOF and Mr. Marsh testified that sanctions are not appropriate where Hamilton's obvious motive was to use an unlicensed practice citation as a defense to avoid payment of half a million dollars for professional work.

CONCLUSIONS OF LAW

Based upon careful consideration of the facts in this case, it is found and concluded as a matter of law that:

1. The Board has jurisdiction in this matter pursuant to S.C. Code Ann. §§ 40-11-100(E) and 40-1-70(6) (1976, as amended).

2. The hearing officer can affirm, dismiss or amend the citation and penalty issued on April 5, 2018. S.C. Code Ann. § 40-11-100(E) (1976, as amended) and the cease and desist order issued on April 11, 2018.

3. Based on a review of the evidence presented, the hearing officer determined that the Engineer's report recommended the Alchemy Polymers AP Lift 430 product used by the Respondent to provided full continuous support to the structural members in the crawlspace of the project(s). The Engineer described the high density expanding closed cell structural foam system as providing the compressive strength to adequately support the superstructure. As such, the hearing officer determined that the scope of work for the use of this foam underneath the crawlspace of the project(s) was structural in nature and required a general contractor's license pursuant to S.C. Code Ann §§ 40-11-20(8) and 40-11-410(1) (1976, as amended).

4. It is the responsibility of the Respondent to determine whether a license was required in South Carolina to perform this work; however, Hamilton was fully aware that Respondent was not licensed in South Carolina throughout Respondent's performance of his scope of work on the project(s). There is nothing in the Respondent's scope of work document that indicated licensing and the Respondent's scope of work document references other work of sub-contractors involved in Hamilton project(s) that was to be completed prior to Respondent's performance of its scope of work. The hearing officer accepted the Respondent's mitigation that Respondent was told by Hamilton and the Board Administrator that a license was not needed in South Carolina for this work.¹ Further, Respondent was not supervising any work on the project(s) and believed that Hamilton was either the licensed general contractor hiring, organizing, and supervising subcontractors, or that Hamilton had hired a licensed general contractor to organize and supervise subcontractors. If this was the case, Respondent was not required to be licensed as a sub-contractor pursuant to S.C. Code Ann. § 40-11-270(E) (1976, as amended). Furthermore, Hamilton never alleged there was substandard work or unprofessional conduct by Respondent, so there was no harm to Hamilton's project(s) from the scope of work performed by Respondent.

5. The hearing officer finds that Respondent violated S.C. Code Ann. § 40-11-110(A)(5) in that Respondent engaged in contracting work in South Carolina when not properly licensed or supervised by a licensee licensed in the required license group and classification. However, based on the mitigating information in the SOF and Mr. Marsh's testimony and the fact that there was no

¹ The hearing officer determined that the information provided to the Board Administrator on November 15, 2017 by Respondent's attorney Bill Richey was very specific regarding the product Respondent used that was recommended by an engineer for the purposed of providing support. Mr. Richey was told Respondent did not need a license unless the foam was installed with the intent to provide the benefit of its insulation properties, which required an Interior Renovation license.

substandard work or harm to any member of the public, the hearing officer does not believe that the Respondent's misconduct rises to the level of warranting a citation and penalty.

6. The action by the hearing officer is consistent with the purpose of these proceedings, and has been made after weighing the public interest and the need for the continued services of general contractors against the countervailing concern that society be protected from professional ineptitude and misconduct.

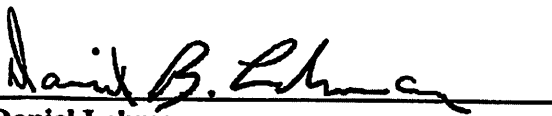
7. The action by the hearing officer is designed to protect the welfare of the public.

NOW THEREFORE, IT IS ORDERED that:

1. The citation issued on April 5, 2018 and the accompanying penalty of \$500.00 shall be dismissed.
2. The cease and desist order issued on April 11, 2018 shall be withdrawn.
3. The Respondent is cautioned that the scope of the work on the project(s) does require a general contracting license in South Carolina if the Respondent is not supervised by a licensee in the required license group and classification.

AND IT IS SO ORDERED.

**SOUTH CAROLINA CONTRACTOR'S
LICENSING BOARD**


Daniel Lehman
Hearing Officer

July 23, 2019

EXHIBIT E

STATE OF TEXAS)
)
COUNTY OF ORANGE)

AFFIDAVIT OF MARSH WATERPROOFING, INC.



1. That I am the Secretary and Treasurer of Marsh Waterproofing, Inc. and authorized to make this affidavit on behalf of the corporation.
2. That in discussion with Alexander Burns of Hamilton Management Services Company, Inc., prior to the beginning of work, he asked me whether I was licensed in South Carolina. I asked him whether I needed to be licensed in South Carolina and he told me he would check with someone and get back to me. He subsequently did respond to me and tell me that there did not seem to be a need to be licensed to do our work in South Carolina. He did not tell me with whom he checked, but I took him at his word.
3. That previous email correspondence with Mr. Burns referenced his contractor providing all preparatory work under the buildings involving water removal, plumbing and electrical changes. He informed me that his contractor would be executing all of that work. It follows that somebody pulled permits for electrical and plumbing repairs and presumably for the project generally, but all of that work was provided by others.
4. That our crew made their initial trip to South Carolina in August only to find that none of the buildings were ready for us to begin work. Our crew returned to Texas to await further notification. The scheduling of the trades, the sequencing of the work, the preparatory electrical plumbing and water removal work, the furnishing of general conditions such as dumpsters and portable bathroom facilities was all provided by others. Mr. Burns was our primary point of contact

EEECORPORATELY FILED 2009 MAR 02 01:59 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1000262

but several other gentlemen who apparently worked for or with him contacted us from time to time with updates on the project.

5. We provided no direction or supervision to others regarding any preparatory work under the buildings and it was accomplished before we arrived on site.
6. During the course of performing the installation of our foam material we made no changes at all to existing grade, standing water, plumbing pipes, electrical wiring, steel girders, steel joists, block piers, brick masonry walls, cracks in concrete slabs, or concrete footings.
7. We have installed foam at existing Church's restaurants in our home state of Texas where no license is required. We have made similar repairs in the state of Mississippi where we have been licensed for many years prior to repairing any restaurants. We have made similar repairs in the states of Alabama, Georgia, South Carolina and North Carolina where, to our best knowledge, after inquiry, no license has been required.
8. We have been provided a copy of the Cease and Desist Order issued by the South Carolina LLR. We previously received the Citation and accompanying letter via mail. We never received the Cease and Desist Order by mail, and only recently received a copy through counsel. Nevertheless, we will fully comply with that Order and with any final determination by LLR of the Appeal of the Citation.

FURTHER, THE AFFIANT SAYETH NOT!

(signature and notarization on following page)

Marsh Waterproofing, Inc.

Tim Marsh (SEAL)
By: Tim Marsh, Its Secretary/Treasurer

Sworn to before me this 30th day
of April, 2018.

Tammy Jo Leger
Notary Public for Texas

My Commission Expires: 9/27/18

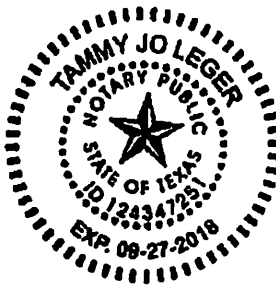


EXHIBIT F

**STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON**

**IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2018-CP-10000262**

MARSH WATERPROOFING, INC.

Plaintiff,

vs.

AFFIDAVIT OF ALEXANDER BURNS

STEEPLE DORCHESTER LTD et al

Defendants.

**PERSONALLY, APPEARED BEFORE ME, ALEXANDER BURNS WHO SWEARS AND IS
DULY DEPOSED AS FOLLOWS:**

I am 18 years of age or older.

I am competent to make this affidavit which is based on my own personal knowledge.

**I am a director of Hamilton Management Services Company, which is a management company
that I established in 2014 in Charleston, South Carolina.**

**Hamilton Management Services Company manages each of the Steeple entities which serve as
defendants in the action against Marsh Waterproofing, Inc.**

**I am not individually a party to this action and have previously provided testimony in the form of
a deposition and a written affidavit dated September 26th, 2019.**

**In my capacity as Director of Hamilton Management Services Company, I have direct
knowledge of the facts and circumstances which give rise to this action.**

**There was never a contract between Steeple Dorchester Ltd. or Hamilton Management Services
Company and Marsh Waterproofing. The only written contract regarding the subject matter was
a written proposal between State Acquisitions, LLC, the parent company of Steeple Dorchester
Ltd and Marsh Waterproofing. I executed the proposal on behalf of State Acquisitions, LLC, to
whom it is addressed, who is not a party to this action.**

**I reiterate the testimony from page two of my prior affidavit that "Hamilton does not owe any
obligation to Marsh as it was the management company for the Steeple entities and not the client
of Marsh".**

**There is currently no leasehold interest for which Marsh Waterproofing can foreclose.
The leasehold interest held by Steeple Dorchester Ltd. was terminated by the landlord, ARC
CAFÉ 001, LLC on March 5th, 2018, effective November 30, 2017, a copy of which was filed**

with the Charleston Register of Deeds. The termination by the landlord was pursuant to the tenant, Steeple Dorchester Ltd, breach of the forbearance agreement, pursuant to the lease, which precluded the filing of any Mechanics' Liens on the property. The Mechanics' Lien was filed by the Marsh Waterproofing on November 16, 2017 and the landlord terminated the lease effective November 30, 2017.

Insofar as the leasehold interest held by Steeple Dorchester Ltd. no longer exists, it is impossible to foreclose upon the interest and impossible to sell the property that is subject to the leasehold interest as it no longer exists. Marsh Waterproofing has elected to voluntarily dismiss the landlord from this action and has not named Cajun Global, LLC d/b/a Church's Chicken, which I understand to be the current tenant of the property. Cajun Global, LLC, is the Franchisor of Church's Chicken, who introduced the me to Marsh Waterproofing, and with whom I understand that Marsh Waterproofing maintains a longstanding and profitable business relationship.

On page four of the Post-Trial Memorandum, the attorney for Marsh Waterproofing states, "Mr. Burns could not rely upon the existence of a license for the qualifications of the contractor if he knew none existed". and further "Mr. Burns was fully aware of the experience and qualifications and the track record of the contractor and was relying upon that knowledge rather than the existence of a license when deciding whether to engage the contractor".

To the contrary, on page two of my prior affidavit, which remains my testimony, "At the point at which Hamilton coordinated the Steeple engagement of Marsh Waterproofing, Inc. it was my belief that Marsh Waterproofing, Inc. was adequately licensed, bonded and insured for the work being performed".

Moreover, also on page four of the post-trial Memorandum, the attorney for Marsh Waterproofing states, "On the facts in the record the parties discussed licensing before the work started and Tim Marsh told Mr. Burns that he was not licensed in South Carolina and asked if Mr. Burns thought he needed to be".

Again, on page two of my prior affidavit, which remains my testimony, "At no time did Mr. Marsh, nor any other party from Marsh Waterproofing, discuss the issue of contractor licensing with me or anyone else at Hamilton or the Steeple entities". Subsequently, on page three I stated, "Contrary to the statements made by Mr. Marsh that I knew Marsh Waterproofing was unlicensed at the time of their hiring, as of the authorization of this payment, I still did not know that Marsh Waterproofing was unlicensed in South Carolina."

The attorney for Marsh Waterproofing has mischaracterized the record by repeatedly disregarding my prior testimony in an effort to mislead the court as to my belief.

In the Post Trial Memorandum, counsel for Marsh Waterproofing stated that my "credibility was undermined by the Consent Judgment against him...". Counsel then references the civil Securities & Exchange Commission Complaint upon which it is based as evidence of "misrepresentations and other illicit dealings."

Nothing related to that matter, which dates from 2014 and prior is in any way connected to this action, nor does the Marsh Waterproofing raise any connection except to attack my personal credibility. Moreover, there is no probative value to the prior action as the settlement is predicated upon an agreement whereby I did not either admit nor deny the allegations in the SEC Complaint.

While I am not admitted before the South Carolina Bar, nor any other State or Federal Bar, I did attend Law School in the State of South Carolina and it is my understanding that under the South Carolina Rules of Evidence, in order for the Marsh Waterproofing to introduce EXTRINSIC information, the Plaintiff can only do so in cross-examination (as opposed to in the form of reply to motion); AND would have to seek the Court's PRIOR consent.

I subsequently advised counsel for the Defendants that I was prepared to testify as an individual, ONLY, if the Court ruled that further inquiry into the matter, upon my cross-examination, was inadmissible. It is my understanding that counsel for the Defendants attempted to previously confer with Plaintiff's counsel regarding this matter, informing him that such evidence was improperly included and required the Court's consent to be raised at cross-examination.

It is my understanding that the counsel for the Defendants attempted to raise the issue of excluding the testimony, via a Motion *in limine*, which the Court heard and elected not to rule upon given the lack of a jury.

Given that the Court did not rule on the Defendants' Motion *in limine* to exclude the evidence, I advised the counsel for the Defendants that I would not be voluntarily testifying as I was not prepared to subject myself to questioning, under oath, regarding the prior SEC matter, insofar as I was not individually represented by counsel in this matter – who could object on my behalf, and was concerned that the adequate defense of my credibility could require me to take a position on matters in which I have consented with the Securities & Exchange Commission to neither admit nor deny in any public statement.

It is my belief that the Plaintiff's attorney included the references to the prior SEC matter as a means of prejudicing the Court against me and my testimony as well as creating a situation in which it was untenable for me to testify, knowing that he could use inadmissible information to force me into an adverse line of questioning. It is my understanding that the Defendants were forced to withdraw their counterclaim against the Plaintiff insofar as without my testimony there was no party available to set forth a *prima facie* case against the Plaintiff.

In a new trial, if the Court were to rule that questioning upon cross examination related to my prior civil matter with the Securities & Exchange Commission was inadmissible, I would be prepared to testify on behalf of the Defense regarding the following matters:

1. The background of the Defendant parties and the circumstances which gave rise to this action.
2. The lack of existence of a contract between Steeple Dorchester Ltd OR Hamilton Management Services Company and Marsh Waterproofing.

3. The existence of a written contract covering the relevant scope of work between Marsh Waterproofing and State Acquisitions, LLC, the parent of Steeple Dorchester Ltd, which is not a party to this action.
4. My conversations with Tim Marsh of Marsh Waterproofing, specifically regarding a lack of any discussion regarding Mr. Marsh or Marsh Waterproofing's licensure requirements.
5. The circumstances of my letter on behalf of Hamilton Management Services Company to the LLR.
6. My understanding as to Marsh Waterproofing's licensure at the time of hiring.
7. My continuing belief that Marsh Waterproofing was adequately licensed at the time I a \$40,000 directed payment for the benefit of Marsh Waterproofing.
8. The inaccuracies regarding Hamilton Management Services Company that were stipulated between the South Carolina LLR and Marsh Waterproofing for the purpose of the LLR hearing.
9. My conversations with representatives of Cajun Global, LLC and ARC CAFEUSA001, LLC related to the requirement that a Mechanics' Lien not be filed against the properties as a condition of the restructuring of the lease between ARC CAFEUSA001, LLC and Defendant Steeple Dorchester, Ltd.
10. My belief that Cajun Global, LLC induced Marsh into filing the Mechanics' Liens as a means of forcing the liquidation of Steeple Dorchester Ltd., which ultimately resulted in Cajun Global, LLC obtaining control over the property and the assets at a significant discount to the price paid by Steeple Dorchester Ltd. three years earlier.
11. My conversation with Glen Kindred of ARC CAFEUSA001, LLC in which he informed me that the filing of the Mechanics' Lien was the proximate cause of the termination of the leases.
12. My understanding of the termination of the leases as the proximate cause of the liquidation of the assets of Steeple Dorchester Ltd.
13. The damages suffered by Steeple Dorchester Ltd. as a result of the Marsh Waterproofing filing the Mechanics' Lien.
14. The Defendants rationale for withholding payment on the basis of potential claims and the need to have the work inspected by a licensed South Carolina contractor or engineer prior to releasing payment.

It is my belief that my testimony would provide the Court with significant direct evidence of the misconduct of the Plaintiff as it relates to the Defendants counterclaim and would serve to

directly refute many of the assertions made by the Marsh Waterproofing in their claims, specifically regarding my beliefs and reliance.

I believe that the Defendants were irreparably harmed by my lack of testimony, insofar as I am the only available party with direct knowledge of these matters.

FURTHER AFFIANT SAYETH NOT.

A. Burns

Alexander Burns.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

The foregoing affidavit of Alexander Burns was acknowledged before me this 14 day of February, 2020, by Alexander Burns.

Kate Michelle Ritzinger

Signature of Notary Public

My commission expires: 9.13.21

[SEAL]

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
: Case No.: 2018-CP-10-00262
MARSH WATERPROOFING, INC.,)
) Plaintiff(s),)
) -vs-) DEPOSITION OF:
) STEEPLE DORCHESTER LTD. and) ALEXANDER CHATFIELD BURNS
HAMILTON MANAGEMENT)
SERVICES COMPANY, INC.,)
) Defendant(s).)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT
: Case No.: 2018-CP-40-00579
MARSH WATERPROOFING, INC.,)
) Plaintiff(s),)
) -vs-)
) STEEPLE DORCHESTER LTD. and)
HAMILTON MANAGEMENT)
SERVICES COMPANY, INC.,)
) Defendant(s).)

RAY SWARTZ & ASSOCIATES OF SOUTH CAROLINA
-Professional Court Reporters-
Serving the Legal Community Since 1957
843-593-4662

Beaufort	Camden	Charleston	Columbia
Florence	Greenville	Greenwood	Hilton Head
Lexington	Myrtle Beach	Newberry	Orangeburg
Spartanburg	Summerville	Sumter	West Columbia

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 2 COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT
 3 : Case No.: 2018-CP-40-00527
 4 MARSH WATERPROOFING, INC.,)
 5 Plaintiff(s),)
 6 -vs-)
 7 STEEPLE DORCHESTER LTD. and)
 8 HAMILTON MANAGEMENT)
 9 SERVICES COMPANY, INC.,)
 10 Defendant(s).)

10 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 11 COUNTY OF ORANGEBURG) FOR THE FIRST JUDICIAL CIRCUIT
 12 : Case No.: 2018-CP-38-00105
 13 MARSH WATERPROOFING, INC.,)
 14 Plaintiff(s),)
 15 -vs-)
 16 STEEPLE DORCHESTER LTD. and)
 17 HAMILTON MANAGEMENT)
 18 SERVICES COMPANY, INC.,)
 19 Defendant(s).)

20
 21 RAY SWARTZ & ASSOCIATES OF SOUTH CAROLINA
 22 -Professional Court Reporters-
 23 Serving the Legal Community Since 1957
 24 843-593-4662

24 Beaufort	Camden	Charleston	Columbia
25 Florence	Greenville	Greenwood	Hilton Head
Lexington	Myrtle Beach	Newberry	Orangenburg
Spartanburg	Summerville	Sumter	West Columbia

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 2 COUNTY OF ANDERSON) FOR THE TENTH JUDICIAL CIRCUIT
 3 : Case No.: 2018-CP-04-00135
 4 MARSH WATERPROOFING, INC.,)
 5 Plaintiff(s),)
 6 -vs-)
 7 STEEPLE DORCHESTER LTD. and)
 8 HAMILTON MANAGEMENT)
 9 SERVICES COMPANY, INC.,)
 10 Defendant(s).)

10 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 11 COUNTY OF GREENVILLE) FOR THE THIRTEENTH JUDICIAL
 12 JUDICIAL CIRCUIT
 13 : Case No.: 2018-CP-23-00491
 14 MARSH WATERPROOFING, INC.,)
 15 Plaintiff(s),)
 16 -vs-)
 17 STEEPLE DORCHESTER LTD. and)
 18 HAMILTON MANAGEMENT)
 19 SERVICES COMPANY, INC.,)
 20 Defendant(s).)

21 RAY SWARTZ & ASSOCIATES OF SOUTH CAROLINA
 22 -Professional Court Reporters-
 23 Serving the Legal Community Since 1957
 24 843-593-4662

24 Beaufort	Camden	Charleston	Columbia
25 Florence	Greenville	Greenwood	Hilton Head
Lexington	Myrtle Beach	Newberry	Orangeburg
Spartanburg	Summerville	Sumter	West Columbia

Given before John P. Crawford, Jr., Court
Reporter and Notary Public, at Clawson and Staubes, LLC,
126 Seven Farms Drive, Suite 200, Charleston, South
Carolina, on Wednesday, May 15th, 2019, commencing at
10:24 a.m.

RAY SWARTZ & ASSOCIATES OF SOUTH CAROLINA

-Professional Court Reporters-

Serving the Legal Community Since 1957

843-593-4662

Beaufort	Camden	Charleston	Columbia
Florence	Greenville	Greenwood	Hilton Head
Lexington	Myrtle Beach	Newberry	Orangeburg
Spartanburg	Summerville	Sumter	West Columbia

A P P E A R A N C E S

For the Plaintiff(s): Clawson & Staubes, LLC

By: Albert A. Lacour III, Esquire
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
ALacour@ClawsonAndStaubes.com

For the Defendant(s): Harper Little, PLLC

By: C. Clay Olson, Esquire
164 Market Street, Suite 139
Charleston, SC 29401
Clay@HarperLittleLaw.com

1
2
3
4
5
6
7
8
9
10

INDEX TO EXAMINATIONS

DIRECT EXAMINATION BY MR. LACOUR	8
CROSS EXAMINATION BY MR. OLSON	165
RE-DIRECT EXAMINATION BY MR. LACOUR	168

INDEX TO EXHIBITS

Plaintiff's Exhibits Marked for Identification:

1. Notice of Deposition	10
2. Assignments of Lessee's Interest in Lease Agreement	23
3. Assignment, Assumption, Consent and Lease Modification Agreements	24
4. Forbearance Agreement	48
5. Proposal of 7/10/17	57
6. Osiris System Quote of 7/12/17	69
7. Email of 7/10/17	84
8. Letter of 7/10/17	90
9. Email of 7/21/17	118
10. Email of 8/3/17	119
11. Email of 8/10/17	125
12. Franchise Default Letters	127
13. Email of 8/21/17	127
14. Notices of Lease Termination	138
15. Lease Terminations	142
16. Marsh Licensure Letters	147

All exhibits were retained by Plaintiff's counsel.

1 DIRECT EXAMINATION BY MR. LACOUR:

2 Q. Good morning, sir.

3 A. Good morning.

4 Q. Tell me what your full name is, please.

5 A. Alexander Chatfield Burns.

6 Q. Mr. Burns, my name is Andy Lacour, and I
7 represent Marsh Waterproofing in the litigation
8 that is pending between Marsh and several
9 entities for which you are appearing today as
10 the representative, and I'm going to ask you
11 some questions today. As we proceed, there are
12 only a couple of rules. One is that if you
13 don't understand my question, you are to
14 address your request for clarification to me,
15 as opposed to somebody else in the room; is
16 that agreeable?

17 A. Yes.

18 Q. And that's really the main rule, and you're not
19 going to hurt my feelings if you ask me to
20 rephrase it or tell me you didn't understand it
21 or to say it against slower or whatever. That's
22 fine. Okay?

23 A. Yes.

24 Q. Secondly, have you been deposed before?

25 A. Yes.

1 Q. Okay. There is another rule. Try to hold your
2 answers until I get to the end of my question,
3 because he's going to take down half my
4 question, then your answer, and then the rest
5 of the question, and it's going to make the
6 transcript really messy. So, will you do that
7 for me?

8 A. I'll try, to the best of my ability.

9 MR. OLSON: He's going to try. I don't know
10 how he's going to do.

11 Q. I get it. In conversation, we all do that a
12 little more often, but in here, we want to slow
13 down a little bit. I might surprise you. There
14 may be a twist on the question you weren't
15 expecting, and it changes your answers. So, if
16 you'll just try and do that for me, and if you
17 get to going too fast, we'll try and slow you
18 down. Okay?

19 A. Yes.

20 MR. OLSON: Jay, if you have any issue with
21 any of this, don't be afraid Raise your hand.

22 MR. LACOUR: Oh, yeah. I second that. Yeah,
23 you can say wait a minute, and we'll stop for
24 you.

25 Q. All right. The other thing, I guess, is that if

1 we take a break at anytime or if we break for
2 lunch or whatever, you certainly can spend time
3 with your lawyer, but you can't discuss what's
4 going on in the deposition, either before or
5 coming up. That's supposed to, you've got to
6 wait until the end of the deposition to talk
7 about what's going on in here; is that
8 agreeable?

9 A. Agree.

10 MR. OLSON: Or I think you can, and he gets
11 to ask you exactly what we talked about.

12 Q. Yeah. It's better not to because --

13 A. I agree not to discuss the contents of the
14 deposition.

15 Q. It's a waiver of attorney client privilege, and
16 you don't want to do that. So, better to not
17 to.

18 (NOTICE OF DEPOSITION MARKED AS PLAINTIFF'S
19 EXHIBIT NO. 1 FOR IDENTIFICATION.)

20 Q. All right. So, let me show you, we issued a
21 notice of deposition for the 30(b)(6)
22 representative of the Steeple entities and
23 Hamilton Management. Are you here today
24 appearing as the 30(b)(6) representative of
25 those entities?

1 A. May I?

2 Q. Yes. Because the way it works is, I just issued
3 the notice to the entity, and the entity
4 decides who's going to come. So, are you here
5 for those entities?

6 A. I am here as a representative on behalf of the
7 Steeple Dorchester Ltd., Hamilton Management
8 Services Company, Steeple Main Columbia Ltd.,
9 Steeple Two Notch Ltd., Steeple Chestnut Ltd.,
10 Steeple West Shockley Ferry Ltd., Steeple South
11 Pleasantburg Ltd.

12 Q. Okay. Thank you. And so, do you understand that
13 as the 30(b)(6) representative, you have
14 basically been designated to speak for the
15 company?

16 A. Yes.

17 Q. Okay. And then, anything you say here will bind
18 the company?

19 A. Yes.

20 Q. Okay. And the other thing about 30(b)(6)
21 depositions is they survive the lawsuit. So,
22 this testimony will be here, will be around,
23 will be available to people in other lawsuits,
24 other times after this point in time. So, it
25 continues to live; do you understand that?

1 A. Yes.

2 Q. Okay. Fair enough. So, in this notice, there
3 was a section called, related to the duces
4 tecum where we asked you to bring certain
5 documents, and one would be the documents
6 supporting your position or your counterclaims,
7 and we asked in particular for leases and
8 assignments for each restaurant, management
9 agreements for each restaurant, operating
10 agreements for Hamilton and Steeple and State,
11 and a letter to the LLR on November 20th, and a
12 termination letter from ARC. Did you bring any
13 of those documents with you today?

14 A. No.

15 Q. Okay. Have those documents, to your knowledge,
16 already been provided to your attorney?

17 A. Yes.

18 Q. Okay. And so, do you know where within the,
19 within the 1,700 pages worth of documents your
20 attorney has produced we can find those?

21 A. No.

22 Q. Okay. Why not?

23 A. I don't know where in the 1,700 pages they
24 would be. My understanding is they would be
25 contained within the 1,700 pages.

1 Q. Okay. From where do you get that understanding?

2 A. I was part of the production to my attorney of
3 the 1,700 pages.

4 Q. Okay. Fair enough. So, are you testifying that
5 you believe you provided those, you saw that
6 they were provided, so to speak?

7 A. To the extent that they were available.

8 Q. Okay. Well, which ones were not available?

9 A. I'd have to go back through the 1,700 pages of
10 production.

11 Q. Okay. So, you didn't do anything before you got
12 here today to try and figure out which ones you
13 had produced and which ones you hadn't?

14 A. No.

15 Q. Okay. That kind of begs one more question. If
16 you think you put everything together, but you
17 haven't gone back to check, then it's possible
18 that these were not produced, correct?

19 A. It's certainly possible. Without inquiry, I
20 wouldn't --

21 Q. All right. So, we need to know that, but right
22 now, you're saying you just don't know it for
23 today?

24 A. I have not, I don't have a copy of the 1,700
25 pages, thus I can't confirm where they would

1 appear in there or not.

2 Q. Okay. All right. Yeah, I didn't know if you'd
3 had a chance, for instance, to --

4 MR. OLSON: Andy, can we go off the record
5 for one second?

6 MR. LACOUR: In a minute.

7 MR. OLSON: Okay.

8 Q. I didn't know if you had had a chance, for
9 instance, before today to go and look for them,
10 to be sure that were produced. You just haven't
11 had that opportunity before today?

12 A. We had produced all documents that were
13 requested of us, to our knowledge. To the
14 extent that anything wasn't produced, it either
15 wasn't available or we were unable to locate
16 it.

17 Q. Okay. All right. Because this, just so you
18 know, this list, this list is a follow-up list
19 of things that, once I went through everything,
20 I hadn't found, so I asked for it. But, you
21 hadn't had an opportunity to figure out if they
22 were produced or not before today?

23 A. Correct.

24 Q. Okay. Fair enough. All right. And then, the
25 other thing is, there's a list of topics, and

1 if you could just read that to yourself. Have
2 you seen it for today?

3 A. No.

4 Q. Okay. Well, take a look at it first.

5 A. All right.

6 Q. Are you the person best suited that's connected
7 with these various entities to answer questions
8 on these subjects that are set forth here on
9 Attachment A?

10 A. Yes.

11 Q. Okay. Great. I just wanted to make sure. If
12 there's somebody else, as we go along, if we're
13 at one of these particular topics where I'm
14 asking you about a particular subject and
15 there's somebody else that knows more than you,
16 if you would, just simply identify them for me
17 and tell me why they know more than you. It
18 might be obvious, but if you can just identify
19 them, then we'll move on past that. Okay?

20 A. Yes.

21 Q. Thank you. Okay. So, where do you reside?

22 A. Mount Pleasant, South Carolina.

23 Q. Okay. And are married?

24 A. Yes.

25 Q. Kids?

1 A. No.

2 Q. No. All right. Tell me your educational
3 background, please, sir.

4 A. I hold a Bachelor of Arts from Columbia
5 University in classical studies, I also
6 attended the Presidents and Key Executives MBA
7 program at Pepperdine University, and the Juris
8 Doctorate program at the Charleston School of
9 Law.

10 Q. Pepperdine MBA. You said Charleston Law?

11 A. Yes.

12 Q. Did you earn all three degrees?

13 A. No.

14 Q. The BA?

15 A. Yes.

16 Q. And the MBA?

17 A. No.

18 Q. And the JD?

19 A. No.

20 Q. How long were you at Charleston Law?

21 A. Approximately one year.

22 Q. Okay. You got the hard part behind you.

23 A. I don't understand the question.

24 Q. If you finished the first year, the hard part
25 is behind you.

1 A. I wouldn't --

2 Q. The next two years are usually easier.

3 A. I wouldn't be in a position to know what the
4 second or third year entail.

5 Q. Yes. Okay. Fair enough. So, where were you
6 raised?

7 A. I was born in New York City. I graduated high
8 school in Westport, Connecticut.

9 Q. Before you became involved with Church's
10 Chicken franchises, were you involved with
11 other franchise type operations?

12 A. No.

13 Q. What was your work history before Church's
14 involvement?

15 A. On the advise of counsel, I invoke my Fifth
16 Amendment right and respectfully decline to
17 answer your question.

18 Q. Okay. Usually somebody only takes the Fifth
19 Amendment when they are currently under
20 indictment or somehow subject to criminal
21 sanction.

22 MR. OLSON: Object.

23 Q. So, tell me what's going on in your life that
24 makes you believe you have a Fifth Amendment
25 right.

1 MR. OLSON: There is a clear objection.

2 A. I've already asserted my right. I'm not going
3 to provide any further information.

4 Q. Okay.

5 MR. OLSON: I'll just state for record that
6 I'm able to make a speaking objection in this
7 circumstance. He has stated, you know, his
8 constitutional right. I don't mean to get loud
9 about it. I mean, if we want to talk about it
10 off the record for a minute or whatever, it
11 might be easier.

12 MR. LACOUR: We can. Sure. I'm just trying
13 to find out what he did for a living, you know,
14 what he knows how to do before we get into
15 this.

16 MR. OLSON: Can we go off the record for
17 just a second?

18 MR. LACOUR: Sure.

19 (The deposition went off the record for a
20 brief period of time.)

21 Q. Trying to synthesize what I just learned, I
22 understand that for the period of time from
23 2011 --

24 MR. LACOUR: you said to --

25 MR. OLSON: To 14, 2014 would be sort of

1 pertinent.

2 MR. LACOUR: Okay.

3 Q. So, you've been advised not to discuss your
4 past employment for a certain time, and that's
5 fine if you want to not tell me about that. Let
6 me just ask you this, during that time frame,
7 were you operating franchise operations,
8 restaurants?

9 A. No.

10 Q. Okay. So, 2011 to 2014, you are not operating
11 any restaurants. That's fine. So, let me, just
12 give me a minute and I'll work around this. And
13 so, but in or about 2014 was your first
14 introduction to franchise restaurant
15 operations?

16 A. Yes.

17 Q. This was November, I think?

18 A. Yes.

19 Q. Got you. Fair enough. And it was Church's, that
20 was your first franchise restaurant group that
21 you started operating, or was it something
22 before Church's?

23 A. Yes.

24 Q. Okay.

25 A. Church's was the first franchise restaurant

1 group that I was involved in.

2 Q. Got it. Today, do you have involvement with
3 other franchises than Church's?

4 A. No.

5 Q. Okay. All right. And in the answers to
6 interrogatories we received, there's an answer
7 to interrogatory number two that says you paid
8 no money, no value for the leases on the six
9 restaurants involved in the suit. Can you
10 explain to me how that came to be?

11 A. On behalf of Steeple Dorchester Ltd., Steeple
12 Main Columbia Ltd., Steeple Two Notch Ltd.,
13 Steeple Chestnut Ltd, Steeple West Shockley
14 Ltd., and Steeple South Pleasantburg Ltd., the
15 leases for the subject properties were acquired
16 via assignment in conjunction with State
17 Acquisitions' purchase of certain operating
18 businesses.

19 Q. Okay. So, State Acquisitions acquired the
20 business?

21 A. State Acquisitions and the various Steeple
22 subsidiaries acquired, collectively acquired
23 numerous business operations.

24 Q. And the Steeple entities -- can we call them
25 the Steeple entities so you don't have to keep

1 naming --

2 A. Without objection.

3 Q. Yes. Thank you. So, the Steeple entities then,
4 what, acquired the leasehold on the properties?

5 A. Yes.

6 Q. And State Acquisitions acquired the business
7 and the business assets?

8 A. No.

9 Q. Okay. Explain how that worked.

10 A. Each Steeple entity acquired the business
11 assets of each location.

12 Q. Okay.

13 A. State Acquisitions is the parent company for
14 each of the Steeple entities and acquired
15 certain franchise rights in addition to each
16 individual location. For example, Steeple
17 Chestnut Ltd., I believe, is in Orangeburg, and
18 it acquired the Orangeburg location assets, and
19 it acquired the Orangeburg location franchise
20 agreement.

21 Q. Okay.

22 A. It acquired the rights to the Orangeburg lease.
23 State Acquisitions, as its parent company,
24 acquired certain other franchise assets,
25 engaged in the financing of the acquisition as

1 the guarantor.

2 Q. Okay.

3 A. State Acquisitions is also a guarantor party to
4 each of the leases which were acquired on
5 assignment.

6 Q. Sure. Okay. So, you're saying State acquired
7 the franchise rights?

8 A. Certain franchise rights.

9 Q. Okay. Well, did Steeple have some franchise
10 rights, as well?

11 A. Yes.

12 Q. Okay. Fair enough. So, the franchise is going
13 to involve both entities at each location,
14 correct?

15 A. I don't understand the question.

16 Q. Any issues related to the franchise agreement
17 could involve both State Acquisitions and/or
18 the applicable Steeple entity?

19 A. Depending upon the issue, yes.

20 Q. That's what I'm getting at. And so, any lease
21 issues are going to involve the Steeple entity?

22 A. And potentially State Acquisitions. State
23 Acquisitions is a guarantor.

24 Q. Okay. Now, I think I get it. So, at the time
25 that the Steeple entities acquired the

1 locations at issue in this case, there were
2 leases executed, and I've got about six lease
3 agreements from the various counties. Do those
4 appear to be the assignment of lessee's
5 interests executed between -- let me see one of
6 them while you're looking at that one. They
7 appear to be identical, but it looks to be an
8 assignment of lessee's interest from Churpeyes
9 II, that's C-H-U-R-P-E-Y-E-S, Roman numeral
10 two, Inc., to your various Steeple entities.
11 There's six of them, one for each location?

12 A. Upon cursory introduction, I have no reason to
13 doubt the documents.

14 Q. Okay.

15 MR. LACOUR: Let's mark these collectively
16 as Exhibit Two.

17 (ASSIGNMENTS OF LESSEE'S INTEREST IN LEASE
18 AGREEMENT MARKED AS PLAINTIFF'S EXHIBIT NO. 2
19 FOR IDENTIFICATION.)

20 MR. LACOUR: And since you've got, while I'm
21 thinking about this, since we've got
22 depositions coming in tomorrow, Clay, we'll
23 probably impose upon Jay to keep these original
24 so you'll have them all if you need them
25 tomorrow.

1 MR. OLSON: That's fine. And tomorrow, we'll
2 start with number whatever.

3 MR. LACOUR: Yeah, or whatever. Yeah, we'll
4 keep going tomorrow, but so just so you know,
5 I'll be providing exhibits to you after this is
6 over with, as opposed to you having them all
7 because we're going to need them tomorrow.

8 Q. So, at the time these leases were signed and,
9 excuse me, these assignments of leases were
10 signed in November of 2014, do you know why
11 these assignments were not recorded?

12 A. No.

13 (ASSIGNMENT, ASSUMPTION, CONSENT AND LEASE
14 MODIFICATION AGREEMENTS MARKED AS PLAINTIFF'S
15 EXHIBIT NO. 3 FOR IDENTIFICATION.)

16 Q. Okay. Also produced was a series of assignment,
17 assumption, and lease modification agreements.
18 Now, we have six assignments, one for each of
19 the locations where we worked, and for some
20 reason, we only have three of these additional
21 documents. Can you look at these and tell me,
22 do you remember executing these, and if so,
23 what purpose did they serve? The only thing,
24 and I'll just suggest to you, the only thing I
25 see different is these come up and have the

1 landlord's agreement to the assignment and a
2 guarantee, which you pointed out, from State
3 Acquisitions, is the only thing I see. But, it
4 looks like we're accomplishing about the same
5 thing, but this time, with the approval, if you
6 will, of the ARC USA people.

7 MR. OLSON: Object to the form of the
8 question.

9 Q. So, can you tell me what the purpose of these
10 was?

11 A. I cannot. Were I to speculate, I would say that
12 the assignment of lessee's interest is a
13 bilateral agreement between the assignor and
14 the assignee.

15 Q. Uh-huh.

16 A. The assignment assumption, consent, and lease
17 modification is an agreement between all of the
18 parties.

19 Q. Yes.

20 A. And the landlord, the assignor, and the
21 assignee.

22 Q. Got you.

23 A. Whereas, the other agreement is bilateral.

24 Q. In Exhibit Three, we're bringing the landlord
25 in consenting to or agreeing to that transfer?

1 A. Correct.

2 Q. Can you tell me why I only have three out of
3 six?

4 A. I cannot.

5 Q. Okay. All right. That's one of the things I was
6 missing. I didn't understand why I had six. I
7 could find six assignments. Okay. So, both of
8 these assignment agreements are in November of
9 2014. So, then did you operate these six
10 locations from November of 2014 until summer of
11 2017 when all these events we are fixing to get
12 to occurred?

13 A. Yes. Each Steeple entity would have operated
14 each location and State Acquisitions, as the
15 parent company of the entities, would have
16 operated them to the extent that it was the
17 parent. Hamilton Management Services Company is
18 a management services company which, for fees,
19 provided certain management services ancillary
20 to the operation of the business.

21 Q. Got you. And so, while we're there, one of the
22 things I asked about was, were there any
23 written management services agreements
24 documenting what Hamilton was doing for each
25 Steeple entity?

1 A. No.

2 Q. Okay. So, can you just tell me, in your own
3 words, the type of services Hamilton provided
4 for the Steeple entities?

5 A. Management services.

6 Q. Okay. Good. What falls into that category, a
7 little more specifically?

8 A. Hamilton Management Services Company was
9 contracted by State Acquisitions, on behalf of
10 the Steeple subsidiaries, to provide certain
11 services related to the administrative function
12 of the entities. For example, Hamilton
13 Management Services Company provided all of the
14 accounting services to State Acquisitions and
15 all of the Steeple subsidiaries.

16 Q. Okay.

17 A. Hamilton Management Services Company contracted
18 all of the third party vendors on behalf of the
19 various Steeple entities. It procured bids, it
20 arranged contracts, it provided all the payment
21 and billing services on behalf of the entity,
22 for fees.

23 Q. Got you. Okay.

24 A. Hamilton Management Services Company received a
25 fee for its services that was set with State

1 Acquisitions covering all of these
2 subsidiaries, in aggregate.

3 Q. Okay. All right. So, just to kind of round out,
4 is Hamilton, Hamilton is a Delaware
5 Corporation?

6 A. Yes.

7 Q. And are you the only shareholder or stockholder
8 or are there others?

9 A. I'm not a shareholder of Hamilton Management
10 Services Company.

11 Q. Not. Okay. Who are the shareholders,
12 stockholders?

13 A. Hamilton Management Services Company is owned
14 by Continuum Fiduciary Management, LLC.

15 Q. It's a corporation. So, it issues stocks, but
16 it's owned by Continuum?

17 A. A limited liability company.

18 Q. An LLC. Okay. And so, does Hamilton have
19 officers?

20 A. I'm currently the only officer at Hamilton.

21 Q. Okay. So, whatever Hamilton needs to cause to
22 happen, you're the individual that can sign the
23 papers or cause it to happen?

24 A. Currently, I am the only officer. However, over
25 the course of Hamilton's history, there have

1 been numerous officers.

2 Q. Oh, sure. I understand. At the time, at the
3 time we're going to be looking at, 2017, summer
4 and fall of 2017, were you the only officer
5 then or were there others?

6 A. Depending upon the time. I would require some
7 more specificity, as there were arrivals and
8 departures of other officers during the course
9 of 2017.

10 Q. Okay. Well, we'll pick that up as we go, then.
11 And does Hamilton have an address?

12 A. Hamilton has a post office box currently, PO
13 Box 22245.

14 Q. Does it have a physical location?

15 A. Not currently.

16 Q. No. But, would it then be operating out of your
17 home, technically?

18 A. It uses its post office box.

19 Q. Just the post office box.

20 MR. OLSON: Object to the form of that last
21 question.

22 Q. And a phone number?

23 A. (843) 300-1985.

24 Q. Okay. Is that a landline?

25 A. Yes.

1 Q. Okay. And so, then the Steeple entities, are
2 they still operating?

3 A. I don't understand the question.

4 Q. The Steeple entities, are they still operating
5 or are they shut down?

6 MR. OLSON: Object to the form.

7 A. The entities currently exist.

8 Q. Okay. Are they doing business?

9 A. Yes.

10 Q. Okay. And do they have a managing member or
11 members?

12 A. They are corporations.

13 Q. The Steeple entities are Ltd., Limited.

14 A. With respect, I promise you they are
15 corporations.

16 Q. They are all corporations, though?

17 A. They're all Delaware corporations that are
18 foreign registered, neither South Carolina or
19 Georgia.

20 Q. Okay. So, do these corporations have officers?

21 A. Yes.

22 Q. And are you the only officer for them or are
23 there other officers?

24 A. Currently, yes. I am, I serve as an officer at
25 the Steeple entities, by contract, from

1 Hamilton Management Services Company.

2 Q. Sure. Do they have addresses different from
3 Hamilton?

4 A. No, not currently.

5 Q. Got you. Phone numbers different from Hamilton?

6 A. Not currently.

7 Q. Got you. I didn't ask you about employees. Are
8 you the only employee of Hamilton or are there
9 other employees?

10 A. Currently, yes.

11 Q. Okay. How many employees at Hamilton?

12 A. Currently, I am the only employee.

13 Q. Oh, only one. Sorry. The same question with the
14 Steeple entities.

15 A. I'm not employed by the Steeple entities.

16 Q. Correct. Are there other employees --

17 A. Not currently.

18 Q. -- of any Steeple entity --

19 A. Not currently.

20 Q. -- in this litigation?

21 A. Not currently.

22 Q. Okay. And then, now State Acquisitions, only so
23 I can understand how this all fits together,
24 it's also a Delaware company, but it's an LLC?

25 A. That's correct.

1 Q. And are you the managing member at State?

2 A. No.

3 Q. No. Okay. Who is?

4 A. State does not have a managing member. State
5 Acquisitions does not have a managing member.

6 Q. Okay. How does it function?

7 A. State Acquisitions has a manager, which is
8 Hamilton Management Services Company.

9 Q. Okay. Now, does State Acquisitions have a
10 physical location?

11 A. No.

12 Q. Does it have a phone different from the one you
13 already identified?

14 A. No.

15 Q. Does it have employees?

16 A. No.

17 Q. Okay.

18 A. Not currently.

19 Q. Okay. It has in the past, but not at the
20 present?

21 A. That's correct.

22 Q. Okay. And so, what's Charleston Trading?

23 A. Charleston Trading is the parent company of
24 State Acquisitions.

25 Q. Okay. Is Charleston Trading also a Delaware --

1 A. No.

2 Q. -- company, corporation?

3 A. No.

4 Q. Is it domestic?

5 A. It's not a Delaware corporation.

6 Q. It's Delaware?

7 A. It is not a Delaware corporation.

8 Q. Okay. Where is it organized?

9 A. Wyoming.

10 Q. Okay. And what does Charleston Trading --
11 you're saying it is the parent company over
12 State Acquisitions?

13 A. Yes.

14 Q. And so, how is it organized, Charleston
15 Trading, is it organized as an LLC?

16 A. It is a limited liability company.

17 Q. Okay. And does it have a managing member?

18 A. No.

19 Q. Or partner?

20 A. No.

21 Q. Okay. So, who operates or acts for Charleston
22 Training?

23 A. Hamilton Management Services Company.

24 Q. So, if Hamilton is the manager at the locations
25 where each of the Steeples entities were

1 operating and Hamilton manages or acts for
2 Charleston Trading, which controls State
3 Acquisitions, then Hamilton can effectively act
4 for any of the entities that we've been
5 discussing?

6 A. Pursuant to its management services agreement.

7 Q. Yeah. All within the bounds of whatever is --
8 I'm not going to get into all the details, but
9 that's how it set up, so that Hamilton --

10 A. Hamilton Management Services Company has
11 limited authority to act on behalf of the
12 Steeple entities, State Acquisitions, and
13 Charleston Trading.

14 Q. Got you. All right. Okay. So, between these
15 various entities, there are certain payments
16 due to Church's on a regular basis, be it
17 weekly, monthly, or annually under the
18 franchise agreements?

19 A. No.

20 Q. No. Okay. Were there?

21 A. Yes.

22 Q. Okay. And so, can you just identify to me the
23 nature -- I don't need specifics. I'm trying to
24 understand what types of payments that were
25 required to be made to the franchisor, was it

1 percentage of sales, for instance?

2 (The deposition went off the record for a
3 brief period of time.)

4 Q. Like for instance, if you could just tell me,
5 there's two types, there is this and there is
6 that that you have to pay. It might be more. I
7 don't know.

8 A. Generically, each Steeple entity was
9 responsible for a payment to Cajun Operating
10 Company, d/b/a Church's Chicken, as a royalty
11 payment under the franchise agreement in the
12 amount of approximately 5% of the gross sales
13 of each location on a weekly basis. Similarly,
14 each Steeple location under the franchise
15 agreement, generically, was required to
16 contribute approximately 5% of its gross sales
17 to a marketing fund.

18 Q. Okay.

19 A. There were other payments that were made by the
20 Steeple entities and State Acquisitions to
21 Church's Chicken, pursuant to the franchise
22 agreement and other agreements.

23 Q. Okay.

24 A. But, generically, the major --

25 Q. The two big ones.

1 A. I'm not prepared to speculate as to size, but
2 presumably.

3 Q. Okay. So, was there other, was there a debt
4 contribution that was being paid by any of the
5 Steeple entities to the franchisor?

6 A. Yes.

7 Q. Okay. And did that stem from the acquisition?

8 A. No.

9 Q. What did that debt arise from?

10 A. A subsequent agreement between the franchisor
11 the various Steeple entities and State
12 Acquisitions.

13 Q. Okay. Are you saying at the point in time that
14 the forbearance agreement was entered into that
15 there was an arrangement made to try and work
16 off some of the debt?

17 A. Which forbearance agreement? Sorry.

18 Q. The only one I know about is the one produced
19 of May 23rd, 2017.

20 A. May I take a look?

21 Q. Yeah. You can look at it.

22 A. Thank you.

23 Q. I may be jumping ahead. I'm just trying to ask,
24 you said there was some debt as a result of an
25 agreement, and I'm wondering if that's the

1 forbearance agreement --

2 A. The forbearance agreement appears to -- sorry.

3 Q. I'm sorry. Let me finish the question. I was
4 wondering whether the forbearance agreement
5 that I placed in front of you was the point in
6 time where there was some accumulated debt that
7 needed to be worked off?

8 A. Approximately.

9 Q. Got you. All right. So, prior to the
10 forbearance agreement, there may not have been
11 any debt category, but after, there was?

12 A. In 2014, there was no debt between State
13 Acquisitions, the Steeple entities, and the
14 franchise. In 2015, there was no debt between
15 State Acquisitions, the Steeple entities, and
16 the franchise. In 2016, there was no debt
17 between State Acquisitions, the Steeple
18 entities, and the franchise. In 2017, there was
19 debt between State Acquisitions, the Steeple
20 entities, and the franchise.

21 Q. Can you tell me what the genesis of that debt
22 was, where did it arise, how did it arise?

23 A. Payments due to the franchise that were
24 refinanced.

25 Q. So, there were payments coming due in 2017 that

1 an arrangement was made to postpone?

2 A. Yes.

3 Q. Or break them down, break them down
4 differently, somehow?

5 A. Otherwise, change, modify the terms of payment
6 of.

7 Q. Got you. Okay. Fair enough. And you sought that
8 arrangement, and they agreed to that
9 arrangement, for whatever reason, just to allow
10 things to continue?

11 A. I don't recall whether we sought the
12 arrangement or the arrangement was offered to
13 us.

14 Q. Okay.

15 A. The arrangement was mutually agreed to by the
16 parties.

17 Q. Okay. All right. So, beginning sometime in
18 2017, there was some amount of debt that was
19 being worked off, if you will, by the Steeple
20 entities and the --

21 A. I wish to amend my prior statement.

22 Q. Go ahead.

23 A. It is, upon reflection, it is conceivable that
24 there was debt due toward the end of 2016.

25 Q. Fair enough.

1 A. I don't wish to state exactly when. I'm
2 confident there was no debt in 2014 or 2015,
3 although the genesis of the debt may have been
4 the end of 2016, as opposed to 2017.

5 Q. Got you. Was there some particular event that
6 caused this debt to suddenly start to
7 accumulate where it hadn't been before, or was
8 it, can you just tell me what you recall about
9 why it occurred, why did the payments suddenly
10 become in arrears?

11 A. It was related to an overall decline in the
12 business.

13 Q. Okay. So, local market share, did somebody else
14 come in?

15 A. I don't recall which specific, that depending
16 upon each specific Steeple store, there could
17 be a confluence of events.

18 Q. I see. Okay. All right. Fair enough. So, for
19 whatever reason, the market got tighter or
20 competition got stronger or something happened,
21 and your business, you saw business decline at
22 some of these locations?

23 A. Yes.

24 Q. Okay. Fair enough.

25 A. Whether that was a cyclical decline or

1 idiosyncratic, I don't have that information
2 currently.

3 Q. Fair enough. And the next question was going to
4 be about Hamilton's arrangement with the
5 Steeple entities, and you said there was not a
6 written agreement, but there was an operating
7 agreement or understanding in place?

8 A. There was an agreement with State Acquisitions
9 which covered its subsidiaries.

10 Q. Got you. Okay. Was it in writing between -- I
11 might have missed or not asked the other
12 question properly. Was there a written
13 agreement between State Acquisitions and
14 Hamilton Management?

15 A. Yes.

16 Q. Okay. Has that been produced?

17 A. I don't know.

18 Q. Okay. So, tell me How Hamilton and State came
19 to hire Marsh in 2017, how did how did that
20 come about?

21 A. Hamilton did not hire State. The various
22 Steeple entities did. Hamilton --

23 Q. Okay. Wait a minute. You said Hamilton didn't
24 hire State.

25 A. I apologize.

1 Q. I know. I'm just going to catch you before you
2 get too far into it.

3 A. Thank you.

4 Q. So, yeah. So, the question is, whether it was
5 State or Hamilton, we'll look at the documents,
6 but how did one of those entities end up hiring
7 Marsh, how did that come about?

8 A. Marsh Waterproofing was initially introduced to
9 the Hamilton, State, Steeple collective group
10 via an introduction by the franchisor, Church's
11 Chicken.

12 Q. Church's. Which is the Cajun Operating people?

13 A. Church's has several entities. There's Cajun
14 Global, Cajun Operating. I'm not prepared to
15 specify which one collectively. They operate
16 d/b/a Church's Chicken.

17 Q. Okay. So, somebody at one of the Church's
18 entities --

19 A. Had a preexisting relationship with Marsh and
20 recommended --

21 Q. To you.

22 A. Actually, either recommended or required. I
23 don't recall whether it was a recommendation or
24 an outright requirement. The implication was
25 that Marsh was to be hired.

1 Q. Okay. Coming from the Cajun people?

2 A. Yes.

3 Q. Whichever entity.

4 A. Coming from the Church's Chicken franchisor, as
5 we understood it.

6 Q. Do you remember the individual that was making
7 that requirement or recommendation?

8 A. There were numerous individuals involved in the
9 conversation.

10 Q. Okay. Who might it have been, then? If you
11 don't remember which one, then --

12 A. I don't recall which, specifically. However, I
13 would be happy to provide a list of the
14 individuals who were involved in the
15 conversation.

16 Q. Well, we've got a list in your discovery.

17 A. Sure.

18 Q. So, let me run through it real quick. With
19 regard to the Cajun Group, we have Joe
20 Christina?

21 A. Yes.

22 Q. It says he's the CEO at Cajun Global.

23 A. My understanding is Joe is currently the CEO.
24 He was previously the senior vice-president of
25 franchise operations, depending upon what time

1 we're talking about.

2 Q. Sure.

3 A. His title may have changed.

4 Q. All right. So, do you have a recollection that
5 Mr. Christina --

6 A. Mr. Christina was involved in these
7 conversations.

8 Q. Okay. But, do you have a specific recollection
9 that he required you to use Marsh or could it
10 have been a recommendation?

11 A. It was certainly a requirement that we use an
12 approved contractor.

13 Q. Okay.

14 A. Marsh was one of the approved contractors.

15 Q. Fair enough.

16 A. And I believe it was recommended that Marsh, of
17 the approved contractors, be the one from the
18 approved list. I do not recall how many were on
19 the list or the circumstances.

20 Q. A list, you believe, existed?

21 A. Yes.

22 Q. Okay. So, were you provided that list?

23 A. I don't know that I was provided the list.

24 However, someone in the organization was likely
25 provided a list.

1 Q. Okay. And which organization?

2 A. State, Steeple, or Hamilton.

3 Q. Okay.

4 A. Depending on where it was going.

5 Q. All right. Did you ever review the list or did
6 somebody else make the choice as to which --

7 A. I believe the only choice that was presented to
8 me from the franchise was Marsh.

9 Q. Okay. And do you know why that was?

10 A. I do not. My understanding is that Church's had
11 a preexisting relationship with Marsh and had
12 worked with Marsh on numerous other Church's
13 properties.

14 Q. Okay. Do you know if any of the other folks on
15 the list had any experience with this repair?

16 A. I do not.

17 Q. All right. And you don't recall the nature of
18 your discussions with whoever in your
19 organizations was making that choice and
20 contacting contractors?

21 A. We were advised that this was a, that this was
22 a requirement by the franchise of some urgency.

23 Q. Yes. Who in your organization was handling that
24 urgent matter?

25 A. It was being handled, depending upon the time

1 frame, by Rikki Vaughn, the president of
2 operations.

3 Q. Anybody else?

4 A. It was also being attended to by Frank Taylor,
5 who was a consultant that we brought in for
6 overseeing business operations.

7 Q. So, he wasn't an employee, but he was an
8 outside consultant?

9 A. Correct. And he was intimately involved.

10 Q. And Rikki Vaughan, though, was an employee?

11 A. Yes.

12 Q. Anybody else involved?

13 A. Depending upon the time, Eric Dunham, who was
14 previously our head of facilities.

15 Q. Okay. All right. Another person is Dusty
16 Profumo?

17 A. Yes.

18 Q. Was he involved in the conversation about --

19 A. Yes.

20 Q. -- which, the specific part about which
21 contractor to hire?

22 A. I don't recall.

23 Q. How about Craig Prusher, the general counsel?

24 A. I don't recall.

25 Q. Jay Allen?

1 A. Yes.

2 Q. He was. Do you have any recollection of your
3 conversations with Mr. Allen?

4 A. I believe Mr. Allen recommended Marsh, and my
5 recollection is that he was going to be
6 involved in coordinating the engagement of
7 Marsh.

8 Q. Okay. And then, was he, or you don't know?

9 A. That's my recollection.

10 Q. Okay. Wayne Stubbs?

11 A. Was also involved with Mr. Allen.

12 Q. Okay.

13 A. His involvement and Mr. Allen's involvement are
14 currently indistinguishable to me. They were
15 both intimately involved.

16 Q. Okay. They were both in the construction
17 division or whatever they call it?

18 A. At Church's, yes.

19 Q. At Church's. And then, Janet Santen at First
20 Financial Bank?

21 A. She was involved in the discussion and agreed
22 to the transaction.

23 Q. Okay.

24 A. As was Glenn Kindred of VEREIT, the landlord.

25 Q. Okay. Wait a minute.

1 A. Sure.

2 Q. Okay. Glenn Kindred and Debbie Hester --

3 A. Yes.

4 Q. -- are VEREIT people?

5 A. Yes.

6 Q. Okay. So, if there was a conversation going on
7 between folks related to the landlord and folks
8 related to the franchisor and your people --

9 A. And the lender.

10 Q. And the lender, yeah. So, what did you
11 understand everybody ended up agreeing that was
12 going to happen? Before anything happened, what
13 was the understanding about how it was supposed
14 to happen?

15 A. Per the forbearance agreement, I refer you to
16 section 3.5 of the forbearance agreement, which
17 indicates that an engineering report would be
18 undertaken no later than, I believe, June 15th,
19 2017.

20 Q. Okay. Since we're going to refer to this, let's
21 go ahead and mark this as -- where are we?

22 A. Three?

23 Q. Four.

24 A. Oh, sorry.

25 Q. Yeah. Three is over there.

1 (FORBEARANCE AGREEMENT MARKED AS
2 PLAINTIFF'S EXHIBIT NO. 4 FOR IDENTIFICATION.)

3 Q. Good enough. But, thanks for your help. It'll
4 take all three of us after awhile to keep up.

5 A. Section 3.5.

6 Q. Yeah. Okay.

7 A. So, 3.5 says we have to hire an engineer.

8 Q. Okay.

9 A. Section 3.6 says the engineer has to tell us
10 what's going on, and 3.5(c) says that we have
11 to meet the engineer's recommendations.

12 Q. Okay. So, as I'm looking at page three of
13 Exhibit Four here, under 3.5(a), it says, lease
14 parties shall deliver to the landlord
15 engineering reports. Now, the lease parties was
16 everybody on your side, the Steeple entities
17 and, because of the guarantees, both State and
18 Hamilton, right?

19 A. I don't believe Hamilton is a lease party.

20 Q. Okay.

21 A. Hamilton was not a party to the leases, so I
22 don't believe it's a lease party.

23 Q. Fair enough. So, then the reports had to be
24 obtained by --

25 A. The lease parties.

1 Q. -- State and --

2 A. The Steeple entries.

3 Q. -- the Steeple entries and given to the
4 landlord?

5 A. That's right.

6 Q. Okay. But, you didn't have to give them to, you
7 didn't have to give them to Church's, but you
8 had to give them to the landlord?

9 A. That was covered under a separate agreement
10 between the franchise and --

11 Q. All right. Fair enough. And then, follow-up
12 confirmation that it got done had to be
13 provided, and then -- Okay. So, it looks like
14 the structural engineer had to be paid for by
15 the lease parties, correct?

16 A. Yes.

17 Q. Okay. And it doesn't specifically say he's got
18 to pay for the repairs?

19 A. I believe it says the lease parties or another
20 third party. I refer you to 3.5(c). It only
21 indicates that the landlord is not required to
22 pay for it.

23 Q. Yeah. That's all I see is the landlord can't be
24 compelled to pay for it. It doesn't really
25 specify who is going to pay for it, does it?

1 A. That's correct.

2 Q. Okay. The engineer getting paid is specifically
3 spelled out, but the repairs themselves aren't
4 mentioned, as I read this, as far as your
5 agreement with --

6 A. I agree.

7 Q. -- the landlord and --

8 A. I agree that the landlord could not be
9 compelled to make the payment. However, the
10 agreement with the landlord did not require the
11 lease party to make the payment, only that the
12 repairs be made.

13 Q. Right.

14 A. So, my understanding of the agreement is that
15 any third party could have provided payment.

16 Q. Just don't ask the landlord to write the check;
17 that was the deal?

18 A. Correct.

19 Q. Okay. All right.

20 (The deposition went off the record for a
21 brief period of time.)

22 Q. So, I'm going to try and move through this
23 stuff faster because I'm not sure how much
24 really this has to do with anything, but I'm
25 just trying to find out. There's an email here

1 from Eric Criswell to you, copied to some of
2 these folks you've mentioned, like Wayne
3 Stubbs, and it's talking about the Orangeburg
4 building and the Sumter store.

5 A. Yes.

6 Q. I'm trying to read upside down.

7 A. Oh, I'm sorry.

8 Q. No. That's okay. I'm pretty good at it, if I
9 can get close enough. You can read it while I'm
10 thinking about my question.

11 A. I do recall the email. We can start there.

12 Q. What's going on here?

13 A. Sure. This email from Eric Criswell from the
14 engineering firm is advising that, based on
15 their observation, two of the stores need to be
16 closed immediately until structural repairs
17 could be made. My understanding is that one of
18 the stores was already closed.

19 Q. Okay.

20 A. And so, only one other would actually have to
21 be closed, and the remaining stores could
22 remain open while the repair was completed.

23 Q. All right. So, these were just the two
24 locations that had the most serious issues that
25 need to be addressed?

1 A. Yes.

2 Q. Okay.

3 A. One of which, again, was already closed.

4 Q. Yes. The safety concerns there, there were no
5 safety concerns where it was closed, and you
6 had time to go in and make the repair?

7 A. Correct.

8 Q. But, that's going to impair your ability to
9 make all the payments that are coming due, if
10 you've got a store closed?

11 A. Potentially.

12 Q. When did that close, did it close in late 16?

13 A. Which store?

14 Q. Well, I don't know. Which one was already
15 closed?

16 A. Orangeburg was already closed.

17 Q. Do you remember when it closed?

18 A. I do not. However, I remember the circumstances
19 regarding its closure.

20 Q. What were they?

21 A. The store had a fire.

22 Q. Oh, okay.

23 A. So, Orangeburg was covered by business
24 interruption insurance during its period of
25 closure, as such, per your question, it would,

1 it's closure would not --

2 Q. Yeah. I'm just thinking back to whether that
3 would have impaired your ability to make
4 payments?

5 A. I would not.

6 Q. But, it didn't because you had good coverage?

7 A. Yes, sir. We also similarly had business
8 interruption insurance for which we reviewed
9 the claim for the other store that was being
10 closed.

11 Q. Got you. All right. So then, we get to July of
12 2017. These are roughly in chronological order.
13 The best way I know is to just walk through
14 things. If you need anything that we haven't
15 marked as an exhibit, you can ask for it. So,
16 the next thing I've got here is a proposal from
17 Marsh; do you recognize that?

18 A. Yes.

19 Q. Okay. Does your signature appear on the second
20 page?

21 A. Yes.

22 Q. Okay. And so, when you signed that, who were
23 you signing on behalf of?

24 A. State Acquisitions, on behalf of its various
25 subsidiaries, the individual Steeple entities.

1 Q. Got you.

2 A. So, apologies. I was signing on behalf of
3 Hamilton Management Services Company, which was
4 the contracted manager of State Acquisitions in
5 the various subsidiaries.

6 Q. Yes. Okay. So, in your words, who do you
7 believe we had our agreement with?

8 A. Steeple Dorchester Ltd., Steeple Main Columbia
9 Ltd., Steeple Two --

10 Q. All the Steeple entities?

11 A. Well, the Steeple entities that are captioned.

12 Q. Okay.

13 A. There are 25 Steeple entities.

14 Q. Oh, there are?

15 A. Yes.

16 Q. So, the Steeple entities in the case are the
17 only ones we're going to ask you about here
18 today.

19 A. Correct.

20 Q. You don't need to go into the rest of them. So,
21 if there's 25 Steeple entities and we're only
22 here on five or six, did the other stores not
23 need repairs?

24 A. That's correct.

25 Q. Okay.

1 A. The engineers surveyed all that were presumed
2 to -- Some stores didn't have crawl spaces,
3 didn't get surveyed; some stores did have crawl
4 spaces, no issue; some stores got surveyed, had
5 crawl spaces, had issues; some stores had crawl
6 spaces, had issues, needed to be closed.

7 Q. That's what I figured. I didn't know the
8 extent. So, July 10th, the question was, when
9 you signed this on July 21st, you were signing
10 on behalf of State Acquisitions and the Steeple
11 entities?

12 A. I was signing on behalf of the Steeple
13 entities, yes.

14 Q. Okay. And in the proposal, how did you
15 understand, what is your understanding as to
16 whether water removal, trash and debris removal
17 was to be performed and by whom?

18 A. My understanding is that the crawl space must
19 be clean and free of standing water and all
20 plumbing and electrical must be repaired and
21 secured by others.

22 Q. Okay.

23 A. It was not part of the scope.

24 Q. Not part of the scope of whom?

25 A. The scope of work of Marsh Waterproofing.

1 Q. Okay.

2 A. Marsh Waterproofing indicates their scope of
3 work and then lists --

4 Q. Right. And then, the plumbing and electrical,
5 that was to be done by others?

6 A. To the extent that it was required.

7 Q. Yeah, if it was needed. Okay. Marsh was going
8 to place the foam material?

9 A. Marsh was going to remediate the crawl spaces.

10 Q. Yes, sir. Then, the specific scope stated in
11 that document is to place the foam material and
12 close the scuttle opening, pour concrete in the
13 scuttle opening, and everything else was by
14 others, is my question, I guess.

15 MR. OLSON: Object to the form.

16 A. As far as everything, I don't know about
17 everything else. I know that the crawl space
18 must be clean and free of standing water, and
19 any electrical and plumbing must be repaired
20 and secured by others.

21 Q. Right.

22 A. My understanding was everything else was to be
23 done by Marsh, related to the remediation. We
24 did not, we were not advised that we required
25 any other vendors, and we were told by Marsh

1 that this would solve the issue.

2 Q. "Apply Alchemy Polymers 430 foam to fill crawl
3 space, remove access door and fill with four
4 inches of concrete after completion." Was there
5 anything else that you understood Marsh was
6 supposed to do, other than what I just said?

7 A. Anything else required to remediate the crawl
8 space issues. My understanding is we --

9 Q. Where is that in here?

10 MR. OLSON: Object to the form.

11 A. It's basically -- you asked me for my
12 understanding.

13 Q. I did. But, where is it stated in there?

14 A. It's based on my conversation with Tim Marsh.

15 Q. Okay. Is it stated in the proposal of July 10th,
16 2017?

17 A. The proposal appears silent. The document
18 speaks for itself.

19 Q. All right.

20 MR. LACOUR: Let's mark this as the next
21 exhibit.

22 (PROPOSAL OF 7/10/19 MARKED AS PLAINTIFF'S
23 EXHIBIT NO. 5 FOR IDENTIFICATION.)

24 Q. All right. Now, that proposal has a provision
25 for the crew appearing, and in the event the

1 crew appears and the crawl space is not ready
2 for the work, what does it provide?

3 A. It provides if the crawl space is not prepared,
4 \$875 per day will be charged while we,
5 presumably Marsh Waterproofing, are waiting on
6 the electrical, plumbing, and cleaning to be
7 finished.

8 Q. Okay. And you had said those were things that
9 were to be provided by others?

10 A. To the extent required.

11 Q. Yeah.

12 A. To the extent not required, Marsh will be
13 providing all of the services related to the
14 remediation.

15 Q. Are we going to be providing anything other
16 than what I read, the installation of the foam
17 and the closing of the scuttle opening?

18 A. I don't know.

19 Q. Okay. And there's nothing in there that says
20 we're going to provide anything besides those
21 two things, is there?

22 A. No.

23 Q. Okay. And if you'll look at the document, both
24 pages, I just want to ask you, do you see
25 anything in that proposal anywhere that

1 mentions furnishing permits?

2 A. No. Nor does it specify that the permits were
3 required to be furnished as it specifies what
4 was otherwise required.

5 Q. Do you see anything in there that says Marsh is
6 going to do work on electrical, plumbing,
7 cleaning out trash, or removing water?

8 A. No.

9 Q. Do you see anything in that document that says
10 Marsh is providing scheduling or sequencing of
11 work of others?

12 A. In this document, no.

13 Q. Anything and there that says Marsh is going to
14 provide dumpsters or any removal services?

15 A. In this document, no.

16 Q. How about temporary facilities, in that
17 document?

18 A. No.

19 Q. Okay.

20 A. My understanding is that most of those were not
21 required.

22 Q. It's also your understanding that all that had
23 to be done before we arrived, isn't it?

24 A. I don't know that temporary dumpsters or
25 facilities were required at all for the

1 project.

2 Q. May not have been. Whatever was required had to
3 be accomplished before we arrived, according to
4 that proposal, didn't it?

5 A. Certain things had to be required in order for
6 Marsh to complete its construction work.

7 Q. Yeah. Certain stuff had to come before the foam
8 was installed, right?

9 MR. OLSON: Object to the form.

10 A. Yes.

11 Q. And the proposal lays that out?

12 A. It provides certain information regarding
13 exclusions, yes.

14 Q. Well, not only is it excluded from Marsh's
15 scope of work, but it tells you that those
16 things have to be completed before the foam can
17 be placed, right?

18 MR. OLSON: Object to the form.

19 A. Yes.

20 Q. And you didn't hear that the first time from
21 Marsh, did you?

22 A. I don't understand the question.

23 Q. Before you got this proposal, you had a stack
24 of engineering reports, one on every store,
25 didn't you?

1 A. Yes.

2 Q. And the engineers spelled out how the work was
3 to happen, didn't they?

4 A. No.

5 Q. Well, let's look at one.

6 A. Sure. Would you like my understanding?

7 Q. No, sir. I'm going to let you read one. I may
8 have to go get one. We'll take a break, and
9 I'll get you one. I don't want you to guess.

10 A. That's fine.

11 Q. Yeah. I need to go get one. Hang on a second.

12 A. Would you like to come back to it, or do you
13 want to go get it now?

14 Q. Oh, no. I think we need to talk about it now.
15 I'll be right back.

16 (The deposition went off the record for a
17 brief period of time.)

18 Q. All right. So, picking up where we left off, I
19 provided you a copy of the Davis Patrikios
20 Criswell engineering report for the Dorchester
21 Road store; is that correct?

22 A. Yes.

23 Q. And basically, did you look at these reports
24 back when you obtained them?

25 A. Yes.

1 Q. And so, if the stores were on a crawl space and
2 if they need a remediation, then the buildings
3 were all built essentially the same, those that
4 needed remediation, correct?

5 A. Similarly enough.

6 Q. At least the structural elements of the
7 building. And then, the reports all basically
8 read the same, did they not?

9 A. No.

10 Q. They did not. Okay. Why not?

11 A. Two of the reports read that the stores were in
12 critical condition and needed to be shut down
13 immediately prior to the repair. The other
14 reports did not indicate that.

15 Q. Okay. All right. So, these stores, the two that
16 you had to shut down immediately, we saw that
17 email earlier about Orangeburg and Sumter?

18 A. Correct.

19 Q. Okay. The other -- Sumter is not in the case,
20 so then the other five involved in this lawsuit
21 all read the same?

22 A. Similarly enough.

23 Q. In the recommendation section is where the
24 engineer spells out what he wants to happen in
25 order to achieve a sound structural foam

1 installation result?

2 A. The engineer provides a recommendation
3 following the general procedure.

4 Q. Uh-huh.

5 A. He specifically states the above-noted
6 procedures in a general recommendation and will
7 require additional engineering design
8 calculation, further observation, and
9 preparation of construction documents prior to
10 implementation, which is beyond the scope of
11 this inspection phase of work.

12 Q. Okay. And he recommends the following general
13 procedure to install the foam, and the first
14 thing is to get the water out, correct?

15 A. Yes, as a general procedure.

16 Q. And the second thing is to check sewer lines
17 and water lines, and a third thing -- he goes
18 right down the list, and the last thing on his
19 list is always to apply the foam, correct?

20 A. As his general procedure. For example, the
21 agreement, the engineer report says, it is our
22 understanding the Church's Chicken has used
23 this, being the foam solution, in the past with
24 other crawl spaces and achieve favorable
25 results. The Alchemy Polymers AP 430 has been

1 reviewed. In review of the specifications and
2 the compressive strength noted, it is adequate
3 to support the superstructure. However, my
4 understanding is that the foam was not the only
5 recommendation for ways of remediating. Based
6 on my conversation with Mr. Criswell, he
7 suggested that there were other potential
8 solutions.

9 Q. Right. But, the --

10 A. Church's favored this one.

11 Q. The other potential solutions aren't spelled
12 out in his reports, are they?

13 A. Correct. This report offers one alternative and
14 makes clear that it is one alternative.

15 Q. Exactly. And when he offers that one
16 alternative, he offers a list of things that
17 have to be done to prepare the space before the
18 foam is installed, does he not?

19 A. That's correct.

20 Q. Okay. And the last thing on this list is the
21 installation of the foam. So, that makes all
22 the other work preparatory, correct?

23 A. Presumably, it makes it outside the scope of
24 the foam.

25 Q. That wasn't the question. I'm just asking about

1 the order of the work. The engineer, and this
2 is how we got off on this subject --

3 A. The document speaks for itself.

4 Q. It does. But, doesn't the engineer spell out
5 the things he recommends for the procedure and
6 puts seven items in front of the installation
7 on the foam?

8 A. Yes. There are seven items in front of the
9 installation of the foam.

10 Q. The only question I asked earlier was, didn't
11 the engineer spell out the order of the work,
12 and that's how we got off on this tangent.

13 MR. OLSON: Object to the form.

14 Q. And you said he didn't.

15 A. He spelled out a path.

16 Q. Okay. He spelled out a path for the use of the
17 structural foam, did he not?

18 A. Yes, as a recommendation.

19 Q. I don't doubt that there's a million ways to
20 skin the cat. I don't care, though. What I'm
21 asking about is, didn't the engineer spell out
22 the order that the preparation had to occur
23 before the foam was installed?

24 A. It also states that all site water should be
25 diverted to prevent future water entry into the

1 crawl space, as an event subsequent to the
2 application of the foam, the second paragraph
3 after the list.

4 Q. Okay. Well, the recommended procedure has a
5 number of, a set of numbered paragraphs.

6 A. I understand that.

7 Q. Now, where are you talking about?

8 A. I'm talking about the paragraph after the set,
9 it says, for example, we recommend verifying
10 existing soil conditions with a local
11 geothermal technician engineer prior to
12 installation, all site water should be diverted
13 to prevent water entry into the crawl space,
14 the provision for a draining system should be
15 included for removal of any future water that
16 might infiltration into the crawl space.

17 Q. Wonderful. Now, none of that is in the scope of
18 work set forth in Exhibit Five, is it?

19 A. No.

20 Q. Okay. So, you had other contractors, though,
21 working on this remediation project, correct?

22 A. No.

23 Q. Okay. Well, who is Osiris Systems?

24 A. I wouldn't describe it as a contractor.

25 Q. That's neither hear nor there.

1 MR. OLSON: Object to the form.

2 Q. Who is Osiris Systems?

3 A. Osiris Systems is a maintenance company that
4 was contracted to provide services in
5 conjunction with this and other projects.

6 Q. Who hired Osiris Systems?

7 A. The Steeple entities.

8 Q. And what did the Steeple entities hire them to
9 do?

10 A. Provide the precondition work prior to the
11 contracting work being done by Marsh.

12 Q. Items one through seven on the report in front
13 of you?

14 A. No. No.

15 Q. No. You've got one through six. What have you
16 got? Pump out storm water is one; did Osiris do
17 that?

18 A. Yes.

19 Q. Inspect the sewer and water and make repairs,
20 as necessary; did Osiris do that?

21 A. No.

22 Q. Replacing cast iron or steel sewer lines, if
23 needed; did they look at those to see what they
24 were made of?

25 A. I don't believe.

1 Q. Okay. Pipe all floor drains to the sewer
2 collection?

3 A. I don't believe so.

4 Q. Check water and sewer lines for good working
5 conditions?

6 A. I don't believe so.

7 Q. Put all the electrical wires in conduit?

8 A. I don't know.

9 Q. Remove the debris and --

10 A. Yes.

11 Q. -- trash and hole pumps?

12 A. Yes. So, I believe they did two of the eight
13 things.

14 Q. All right. Was that because two or three of the
15 eight things was all that was necessary --

16 A. No, sir.

17 Q. -- in these locations?

18 A. No, sir.

19 Q. Okay. Explain that to me.

20 A. Roto-Rooter was contracted to do the piping
21 work at some of the locations.

22 Q. Okay.

23 A. Roto-Rooter is a licensed contractor.

24 Q. Why didn't we get a Roto-Rooter quote or
25 invoice or anything about Roto-Rooter?

1 A. I don't know.

2 Q. You say you did have Roto-Rooter on the jobs?

3 A. Yes, sir.

4 Q. But, you didn't produce any documents from
5 Roto-Rooter?

6 A. I can't speak to what was produced. I haven't
7 had a chance to review your production set.

8 Q. Yeah. This is all I've got, this quotation here
9 (indicating). That quote from Osiris Systems is
10 what I got, the only other entity hired to work
11 on this work, on this project, this remediation
12 project.

13 A. I believe this quote was not, we did not agree
14 to these terms.

15 Q. That's the only one you produced.

16 A. Okay.

17 Q. Have you got a different one?

18 A. I don't know if an additional quote was
19 written, but the services were not contracted.
20 Not all these services were contracted with
21 Osiris.

22 Q. Yeah. Let's mark this first, so we know what
23 we're talking about.

24 (OSIRIS SYSTEMS QUOTE OF 7/12/17 MARKED AS
25 PLAINTIFF'S EXHIBIT NO. 6 FOR IDENTIFICATION.)

1 Q. All right. So, Exhibit Six is the only other
2 invoice that you produced to me, and it's from
3 Osiris. If you look at it, it does lay out some
4 of the preparatory work in the engineering
5 report as being the Osiris scope; is that
6 correct?

7 A. Yes.

8 Q. Maybe not all of it, but some of it?

9 A. Yes.

10 Q. And so, you're saying that Six may not be the
11 only proposal you got from Osiris?

12 A. Correct. And there may be other proposals.

13 Q. Fair enough.

14 A. Written or otherwise.

15 Q. Well, apparently there's one to Roto-Rooter,
16 but we don't have that one, either.

17 A. There may not be a proposal. Roto-Rooter may
18 have just billed it.

19 Q. Okay. It could be just an invoice?

20 A. I don't have that information.

21 Q. Got you. Well, did Osiris get paid for doing
22 some work on these buildings before Marsh
23 appeared to install the foam?

24 MR. OLSON: Object to the form.

25 A. I don't believe they got paid prior to Marsh

1 beginning to do the work. I believe --

2 Q. I don't know that that's what I asked you. I
3 said, did they appear to do some work prior to
4 Marsh appearing to do its work?

5 A. Osiris appears to have done work prior to Marsh
6 doing their work.

7 Q. Okay. So, as far as you know, yes, Osiris came
8 to the jobs and did certain things and then,
9 when they were complete, Marsh appeared and did
10 its work?

11 A. Osiris and Marsh were in contact and
12 coordinated the schedule together.

13 Q. Yeah. All right.

14 A. My understanding is that Osiris was operating
15 on the pumping schedule, per Marsh's direction.

16 Q. Per Marsh's direction?

17 A. Yes.

18 Q. Marsh wasn't here, were they?

19 A. Marsh provided a schedule and worked with
20 Osiris to coordinate. There was a number of
21 communications between myself, Osiris, and Mr.
22 Marsh regarding the scheduling.

23 Q. And as you sit here now, it's your recollection
24 that Marsh provided schedule?

25 A. Yes.

1 Q. As opposed to your people?

2 A. That's correct. Marsh was going to be
3 scheduling when they could come out and when
4 they could schedule it.

5 Q. Before we go any farther, looking back to
6 Exhibit Five. Is there anything in Exhibit Five
7 that spells out grading or filling or mucking
8 of the soil by Marsh?

9 A. I believe the document is silent on grading,
10 filling, and mucking of the soil.

11 Q. Okay. Does it indicate Marsh is going to
12 perform any of the plumbing or electrical?

13 A. No.

14 Q. Does it indicate Marsh is going to make any
15 repairs to the steel joists or girders, any
16 welding work in there?

17 A. No.

18 Q. Any masonry repairs to block or brick piers or
19 stem walls?

20 A. Yes. The four inches of concrete would appear
21 to be.

22 Q. No. The question is, block or brick piers or
23 stem walls?

24 A. I'm not familiar with the distinction, so I'm
25 not qualified to answer the question.

1 Q. It's a vertical thing.

2 A. Well, again, if I'm not qualified to answer
3 that question, then I'm not going to be able
4 to. My understanding is that the concrete would
5 qualify as that, so if you're telling me it
6 doesn't --

7 Q. I'm getting to that. Do the words block or
8 brick appear in the --

9 A. The words block or brick do not appear.

10 Q. Okay. That's fair enough. Now, it does say
11 we're going to remove the door and close to
12 scuttle opening?

13 A. The word scuttle opening, it says, and fill
14 with four inches of concrete after completion.
15 It does not specify where or how.

16 Q. Okay. Is there anything in there about crack
17 repair in footings or slabs?

18 A. I don't know where the four inches of concrete
19 would go or to the extent that they may apply
20 to the footings or fillings, and without
21 sufficient information to determine that, it's
22 ambiguous.

23 Q. But, no crack repair?

24 A. I don't know, I don't know if the concrete
25 applies. I can't answer that question.

1 Q. Do you see anything in there indicating crack
2 repair?

3 A. It indicates that four inches of concrete will
4 be applied. I don't know if the four inches of
5 concrete would apply to crack repair or
6 something else. I don't have that information.

7 Q. Do you have any clue how these buildings were
8 constructed?

9 A. I do not.

10 Q. You've never been out there to look at one?

11 A. From a construction standpoint, no.

12 Q. Have you ever been out there and look at them
13 when any of this was going on?

14 A. I was not on-site during any of this.

15 Q. Did you ever read the reports that you got from
16 the engineers that showed photographs of all of
17 it?

18 A. I've already stated that I've read the reports.

19 Q. Then, why don't know what they're talking about
20 when they're talking about the access opening?

21 MR. OLSON: Object to the form.

22 Q. There is a photograph of it in every report.
23 We'll go back to the one you had.

24 MR. OLSON: Object to the form.

25 Q. At the top of page three, photo five, that is

1 the access opening.

2 A. Okay.

3 Q. It's in every report.

4 A. Agreed.

5 Q. The proposal, Exhibit Number Five, says to
6 remove the access door --

7 A. Yes.

8 Q. -- and to fill the opening with four inches of
9 concrete.

10 A. Due respect, it says, remove the access door
11 and fill with four inches of concrete. I don't
12 know if the concrete would go to the footings
13 or if it would go to the top. I am without
14 sufficient information to explain, in terms of
15 answering your question.

16 Q. Take a look at the picture.

17 A. I am without sufficient information to answer
18 your question as to where the concrete would be
19 applied. Your question was whether the concrete
20 would be related to the footings. I do not
21 know. I'm not an expert on this. I did not
22 inspect the work.

23 Q. I'm not asking about experts. I'm asking you,
24 have you set foot in any of the buildings after
25 the repairs were made?

1 A. No.

2 Q. None?

3 A. None.

4 Q. You don't own any buildings that were repaired?

5 MR. OLSON: Object to the form.

6 A. I don't own any buildings that were repaired.

7 That's correct.

8 Q. All the ones that were repaired, you no longer
9 control or own?

10 A. That's correct.

11 Q. Okay. All right. And you haven't been back,
12 after the fact, to look at the work that was
13 done?

14 A. I have not inspected any of the work that was
15 completed.

16 Q. All right. Did anybody employed by you inspect
17 the work to see if it was completed?

18 A. I don't know.

19 Q. Any of the Steeple entity employees, were they
20 in any of the stores?

21 A. Yes.

22 Q. During or after the repairs?

23 A. Yes.

24 Q. Okay. So, who, that worked for you, would have
25 known what happened?

1 A. Rikki Vaughn.

2 Q. Okay. Where's Rikki today?

3 A. I don't know.

4 Q. Okay. You don't know where he's working now?

5 A. He's a former employee no longer in our custody
6 or control.

7 Q. Right. But, you don't have a forwarding address
8 or anything for him, where you send his tax
9 records?

10 A. I don't. To the extent that we have any
11 information, it would have been produced.

12 Q. Well, you didn't produce anything on Rikki, so
13 I'm just asking if you know who in your
14 organization knows where Rikki's forwarding
15 address is?

16 A. I'd have to inquire.

17 Q. Who would you ask?

18 A. Mr. Vaughan. I'd have to look through our files
19 to see if we have a current forwarding address.
20 Mr. Vaughn was terminated in 2017.

21 Q. So, the answer is --

22 A. So, I don't know that we would have it.

23 Q. The first question was, who does know, and the
24 answer is you don't have any other employees,
25 so it's got to be you?

1 A. Sure.

2 Q. Okay. And then, where are you going to look?

3 MR. OLSON: Object to the form.

4 MR. LACOUR: What's wrong with the form of
5 the question?

6 MR. OLSON: You're asking him where he's
7 going to look?

8 MR. LACOUR: Yep. I'm asking him what
9 records he's going to look at. I'm entitled to
10 know. He says the record --

11 MR. OLSON: He hasn't said there are any
12 records.

13 MR. LACOUR: He said he was going to go
14 look.

15 A. I'm going to look through the documents we've
16 produced. My understanding is that if we were
17 asked for it, we would have provided it, and so
18 where I would look would be the documents we've
19 produced.

20 Q. No. That's not the question you were asked. The
21 question you were asking is, what record does
22 your organization have of Mr. Vaughn's current
23 address or forwarding address?

24 A. I don't know if we have a record of his current
25 address.

1 Q. Okay. Well, then you wouldn't be able to send
2 him his tax records following his termination,
3 would you?

4 MR. OLSON: Object to the form.

5 A. The record we would have post-termination may
6 not exist. We may have a record pre-termination
7 of his last known address.

8 Q. Uh-huh. So, where are you going to look, at
9 what record are you going to look --

10 A. I will consult, I would request the document
11 from our third party payroll provider to
12 provide me with a copy of that document. That's
13 not a record in our custody or control.

14 Q. Who is your third party payroll provider?

15 A. I don't recall.

16 Q. You don't know?

17 A. We've switched. We've had several payroll
18 providers. I'd have to find out which one
19 during the time in which Mr. Vaughn was
20 employed.

21 Q. Okay. So, you don't know who's got the record,
22 and you don't know who you can ask?

23 A. I believe I said I was going to ask the payroll
24 provider, to the extent that we're going to go
25 off the tax record.

1 Q. But, you can't ask your current payroll
2 provider, so you don't know who you're going to
3 ask, yet, do you?

4 A. No.

5 Q. Okay. So, if you don't understand about the
6 extent of the concrete repairs, we'll move past
7 that one. Does it set forth the price for the
8 work?

9 A. It sets forth a rate.

10 Q. Yes. Does it set forth the price of the work?

11 A. It sets forth the rate. It says price and then
12 price for multiple stores. There are two
13 different rates.

14 Q. Yes. And so, did they do multiple stores for
15 you?

16 A. Yes.

17 Q. Was it your understanding that the price for
18 the work was going to be the multiple store
19 location price?

20 A. Yes.

21 Q. Okay. And then, is that what you got invoiced
22 for, that multiple store location price?

23 A. I don't have a copy of the invoice.

24 Q. You don't recall?

25 A. Yes.

1 Q. So, was it at the multiple location rate?

2 A. That's correct.

3 Q. Okay. And according to the email on top of that
4 stack of invoices, Marsh Waterproofing was
5 asking Alex. Are you the only Alex that works
6 at Hamilton Management Services Company?

7 A. Yes.

8 Q. It says, Alex, how do the invoices need to be
9 made out? Do they need to be in each entity
10 name? Please advise. What was your response?

11 A. I believe I provided that they should be made
12 to each entity.

13 Q. Well, you've got all seven of them there. Take
14 a look at how they were made out.

15 A. Then, they were made to State Acquisitions, the
16 parent company of each entity.

17 Q. Which is in keeping with what you said earlier,
18 is you thought State was doing the hiring on
19 behalf of the Steeple entities. Okay. All
20 right. So, back to Exhibit Five, does it say
21 when payment was due from Hamilton --

22 A. It says payment due upon completion.

23 Q. -- Steeple, and State Acquisitions?

24 A. Due upon completion.

25 Q. Okay. Was it paid?

1 A. To my knowledge, no.

2 Q. Okay. All right. So, the proposal, Five, is to
3 State Acquisitions, LLC, and it's directed to
4 State Acquisitions, correct?

5 A. Yes.

6 Q. Because you had asked them for a quote?

7 A. Yes.

8 Q. And then, the same thing on the Exhibit Six,
9 it's addressed to Rikki Vaughn at State
10 Acquisitions?

11 A. Correct. Exhibit Five is addressed to both
12 Church's Chicken and State Acquisitions.

13 Q. Well, to Church's Chicken restaurant?

14 A. Sure.

15 Q. But, it wasn't --

16 A. But, State Acquisitions is not a Church's
17 Chicken restaurant.

18 Q. Correct. The business location was a franchise,
19 Church's Chicken?

20 A. Correct. But, State Acquisitions was not.

21 Q. Is not?

22 A. Correct.

23 Q. I understand.

24 A. I'm merely pointing out the form of a document.

25 Q. Yes. I understand. Okay. So, State Acquisitions

1 then, when you signed Exhibit Five, it was
2 agreeing to pay the multi-location price, the
3 \$36,800, for each of the --

4 A. On behalf of its subsidiaries, yes.

5 Q. For each of the seven locations?

6 A. I don't know how many. I believe you had
7 provided me with six. I don't know if six or
8 seven were completed.

9 Q. Seven were completed, one was paid.

10 A. Okay.

11 Q. And the other six are due.

12 A. Okay.

13 Q. Do you know how one got paid for?

14 A. I don't recall.

15 Q. Okay.

16 A. I wish to amend my answer. When you asked if
17 they were paid, you were informing me that one
18 of them was paid. I did not previously recall
19 that, so thus --

20 Q. The six we're discussing weren't paid.

21 A. Sure. Agree.

22 Q. But, seven were repaired, initially?

23 A. Yes.

24 Q. And there are seven invoices, one location got
25 paid, and the other six did not. I don't even

1 know what location was paid; do you recall?

2 A. I do not.

3 Q. Okay.

4 MR. LACOUR: Let's mark this one as the next
5 one.

6 (EMAIL OF 7/10/17 MARKED AS PLAINTIFF'S
7 EXHIBIT NO. 7 FOR IDENTIFICATION.)

8 Q. I want to show you Exhibit Seven, which was
9 email from you to Glenn Kindred, who is one of
10 the guys at the landlord's?

11 A. Yes.

12 Q. Just read it to yourself. I want to ask you
13 some questions about it.

14 A. "Dear Glenn, as you are aware --

15 Q. No, no. Read it to yourself.

16 A. Oh, sure.

17 Q. Sorry.

18 A. Sure.

19 Q. By the way, before I get to that, we didn't
20 have an invoice from Roto-Rooter, and you
21 already told me you thought they did some work.
22 Do you remember what they worked on?

23 A. The plumbing.

24 Q. So, like the drains, it talks about drains and
25 sewer?

1 A. It talks about the piping and plumbing. Yes.

2 Q. Okay. I got you. So, Osiris wasn't doing that,
3 but they might have been doing the electrical
4 and wiring?

5 A. I don't believe Osiris was doing the
6 electrical. I believe Osiris was just doing
7 pump out.

8 Q. Okay. Do you know who was doing the electrical?

9 A. I don't believe there was any electrical work
10 required.

11 Q. Everything was already in conduit?

12 A. Yes.

13 Q. Okay. Got you. All right. That would make
14 sense, but I don't know. Okay. I'm sorry.

15 A. I don't know if there was any electrical work
16 required to be done, but I don't believe there
17 was another contractor to do it.

18 Q. Okay. Let's look at what's now been marked
19 Exhibit Seven. And so, in that letter, and I
20 think in the first paragraph, you are writing
21 to the landlord, and it looks like a brief
22 description of the past experience of Marsh?

23 A. Yes.

24 Q. Okay. So, where did you come by that
25 information that's in that paragraph?

1 A. From Church's Chicken, directly.

2 Q. Okay. So, you --

3 A. From Jay Allen and Wayne Stubbs, as well as a
4 conversation with Tim Marsh.

5 Q. Well, okay. So, first of all, some information
6 came from Tim and some came from Church's?

7 A. That's correct.

8 Q. What information in there came from Tim?

9 A. That he had -- well, the price, the negotiated
10 price, that come from Tim.

11 Q. Yeah.

12 A. And I believe Tim also mentioned that he had
13 remediated approximately 50 Church's Chicken
14 locations.

15 Q. Fair enough. All right. Do you know any
16 different than that today?

17 A. Whether there have remediated 50 locations?

18 Q. Yeah.

19 A. No.

20 Q. Okay. And then, in the second paragraph, it
21 looks like it's just a discussion of financial
22 issues between your companies and the landlord?

23 A. I don't understand the question.

24 Q. Huh?

25 A. I don't understand the question.

1 Q. I don't understand, really. It talks about,
2 given your financial position?

3 A. Yes.

4 Q. What are we talking about, what was your
5 financial position at the time of that letter
6 that you are referring to?

7 A. That we did not have a sufficient budget for
8 capital expenditure for this without, as we
9 said, on our own.

10 Q. Okay.

11 A. For example, it states that we've sent demand
12 letters to two other landlords requiring their
13 contribution, that without them paying
14 similarly, the VEREIT leases, which do not
15 include those other two landlords, obviously.
16 The forbearance agreement, Exhibit Four, does
17 not contemplate those other two leases.

18 Q. Okay.

19 A. Is that clear?

20 Q. Yeah.

21 A. So, for example --

22 Q. I'm more interested in understanding, though,
23 so you're asking landlords to help you cash
24 flow it, basically?

25 A. In addition to the franchise.

1 Q. Yeah.

2 A. The forbearance agreement provides that it will
3 be paid for by us or a third party.

4 Q. Uh-huh.

5 A. We're indicating that we will require a third
6 party, per the forbearance agreement, to be a
7 part of this before we can accept the
8 transaction.

9 Q. Okay. And you have to forgive me.

10 A. Sure.

11 Q. I didn't get Exhibit Four until this morning
12 when I arrived. So, that's new to me. So, the
13 forbearance agreement was just a month or two,
14 signed just a month or so before this letter
15 was written?

16 A. Yes,

17 Q. So, what you're saying in this letter, Exhibit
18 Seven, is that given that you are already on a
19 tight budget and trying to remediate past due
20 payments, you're going to need further
21 forbearance or something to help you cash flow,
22 to have the cash to pay for the repairs?

23 A. Yes.

24 Q. Okay. Got it. But, the seven locations times
25 \$36,800, the multiple store price, is about

1 \$220-something thousand, if I remember right.

2 A. I'll take your word for it.

3 Q. Okay. So, did you tell Marsh Waterproofing that
4 you didn't have the money to pay him when you
5 hired him?

6 A. Marsh didn't inquire.

7 Q. Okay. So, the fact that they didn't ask makes
8 it okay for you to hire him to do work that you
9 know you don't have the money to pay?

10 MR. OLSON: Object to the form.

11 A. We believed that our agreements between our
12 lender, our landlord, and our franchise, in
13 addition to our working capital and the
14 contributions from the other two landlords,
15 would have provided sufficient financing at
16 that time. We were actively negotiating a
17 restructuring with all of the parties at that
18 point, who had agreed in good faith to provide
19 us sufficient financing to continue operations,
20 including the remediation.

21 Q. I get it. You had a plan in place that you were
22 working presently, at that time, to try and get
23 to where you had the cash?

24 A. Yes.

25 Q. But, you didn't have it, correct?

1 A. I'm not prepared to say whether we had the cash
2 or not. We certainly had other liabilities, but
3 whether we had the money in our account --

4 Q. Yeah.

5 A. It's a matter of fungible payment.

6 Q. Well, you signed this and sent it back to him,
7 presumably, on July 21st, 2017?

8 A. Yes.

9 Q. And so, here on July 10th, you're working on it.
10 Did you -- Here's another one, very similar. Is
11 that the same kind of letter going to the
12 Church's people?

13 A. Yes.

14 Q. All right. So, we can mark that one.

15 (LETTER OF 7/10/17 MARKED AS PLAINTIFF'S
16 EXHIBIT NO. 8 FOR IDENTIFICATION.)

17 Q. So, taking Seven and Eight together, this is
18 where you were working with both your landlord
19 and your franchisor to try and get their
20 cooperation to allow you to have enough relief
21 that you can cash flow these payments?

22 A. Which was, again, these letters were sent 11
23 days prior to my execution of the --

24 Q. Sure. Yeah. You were working on it.

25 A. And we believed we had sufficient agreement.

1 Q. Okay. All right. Fair enough. I'm just saying.
2 So, did that all pan out, did everybody agree
3 to what you were asking?

4 A. We had a provisional agreement prior to my
5 execution of the Marsh document.

6 Q. Okay. All right. So, through further
7 discussion, emails, whatever, telephone
8 conferences, you believe you had found a way to
9 make the thing, not everything you're proposing
10 here, but you had come to some agreement as to
11 how it was going to happen?

12 A. Yes.

13 Q. Okay. And then, so once you got to that
14 agreement, then you signed off with Marsh and
15 told him, okay, you're hired?

16 A. Yes.

17 Q. Okay. So, what happened in terms of the
18 financing arrangements that you thought you
19 had?

20 A. We continued to move forward in our discussions
21 of the restructuring and ultimately what
22 precipitated the termination of our negotiation
23 was when Marsh decided to file a lien on the
24 property. At that point, the landlord indicated
25 they were no longer interested in engaging in

1 any further discussions, as we had breached the
2 forbearance agreement, Section 3.2(b),
3 subsection 2 requires any other charges that
4 result in liens on any or all portion of the
5 properties. It advised us that we, that by
6 filing the liens, we had breached that and they
7 were no longer prepared to negotiate.

8 Q. All right. So, you hired us on July 10th, signed
9 by you July 21st, 2017, right?

10 A. Sure.

11 Q. And then --

12 A. This was prior to signing.

13 Q. Well, but on the same date you got --

14 A. The proposal.

15 Q. -- our proposal, you were busy trying to work
16 out the arrangements to pay for it?

17 A. Prior to agreeing to the proposal, yes.

18 Q. Yeah. It probably started beforehand. I get
19 that. But, then you still hadn't reached an
20 agreement with them at the time Marsh filed
21 their liens, is what you just told me.

22 A. We had we had a continuing agreement, in
23 principle.

24 Q. But, nothing final?

25 A. That's correct.

1 Q. Okay. So, you still hadn't struck a deal as to
2 exactly how you were --

3 A. We had we had an interim operating plan, but we
4 had not resolved all of the outstanding
5 liabilities.

6 Q. All right. And we know when we filed our liens,
7 it was the middle of November of 2017, but the
8 bills had been sent on September 5th, 2017. You
9 looked at those a minute ago, right?

10 A. Sure.

11 Q. Okay.

12 A. So, roughly 60 days.

13 Q. Yeah. In July, you didn't have a final deal,
14 and September 5th, you didn't have a final deal,
15 and by November, mid-November, call it November
16 15th, you still didn't have a final deal?

17 A. We were in the process of finalizing a deal
18 when the deal went away.

19 Q. Okay. Well, but the deal went away because of a
20 new breach of Exhibit Four, correct?

21 MR. OLSON: Object to the form.

22 A. Yes.

23 Q. Okay. All right. But, you are counting on these
24 folks' assistance, if you will, and maybe
25 further forbearance, whatever, to help you find

1 a way to pay these --

2 A. To meet all of our obligations.

3 Q. -- obligations, out of cash flow?

4 A. Or additional capital injection or what have
5 you.

6 Q. Okay. Maybe assistance with different financing
7 or whatever.

8 A. We believed that there was a viable path to
9 meet all of our obligations.

10 Q. Sure. I get it. So, what happened in November,
11 who was it that backed out in November, was it
12 the landlord or the franchise?

13 A. So, as soon as the liens got filed, the
14 landlord sent us a termination of all of our
15 leases.

16 Q. Okay.

17 A. Once the landlord terminated all of our leases,
18 the lender commenced litigation and the
19 franchise sent us further default on our
20 franchise. Once the landlord and the bank were
21 out, the franchise told us that we were going
22 to be out, similarly, and the only thing we
23 could do was effectively hand over the
24 properties to the franchise.

25 Q. Okay. So, did the landlord terminate any --

1 A. The landlord terminated all the leases because
2 we had defaulted on these (indicating). They
3 terminated every single one of our leases.

4 Q. All leases?

5 A. Yes.

6 Q. Not just the six that were --

7 A. Because we breached the forbearance agreement,
8 it resulted in a termination of everything.

9 Q. Okay.

10 A. With no further opportunity for negotiation, no
11 opportunity for cure.

12 Q. All right. And then, on the franchise --

13 A. The lender -- no. As soon as the lender said
14 no, the bank sued everyone, sued all the
15 borrowers.

16 Q. Wait a minute. So, who --

17 A. First Franchise Capital, Janet Santen.

18 Q. As soon as the lender said --

19 A. As soon as the landlord said we're out, you've
20 breached our agreement.

21 Q. Wait a minute. Slow down. You said the
22 landlord, and you said lenders?

23 A. Yes.

24 Q. So, slow down. So, I need to understand. As far
25 as the leases go, leases were terminated by the

1 ARC USA people?

2 A. VEREIT.

3 Q. VEREIT people, V-E-R-E-I-T people. But, then as
4 far as the franchises, were all the franchises
5 terminated?

6 A. Yes.

7 Q. Or just the five or six that were left?

8 A. Because all the leases were terminated, all the
9 franchise agreements were terminated.

10 Q. Because you have to keep a location?

11 A. Agreed.

12 Q. I understand. Okay.

13 A. And also, again, at the same time, because the
14 landlord exercised the right, the bank sued
15 over its collateral.

16 Q. I understand.

17 A. So, the liens were the death knell, if you
18 will, of what was otherwise a restructuring
19 plan that had been agreed to in principle by
20 the parties.

21 Q. But, you didn't have a final agreement?

22 A. We did not have a final agreement.

23 Q. And apparently, there wasn't any viable backup
24 plan in place to get a bridge or do something?

25 A. Once the lease is were terminated, we were out

1 of --

2 Q. Okay. And so, what do you know about lien
3 rights of contractors?

4 A. I know that in South Carolina, any work over
5 \$5,000 is required to be conducted by a general
6 contractor, and the general contractor, a
7 licensed general contractor, and that licensed
8 general contractors have certain rights to file
9 liens.

10 Q. Okay. And do you realize that the lien rights
11 are not unlimited in time?

12 A. I do.

13 Q. Okay. Did you know that before?

14 A. I did.

15 Q. Okay. So, you knew you had only about 90 days
16 to get these people paid?

17 A. We did not, we did not contemplate the
18 likelihood of them filing a lien. We believed,
19 at that time, that they were actually not able
20 to file a lien. At the point at which the lien
21 was filed, we did not believe the lien could be
22 filed.

23 Q. So, let me get this straight. So, you hired the
24 contractor in July --

25 A. Yes.

1 Q. -- to do almost a quarter of a million dollars
2 worth of work, and you didn't have the money in
3 July or August or September or October,
4 correct?

5 MR. OLSON: Object.

6 A. I disagree. I dispute that we didn't have the
7 money.

8 Q. You didn't have the money. If you had the
9 money, you would have paid him.

10 MR. OLSON: Objection.

11 A. I don't agree.

12 Q. Okay. So, you hired the contractor in July, and
13 he did a quarter of a million dollars worth of
14 work for you in August, and you never intended
15 to pay him?

16 MR. OLSON: Object to the form.

17 A. I disagree. We did intend to pay.

18 Q. Well, at what point did you decide you didn't
19 intend to pay because you didn't think he could
20 file a lien?

21 MR. OLSON: Objection.

22 A. No. At the point at which we became aware that
23 a contractor that had previously sent us
24 documents in which they stated they were
25 licensed, bonded, and insured, we found out was

1 not licensed in South Carolina, and we were
2 unclear as to whether we were going to have to
3 have the work removed and redone by a licensed
4 contractor.

5 Q. Okay. So, you're talking about something that's
6 unrelated to this work in these projects?

7 A. I am not. I am stating that we were, at the
8 point at which we determined that we were
9 uncertain as to the payment of Marsh, we were,
10 it was because we were uncertain as to whether
11 the work was completed per South Carolina code
12 by an unlicensed contractor.

13 Q. Well, first of all, who ever suggested that
14 Marsh was licensed, bonded, and insured?

15 A. Marsh's, all of the documents that Marsh sent
16 us, in their logo, has licensed, bonded, and
17 insured, and it appeared on their website, and
18 it appeared in the logo in their emails.

19 Q. All right. Does this proposal have the logo?

20 A. It does not.

21 Q. Well, show me something that does.

22 A. I don't have all 1,700 documents here. If you
23 would like to send me the --

24 Q. I haven't seen a thing.

25 A. Okay.

1 THE WITNESS: Clay, would you kindly pull up
2 Marsh Waterproofing's website?

3 A. My recollection is that the front page of their
4 website, their logo at the time, I don't know
5 if it currently does, but at the time, it said
6 licensed, bonded, and insured.

7 THE WITNESS: May I?

8 MR. OLSON: It's going to be hard to be an
9 exhibit, but you can reference it.

10 MR. LACOUR: Sure.

11 MR. OLSON: This is
12 www.MarshWaterproofing.com.

13 A. I apologize. It says licensed and bonded.

14 Q. Okay.

15 A. There you are.

16 Q. Licensed and bonded?

17 A. Yes.

18 Q. And it shows three different states, Texas,
19 Louisiana, and it looks like Mississippi,
20 doesn't it?

21 A. I'll take your geography for it.

22 Q. Well you tell me. It doesn't show South
23 Carolina there, does it?

24 A. No.

25 Q. Okay.

1 A. Nor does it state that that is an exhaustive
2 list of where they're licensed, but it does
3 state in plain language, licensed and bonded.

4 Q. Licensed and bonded, Texas, Louisiana, and
5 Mississippi.

6 A. It does not say Texas, Louisiana, and
7 Mississippi. It has a graphic of three states.

8 Q. Okay. Good enough. All right. So, you got
9 anything else to show me that Marsh sent you
10 saying they were licensed in the state of South
11 Carolina?

12 A. I believe that same logo appeared in other
13 correspondence. That's my recollection.

14 Q. Okay. Anything besides that logo?

15 A. No.

16 Q. Okay. With three same three states. You had
17 never seen one with South Carolina showing
18 graphically, have you?

19 A. No.

20 Q. Okay. All right. That's fair enough. The other
21 thing I want to know is, who was it, at what
22 point did you decide that maybe you didn't have
23 to pay him because maybe you could catch them
24 in some kind of a licensing issue, whether it
25 exists or not, remains to be determined by the

1 jury?

2 MR. OLSON: Object to the form.

3 Q. But, at what point did you decide that was your
4 way out, you shouldn't have to pay him?

5 MR. OLSON: Object to the form.

6 A. At the point at which we determined that Marsh
7 was definitively not licensed, we believed that
8 we had an obligation to consider whether we had
9 to have the work redone by a licensed
10 contractor.

11 Q. You did believe that. Did anybody tell you that
12 or you just believed that on your own?

13 A. It was a discussion, there was a discussion
14 among the company.

15 Q. You and other employees?

16 A. Some of those discussions are privileged.

17 Q. Well, you don't have to tell me about
18 discussions with lawyers.

19 A. Again, you said a discussion with yourself or a
20 discussion with others, and I'm telling you
21 that some of the discussions with others are
22 privileged.

23 Q. Okay. And so, the question was not with whom.

24 A. Fine.

25 Q. The question was, at what point in time did you

1 decide it?

2 MR. OLSON: Object to the form.

3 A. After.

4 MR. LACOUR: What's wrong with the form of
5 that question? I'm entitled to know when he
6 decided.

7 MR. OLSON: That's fine. You're implying
8 that he made a decision that was not going to
9 pay them.

10 MR. LACOUR: I'm not implying anything. He's
11 already said so. I'm asking him when he did
12 that. Noted.

13 Q. Answer the question. When did you make that
14 decision?

15 A. After the invoices were received, but before
16 the liens were filed. I don't recall the
17 specific date.

18 Q. After the invoices and before the liens?

19 A. Yes.

20 Q. Well, then why were you continuing to negotiate
21 if you made your decision before the liens --

22 A. Yes.

23 Q. -- that you weren't going to pay him?

24 A. Because Church's made clear that it was
25 important to them, as part of their agreement

1 to the overall forbearance, that as they put
2 it, even if we were not required to make the
3 payment, they referred to it as a, their words,
4 moral obligation. So, in order to get Church's
5 on board with the restructuring, even if we did
6 not have a legal obligation to pay it, Church's
7 required us to make payment as part of them
8 agreeing to get on board.

9 Q. Okay. And so, in your mind, the fact that
10 somebody traveled halfway across the country
11 and performed the work you asked him to
12 perform, furnished the materials, whatever,
13 under their proposal and sent you the bill,
14 those facts didn't impose upon you any
15 obligation to pay for it?

16 A. Those facts, taken on balance with the fact
17 that the work may not have been completed to
18 South Carolina standards.

19 Q. You got any proof of that?

20 A. That the work was not completed?

21 Q. To South Carolina standards, what you just
22 said.

23 A. We did not ultimately conduct any full
24 investigation. There were concerns raised.

25 Q. Did you ever write any letter or email to Marsh

1 and ask any questions about South Carolina
2 standards?

3 A. No.

4 Q. Okay. Did you ever make any complaint to Marsh
5 about the quantity of the work or the quality
6 of the work?

7 A. Yes.

8 Q. In writing?

9 A. Yes.

10 Q. Where?

11 A. There's a discussion with Marsh about a
12 question related to some of the concrete work
13 that was raised by Rikki Vaughn.

14 Q. And where is that? It's not in any of the
15 emails you produced.

16 A. I assume that would be something that Marsh
17 would have, if it went to Marsh directly.

18 Q. I don't know that it exists.

19 A. Okay.

20 Q. We don't have it. You haven't produced it, and
21 I haven't seen it. So, you think there's an
22 email between Rikki Vaughn and who?

23 A. And Tim Marsh.

24 Q. Okay. And what is the subject of their
25 discussion?

1 A. An issue related to the concrete.

2 Q. And what was the question about the concrete?

3 A. Whether it was adequately provided? I don't
4 know the specific nature of the issue.

5 Q. What was the perceived inadequacy?

6 A. I don't know. I didn't inspect it. I'm going
7 based on the conversation I had with Rikki in
8 which he indicated there may have been an
9 issue. You asked me if there were any
10 discussion of it.

11 Q. Yeah. I'm trying to figure it out. So, you
12 believe an email exists, but you've never seen
13 it?

14 A. Correct. I was not a party to the email.

15 Q. Okay. Well, fine. All right. Anything other
16 than the mystery missing email that you believe
17 is in writing between any of your entities and
18 Marsh about deficiencies and quality or
19 quantity of the work?

20 A. Not to my knowledge.

21 Q. You never even confronted Marsh about the
22 licensing, did you?

23 A. No.

24 Q. Okay. Got it.

25 A. Nor did Marsh send me demand for payment. He

1 sent me an invoice, but --

2 Q. Did you not receive invoices?

3 A. I received the invoice.

4 Q. Did you not sign a proposal that said that
5 payment is due upon completion?

6 A. I did.

7 Q. Isn't that a term on the bottom of Exhibit
8 Five, right down there the bottom (indicating)?

9 A. Yes. It is.

10 Q. Okay. And you agreed to that, even when you
11 knew you didn't have the money to make the
12 payments, right?

13 A. I repeatedly dispute that we didn't have the
14 money to pay it.

15 Q. Then, why were you working so hard in Exhibit
16 Seven and Eight to get the money to pay for it?

17 A. The documents speak for themselves.

18 Q. Huh?

19 A. The documents speak for themselves.

20 Q. Yeah. And it looks to me, speaking for
21 themselves, like you were working very hard to
22 acquire the money to pay for it.

23 A. I've already provided my answer.

24 Q. Okay. So, you were not negotiating with these
25 people to get the money to pay Marsh, you had

1 the money to pay Marsh?

2 A. We were negotiating with regard to a global
3 settlement for all of our liabilities.
4 Specifically --

5 Q. Let me ask you a question. Do you see Marsh's
6 signature any place on Exhibit Four?

7 A. Exhibit Four, the forbearance agreement?

8 Q. Yeah.

9 A. I do not.

10 Q. It wasn't in that discussion, was it?

11 A. That's correct.

12 Q. He didn't have any idea how much money you were
13 into these people for when you hired him, did
14 he?

15 A. Nor did Marsh inquire.

16 Q. No. I understand that.

17 A. Despite their substantive conversation with
18 Church's.

19 Q. Even if he had inquired about whether you owed
20 money to these people and were behind with
21 these people, you're not going to tell him your
22 personal business, are you?

23 A. I respectfully decline. I disagree. Were Marsh
24 to have asked, we would have an obligation for
25 good faith, fair dealing, and sufficient

1 candor. We were not privy to the conversation
2 that Marsh had with Church's where we
3 understood --

4 Q. Let me see if I get that whole comment you just
5 made, the full impact of it.

6 A. Sure.

7 Q. If Marsh doesn't ask you, you don't have to be
8 honest with him; is that what you just said?

9 MR. OLSON: Object to the form.

10 A. No, sir.

11 Q. Well, try and rephrase it, because that's what
12 I heard.

13 A. What I said was that if Marsh had asked us. You
14 said even if Marsh asked, we didn't have to
15 tell them our business. That is different. I'm
16 saying if Marsh had asked, we had an obligation
17 to tell them.

18 Q. And since Marsh didn't ask, you have, in your
19 view, no obligation to tell them?

20 A. No obligation. If they do not ask for any
21 financial detail or deciding to provide us
22 credit terms, we did not have any obligation to
23 provide it to them.

24 Q. We didn't provide credit terms.

25 A. I respectfully disagree.

1 Q. Well, it was due upon completion.

2 A. Respectfully, credit terms are when work is
3 provided first and payment is provided second.

4 Q. Fair enough.

5 A. Marsh did provide credit terms.

6 Q. We did.

7 A. Marsh could have required 100% deposit up
8 front, a 50% deposit up front.

9 Q. Okay. Fair enough.

10 A. So, Marsh did provide credit terms, and they
11 did not ask any questions of us prior to
12 providing the credit terms.

13 Q. At the time he signed that, you had no way to
14 comply, and you knew it.

15 A. I do not agree. We certainly could have
16 complied.

17 Q. Well, where is your proof --

18 A. My proof is --

19 Q. -- that you have to cash or the wherewithal to
20 pay for the repairs?

21 A. Yes. May I?

22 Q. Yes. Seven or Eight, you can have anything you
23 see.

24 A. So, in document Seven, we state, "In order to
25 finance the VEREIT property crawl space

1 remediation, we are requesting that we be
2 permitted to defer the payment of rent in an
3 amount equal to the cost of the remediation",
4 which means we had and believed we had
5 sufficient cash were we to not pay VEREIT. So,
6 we had the cash were we do not pay someone
7 else.

8 Q. Yeah. But, you knew you had to pay VEREIT.

9 A. No. We didn't. We specifically asked VEREIT if
10 we were going to be able to not pay them.

11 Q. You were asking VEREIT to excuse you from the
12 obligation to pay them, so you could pay Marsh,
13 weren't you?

14 A. That was one of the options that we were asking
15 for. Yes.

16 Q. And so, back to where we were in July and
17 August and September and October and November,
18 you had all that time to let Marsh know, some
19 of that time before Marsh did his work, that
20 without being excused from some of your other
21 financial obligations, you didn't have the cash
22 to pay him; isn't that correct?

23 A. Marsh did not inquire.

24 Q. I understand that. That's not the question.
25 Just answer --

1 A. We similarly had the obligation or we similarly
2 had the opportunity to provide them information
3 as to the price of our various products or any
4 other tangentially relevant information. They
5 didn't ask us whether sales were up or down, or
6 you know, anything else. We could have provided
7 them any information.

8 Q. I get that. You didn't find it to be your
9 obligation, as you said earlier, in dealing --

10 A. To provide any non-requested information, no.

11 Q. -- in dealing with people in good faith and in
12 fair dealing to let the guy know that you were
13 going to have him come up here and do that
14 work, and unless you got excused from some
15 other financial obligation, you didn't have the
16 money to pay him; isn't that right?

17 A. We did not, we did not have the obligation to
18 tell him.

19 Q. Okay. There's some continuing emails with Dusty
20 Profumo about \$40,000 coming from Church's?

21 A. Okay.

22 Q. And conditioned on whether the landlord will
23 agree to a deferral for some period of time of
24 the rent. So, was this just the two of them
25 trying to, is that just the two of the

1 creditors kind of pushing back and forth about
2 who's going bear the most of it or the least of
3 it?

4 A. That's my understanding.

5 Q. Okay. And you're kind of in the middle trying
6 to get some concession from both, and they
7 might be muscling back and forth about who's
8 going to do what?

9 A. Yes.

10 Q. Got you. All right. And that's pretty normal.

11 A. And our understanding is that Church's
12 ultimately was the one who induced Marsh into
13 doing business with us.

14 Q. Okay.

15 A. We did not, we did not seek out or solicit
16 Marsh, so to the extent that Church's did or
17 didn't or should or shouldn't have provided any
18 information regarding our financial condition,
19 I can't speak to that, either.

20 Q. I don't know that anybody had any information
21 on your financial --

22 A. Church's had copies of all of our, Church's had
23 current financial statements, was in all of our
24 restructuring discussions, and was copied on
25 all of the weekly transactions. They knew

1 exactly how much money was in the bank account.

2 Q. I get that. But, nobody told Marsh, did they?

3 A. No. I'm simply speaking to Church's and
4 Church's conversations with Marsh, and in
5 answering your question of whether we did, I'm
6 saying that Church's was in the same position.

7 Q. Church's is allowed to provide any of your
8 financial information or documents to anybody
9 else, are they?

10 A. I don't believe we have a confidentiality
11 agreement regarding that.

12 Q. You've got a franchise agreement --

13 A. We do.

14 Q. -- though, covering that?

15 A. Except that Church's --

16 Q. It doesn't allow them to distribute your
17 financial information to the world, does it?

18 A. I believe that in the context of procuring
19 vendors, they are allowed to provide certain
20 information. Church's was the one who procured
21 Marsh for us.

22 Q. Okay.

23 A. They were the ones who secured, my
24 understanding is they were the ones who secured
25 you.

1 Q. We are not Church's vendor here, we are your
2 vendor, right?

3 A. You are our vendor by association. Church's is
4 the one who arranged --

5 Q. Do you see anybody else's signature on page two
6 of Exhibit Five but yours?

7 A. I do not.

8 Q. Okay. Marsh was here as your vendor. All right.
9 So, Exhibit Four is the forbearance agreement
10 that was signed in May?

11 A. Correct.

12 Q. That was something I hadn't seen before today.
13 So, does that basically reflect that in May,
14 the two months before we were hired, month and
15 a half, you're basically almost \$600,000 in
16 debt, whatever is set out on this chart here,
17 as part of that document?

18 A. Exhibit A of Plaintiff's Exhibit Four, I
19 believe, accurately reflects the past due
20 amount due to the landlord.

21 Q. Yeah. All right. At that time?

22 A. At that time.

23 Q. Yeah. And so, I don't know where my notes are
24 now because, like I said, I was trying to
25 scramble around this morning since I didn't

1 have it before now. Almost \$524,000 in the
2 total due column, if you add up all the
3 different locations?

4 A. Sure.

5 Q. But, that's between your entities and the
6 landlord?

7 A. That's correct.

8 Q. The VEREIT people, correct?

9 A. Yes.

10 Q. Okay. Got it. All right. Was there also some
11 money that was owed to Church's at that time?

12 A. I believe so.

13 Q. Is there a forbearance agreement or something
14 to do with that, or was Church's just working
15 with you?

16 A. There were promissory notes between Church's
17 and -- but, there was no forbearance agreement.

18 Q. All right. So, have the notes been produced?

19 A. No.

20 Q. Why not?

21 A. Were they requested?

22 Q. Everything was requested. So, do you remember
23 how much you owed Church's --

24 A. I do not.

25 Q. -- in this time frame?

1 A. I do not.

2 Q. Do you remember how much you owed Church's when
3 things were terminated?

4 A. At the point in which they were terminated, we
5 ultimately resolved to owe Church's zero.

6 Q. Okay. And how much did you owe them the minute
7 before you agreed to zero?

8 A. I don't recall.

9 Q. Ballpark?

10 A. Several hundred thousand dollars.

11 Q. Okay. All right. So, you might not have owed
12 Church's several hundred thousand in May of
13 17, but you owed them something, you were
14 behind with Church's, too; is that right?

15 A. Yes.

16 Q. I saw something a minute ago that might be
17 relevant to that, and now I can't find it.

18 A. Actually, I do want to amend an earlier
19 statement.

20 Q. Sure.

21 A. When you asked specifically about whether we
22 had the ability to pay for all the Marsh work
23 and what have you, we were actively engaged in
24 the sale of some real estate that was owned by
25 a subsidiary of State Acquisitions.

1 Q. Uh-huh.

2 A. Whether we had a contract at that point or not,
3 we ultimately ended up closing and receiving
4 additional proceeds. So, part and parcel to
5 this discussion was always that we would have
6 had sufficient funds from our sale to meet
7 numerous obligations.

8 Q. Was that the one --

9 A. Including --

10 Q. Was that the one location we get paid for?

11 A. No. That location did not have a crawl space.

12 Q. Okay.

13 A. But, specifically, we had a source of financing
14 from the net proceeds of the sale of that
15 property.

16 Q. Then, it closed?

17 A. Yes. It did.

18 Q. And you still didn't pay them?

19 A. That's correct.

20 MR. LACOUR: All right. Let's mark this one.

21 (EMAIL OF 7/21/17 MARKED AS PLAINTIFF'S
22 EXHIBIT NO. 9 FOR IDENTIFICATION.)

23 Q. Okay. Tell me what Exhibit Nine is, please.

24 A. Exhibit Nine is a document related to the, it's
25 an internal email between myself and an

1 administrative assistant at Hamilton Management
2 Services Company stating that the work needed
3 to be done, the pumping work needed to be
4 completed prior to Marsh beginning.

5 Q. Uh-huh. It references an attached schedule?

6 A. Yes.

7 Q. Who created the schedule?

8 A. I don't recall.

9 Q. Well, look at the email.

10 A. Presumably, it would be me.

11 Q. Read the email. Exhibit Nine says who created
12 the schedule. Who created the schedule?

13 A. "Attached is my proposed schedule." So, me.

14 Q. My?

15 A. Yes.

16 Q. Who created the schedule?

17 A. I created this document based on a conversation
18 with Tim Marsh.

19 Q. Okay. You created the schedule that's attached
20 to Exhibit Nine?

21 MR. OLSON: Object to the form.

22 A. Yes.

23 MR. LACOUR: Let's mark Ten.

24 (EMAIL OF 8/3/17 MARKED AS PLAINTIFF'S
25 EXHIBIT NO. 10 FOR IDENTIFICATION.)

1 Q. I want to show you Exhibit Ten, and you have to
2 read it from the back to the front.

3 A. Okay.

4 Q. Who is sending who the schedule --

5 A. From me --

6 Q. -- initially?

7 A. From me to Tim.

8 Q. Yes, sir.

9 A. In which I say, Tim, please see the attached
10 schedules. If these dates work for you, I will
11 confirm with my contractor who is doing the
12 pump-out and doing the plumbing and electrical.
13 He will be working one step ahead of you on
14 each site.

15 Q. Got you. So, you told us you had a contractor?

16 A. A contractor doing the pump-out and a
17 contractor doing the plumbing and electrical.

18 Q. And that was Roto-Rooter and Osiris?

19 A. Yes.

20 Q. All right. And then, you're sending your
21 schedule to Tim?

22 A. Yes. My proposed schedule, asking him if these
23 dates work for him.

24 Q. Yeah.

25 A. Because he will ultimately control the

1 schedule.

2 Q. Well, when he can be here will control it, but
3 you prepared the schedule and you said --

4 A. I specifically say, if these dates work for
5 you. It is not a firm schedule. I'm not
6 requiring that it be done on these dates.

7 Q. Yes. And the schedule originated with you and
8 Exhibits Eight, Nine, and Ten, right?

9 A. Based upon a discussion with Tim as to when he
10 could be out there.

11 Q. Absolutely.

12 A. I consider it a collaborative schedule.

13 Q. Right. But, you didn't, Tim didn't decide which
14 site got done first, second, and third, did he?

15 A. No. Tim suggested that they needed to be done
16 in a specific geographic area, and we proposed
17 a plan.

18 Q. And y'all figured it out. Okay. Y'all, being
19 you and Mr. Marsh?

20 A. Marsh. We discussed with Tim and Rikki and the
21 people pumping and Roto-Rooter.

22 Q. Right.

23 A. Everyone was involved in the discussion.

24 Q. All right. And then, who created this document
25 that's attached to these emails?

1 A. I did.

2 Q. Okay.

3 A. Presumably.

4 Q. All right. This looks like pages are missing
5 these things go together. Do these things go
6 together (indicating)? Just look at those and
7 tell me if they go together.

8 A. Sure.

9 Q. They may not.

10 A. Yeah. They do.

11 Q. What is all that?

12 A. Okay. This is a message between the CFO of
13 Church's and me.

14 Q. Okay.

15 A. The message says, we have \$39,000 worth of
16 funds that Church's was holding on our behalf.

17 Q. Okay.

18 A. They were prepared to give that money over,
19 along with potentially some other money of --
20 They have some money that's ours.

21 Q. Right.

22 A. They want to make sure that we've done the
23 work, and if we have done the work, they are
24 prepared to hand over the money to pay for, as
25 a down payment to help contribute with some of

1 the crawl space remediation.

2 Q. Okay.

3 A. Which is exactly what I had asked for from them
4 on July 10th. So, I would actually amend my
5 statement and say by August 10th, we now have an
6 agreement, in principle, or we now have an
7 agreement documented between Church's and I,
8 per my email of July 10th.

9 Q. That might be part of the same thread, but I'm
10 not sure. Take a look at that.

11 A. List given two days between -- Yeah. This is
12 all part and parcel to the scheduling. I don't
13 see any inherent distinction.

14 Q. Okay.

15 A. Do you want to mark these as exhibits?

16 Q. I'm trying to see what's changing here.

17 A. Can I --

18 Q. Wait a minute. I'm just looking at the --

19 A. Some of it has to do with the weather not
20 cooperating and dates getting shifted.

21 Q. Yeah. That's what I was thinking. It looks like
22 the same format, so to speak, but having to
23 shuffle the dates.

24 A. And that was just because the weather wasn't
25 cooperating.

1 Q. All right. So, was that holding up the Roto-
2 Rooter and Osiris people, trying to get it
3 dried out?

4 A. I don't know if it was holding them up or if it
5 holding Marsh up or, I don't have the specifics
6 as to who, my understanding is completion was
7 being held up.

8 Q. Okay. Well, on August 11th and August 10th, these
9 are all -- Here's the 10th and here's the 11th
10 stuff. But, the 10th and 11th, we hadn't even
11 come to Charleston, at that time.

12 A. I don't know.

13 Q. That's before.

14 A. I don't know. But, for contractor contacts, it
15 does list the contractor for pump-out,
16 plumbing, and electrical as Osiris, which was
17 subsequently Roto-Rooter for plumbing, and the
18 contractor listed for foam installation is
19 listed as Marsh Waterproofing.

20 Q. Okay.

21 A. So, Marsh Waterproofing is listed as the
22 contractor for providing the foam services.

23 Q. Yes, sir. I get it. And this is, you're telling
24 other folks --

25 A. Church's, yes. I'm telling them who my

1 understanding of the various people doing the
2 various things are.

3 Q. Got you. All right. So, and we're getting close
4 because this is August 15th, and we actually
5 came and started slightly after that.

6 MR. LACOUR: Let's mark that as the next
7 exhibit.

8 (EMAIL OF 8/10/17 MARKED AS PLAINTIFF'S
9 EXHIBIT NO. 11 FOR IDENTIFICATION.)

10 Q. So, there's a lot to back and forth, and we
11 probably don't need to go through them, but
12 it's mostly Mr. Profumo at Church's, it's like
13 he's hammering you every day, did you start,
14 did you start, did you start?

15 A. Yes.

16 Q. They were really pushing y'all to get it
17 started and get it done?

18 A. Yes.

19 Q. Why?

20 A. They were concerned about potential structural
21 safety issues given that a Church's had
22 previously collapsed in Texas and they were in
23 the middle of a \$50 million litigation.

24 Q. So, they were just trying to get that wrapped
25 up?

1 A. Yes.

2 Q. That's all that is?

3 A. Yes.

4 Q. Okay. All right. Let me find one here. Here we
5 go. So, we've got -- I think these are related
6 (indicating).

7 A. Sure. They are.

8 Q. We've got these two letters --

9 A. They are. I can, I can -- I'm good.

10 Q. Okay. So, what's --

11 A. Sure. I'm going to start with this one
12 (indicating). Can we mark these? These are
13 defaults --

14 Q. Hang on. Do you want to mark those as one
15 exhibit?

16 A. Yes.

17 Q. Because it's the same thing, just different
18 locations?

19 A. Yes.

20 Q. Okay.

21 MR. OLSON: These are Church's letterhead
22 defaults?

23 MR. LACOUR: Yes.

24 MR. OLSON: Both of the are going to be
25 marked as one exhibit?

1 MR. LACOUR: Yes. We're going to do July 7th
2 and July 10th.

3 (FRANCHISE DEFAULT LETTERS MARKED AS
4 PLAINTIFF'S EXHIBIT NO. 12 FOR IDENTIFICATION.)

5 Q. Okay.

6 A. Church's sent correspondence to all the Steeple
7 entities saying, effectively, we are very
8 serious about you getting these crawl spaces
9 done. We understand, per my correspondence,
10 that you have a plan, and if you don't complete
11 them by a certain, that you are in default and
12 your cure period runs 30 days. So, if you don't
13 get them done by then --

14 Q. Thirty days.

15 A. -- then you're out.

16 Q. Okay. And then, the email is just --

17 A. They've extended --

18 Q. Towards the end of that, they extended it?

19 A. There were some weather issues, we were
20 complying, you know.

21 Q. Okay. So, let me mark that, that's Thirteen.

22 A. Sure.

23 (EMAIL OF 8/21/17 MARKED AS PLAINTIFF'S
24 EXHIBIT NO. 13 FOR IDENTIFICATION.)

25 Q. So, Exhibit Thirteen is follow-up emails to the

1 two letters that are Exhibit Twelve?

2 A. And Eleven. Yes.

3 Q. Simply where they are acknowledging that they
4 know you're working on it, they know you're
5 having issues with weather and whatever and
6 coordination.

7 A. Yeah.

8 Q. So, just we'll give you a few more days, as
9 long as you're on top of it.

10 A. Everyone's fine.

11 Q. Okay. So, there was no, at least as of August
12 21st, they were not terminating --

13 A. Correct.

14 Q. Right. They are not terminating anything. They
15 are going to take a step back --

16 A. We're actually back in good standing.

17 Q. Yeah. They're going to take a step back and let
18 you finish it and --

19 A. Yes. And then, once we had finished it, the
20 defaults were cured.

21 Q. Right. Okay. Well, then if --

22 A. No. The defaults were cured.

23 Q. Yeah. Well, but if you finished the repairs --

24 A. Yes.

25 Q. -- with the buildings, then it would cure the

1 defaults --

2 A. Yes.

3 Q. -- in the franchise?

4 A. Yes.

5 Q. And if you finished the repairs with the
6 buildings, it would avoid any kind of issue
7 with the landlord?

8 A. Yes.

9 Q. Okay. And you did get the work done?

10 A. Whether the work was completed to South
11 Carolina code remains an open issue. But, yes,
12 some work was completed. Crawl spaces were
13 filled with foam.

14 Q. Right. The work got done?

15 A. To my knowledge.

16 Q. So, I guess what I'm trying to figure out --
17 Let me back up to what you just said. You've
18 mentioned it a couple times now, so let me
19 chase that rabbit. So, who raised an issue
20 about code compliance?

21 A. That was a discussion that was had at State
22 Acquisitions.

23 Q. Okay. And so, what code provision was anybody
24 worried about?

25 A. The concern was that if the work was performed

1 by an unlicensed contractor that they may not
2 have completed the work to South Carolina
3 standards as they are not licensed by the State
4 of South Carolina.

5 Q. Okay. So, do you know anything about the
6 distinction between licensing and
7 qualifications to build?

8 A. I do not.

9 Q. Okay. All right. Do you grasp the concept, I
10 guess a general way to describe it, that
11 somebody with 30 or 40 years in construction
12 will know the right way to do something --

13 A. I do not.

14 Q. -- whether he's got the license or not?

15 A. I do not. I vehemently disagree with that.

16 Q. Oh, you do?

17 A. I do.

18 Q. On what basis?

19 A. On the basis that if that were the case, I
20 believe the State of South Carolina, in their
21 infinite wisdom, would provide for an
22 experience waiver in lieu of a license, and the
23 fact that they have not done so is the basis by
24 which I believe that experience is no
25 substitute for adequate licensure.

1 Q. Yeah. You missed the whole point.

2 MR. OLSON: Object to the form.

3 Q. The man owns the company might have the
4 license, but the guy that's been doing the work
5 in the field is the guy that knows how to do
6 the work, and he didn't have a license.

7 A. But, without a license, I would have no basis
8 of knowing whether that person has 30 or 40
9 years worth of experience, has never done this
10 before, or what have you. The licensure is the
11 standard. So, I would not know.

12 Q. You would know, you wrote a letter about it,
13 and we've already marked it as an exhibit.

14 A. That they had experience or did not have
15 experience?

16 Q. Fifty restaurants, you wrote in your letter.

17 A. Yes.

18 Q. Okay. Fair enough. Why was Sumter taken off the
19 list?

20 A. There was a question as to -- The landlord had
21 the obligation to repair the Sumter property.

22 Q. Okay.

23 A. The landlord had indicated that they would
24 prefer to ultimately just take back the
25 property and terminate the lease.

1 Q. Okay. So, your lease at the Sumter location
2 with that landlord put the burden on them?

3 A. Yes.

4 Q. But, the VEREIT leases --

5 A. That's correct.

6 Q. -- then put the burden on VEREIT?

7 A. Correct.

8 Q. Fair enough. All right.

9 A. So again, we said to these, we said because the
10 Sumter landlord wasn't going to pay, then we
11 weren't going to do the work. Presumably, if we
12 have no intention of paying for any of the
13 work, we would have also done that property.
14 The only reason we didn't do that was because
15 the Sumter landlord wasn't going to pay for it
16 and did not want to be on the hook for paying
17 for it. So, in answer to your earlier question
18 of whether we had any intention, I believe this
19 is indicia of the fact that we did intend, at
20 that point, to pay for the work. Otherwise, why
21 would we not have what, why would we have
22 dropped one off solely because someone else
23 wasn't paying for it, in answer to your
24 question.

25 Q. Okay. There's nothing here -- I've got a lot of

1 correspondence on the termination of leases.

2 A. You should have seen the box.

3 Q. Yeah. I imagine. But, I don't have any
4 information on termination of franchises.

5 A. The franchise agreements were not terminated.

6 Q. They were not?

7 A. No.

8 Q. Okay.

9 A. Well, not pursuant to this.

10 Q. Well, tell me about the termination of the
11 franchise agreements.

12 A. The franchise agreements were novated to the
13 franchisor.

14 Q. Basically, they allowed you to give it back?

15 A. Yes.

16 Q. They didn't ask for anything from you?

17 A. Correct. Well, they asked for certain things,
18 releases, transitional assistance.

19 Q. Paperwork?

20 A. No. A release is more than paperwork. I gave up
21 certain claims against them.

22 Q. Okay. Paperwork and releases and transitional
23 assistance?

24 A. Right.

25 Q. Did somebody else to pick up the location?

1 A. No. They picked up the locations.

2 Q. They did?

3 A. Yes.

4 Q. All right. So, basically -- on all of them?

5 A. One the ones that they wanted.

6 Q. Okay. So, there might be some that are still
7 closed and shuttered?

8 A. Yes.

9 Q. Okay. But, they've got --

10 A. They took them all over, they may have kept
11 them closed.

12 Q. Yeah, exactly. But, Church's --

13 A. Church's got them all. No one else got them.

14 Q. Okay. Got it. That's what I was trying to
15 figure out. But, I don't have anything here on
16 that. I've got all this stuff on the leases and
17 termination of leases. Here's two things. This
18 letter, that is a notice to your lender?

19 A. Yes.

20 Q. Saying that they terminated the leases --

21 A. The lease, yes.

22 Q. -- on December 13th, 2017?

23 A. The 12th. On the 12th, they noticed us that they
24 terminated the lease on the 13th. Yes. This says
25 that the lender, who is the secured party on

1 the collateral, can come pick their stuff up.

2 Q. I get it. Yeah. And so, what I was looking for
3 was, I had asked, one of the things I've been
4 asking for is the December 13th letter, which
5 wasn't in the stuff that was produced.

6 A. Okay.

7 Q. Where is the termination letter December 13th,
8 2017?

9 A. Without reviewing the 1,700 pages that were
10 produced, I can't tell you.

11 Q. I have reviewed it, and it's not there. That's
12 why I've been asking for it in my subsequent
13 list.

14 A. Okay.

15 Q. I made a list of everything I didn't find after
16 I went through it all.

17 A. Okay.

18 Q. And he's had it for a month, and I've been
19 trying to get this stuff.

20 A. We have produced everything we had related to
21 this, so it's possible it's no longer in our
22 custody or control.

23 Q. Yeah. Did it come from the same people --

24 A. Yes.

25 Q. -- the Kutak Rock people?

1 A. Yes.

2 Q. I don't know if I would have any luck with them
3 giving me anything that involved you, but you
4 can certainly ask for it, perhaps. I can't get
5 it.

6 A. Presumably, VEREIT would also have a copy.

7 Q. Yeah.

8 A. Which would be available --

9 Q. I would think y'all would have it, but
10 apparently not. And that letter would say why
11 they were terminating it, and that was pretty
12 much explain everything about why they
13 terminated the leases. That's really the key,
14 central thing. It will either support your
15 position or not, and I can't understand why we
16 don't have it. Do you know the reason why we
17 don't have it?

18 A. No. My understanding is we had produced all the
19 documents related to the termination that were
20 in our custody and control.

21 Q. You've said that four or five times now, and
22 I've got five notes of things that we don't
23 have.

24 A. I don't understand the question.

25 Q. You keep saying that, every time you don't have

1 it, and you keep saying, we've produced
2 everything we have, but yet you've made no
3 attempt to go back and look for any of the
4 specific stuff we said was missing and that we
5 need, and I just wondered, have you got any
6 explanation for that?

7 A. No.

8 Q. Okay. On the lease side of it, the termination
9 letters dated in August, and then an actual
10 memorandum for each location dated in March of
11 2018; is that right?

12 A. Sure. This termination terminates --

13 Q. Yeah. All the leases, everything that has been
14 put under lease, and then put under the
15 forbearance agreement, and the letters say,
16 okay, we're terminating it. And see, this is
17 why I was confused because we got, on the
18 lease, we've got August 15th, and we've got
19 these terminations that refer to the --

20 A. Right. These reserve the rights, but they don't
21 actually terminate. It's notice of termination.
22 They didn't actually terminate --

23 Q. This is the actual paperwork to terminate
24 (indicating)?

25 A. Correct. Again, thus there's a forbearance

1 between them. There's another forbearance.

2 Q. Okay. Well, that hasn't been produced.

3 A. Okay.

4 Q. Forbearance was back in May.

5 A. Right.

6 Q. The only one you've produced is this one
7 (indicating), that's in May. And then, by
8 August, they're saying, no, we're going to
9 terminate, but see, this is what I don't get.
10 If they're going ahead and terminating your
11 leases in August, then --

12 A. Clearly, it was not the case.

13 Q. Well, August 15th?

14 A. I agree.

15 Q. It says you were being terminated.

16 A. And yet, we were not until May of 2018.

17 Q. Well, maybe you were and you just didn't get
18 around to taking the lease off the record until
19 May. Back up.

20 A. Sure. But again, you were in the properties in
21 August, so how would we have been out?

22 Q. Yeah. Let's find out.

23 MR. LACOUR: Let's mark these as Fourteen.

24 (NOTICES OF LEASE TERMINATION MARKED AS
25 PLAINTIFF'S EXHIBIT NO. 14 FOR IDENTIFICATION.)

1 Q. So, Fourteen is notices of termination of your
2 lease and the landlord reserving their rights,
3 correct?

4 A. Yes.

5 Q. And they're all dated August 15th, but you can
6 look through it.

7 A. Okay. Sure.

8 Q. All right. But, you had had a forbearance
9 agreement with all concerned?

10 A. Yes

11 Q. Back in May?

12 A. Yes.

13 Q. All right. So, what document have you got to
14 show me or show me that these terminations were
15 somehow rescinded or undone after they were
16 issued in August of 2017?

17 A. I'd have to look through the document
18 production.

19 Q. Okay. Well, if they were terminated in August
20 of 2017 --

21 A. I do not believe they were. My recollection is
22 that they were not, that this notice of
23 termination notwithstanding, they were
24 ultimately terminated in 2018. Sorry, they were
25 ultimately terminated later in 2017.

1 Q. Well, that's what I'm getting at because
2 there's a mystery letter that supposedly
3 terminates them in December, but that's the one
4 that's not been produced.

5 A. All right.

6 Q. Hence, my specific request. That's why I've
7 been tracking that one thing down, it was the
8 missing piece. Now, I didn't have this piece
9 until now, but if I've got this straight, I had
10 been looking at these documents, which were
11 produced, saying you were terminated August
12 15th, and you're saying no, there's one in
13 December, but you haven't produced it, and I
14 can't find it, and that's why I'm so curious
15 about it.

16 A. Might I suggest, I would suggest it might be
17 prudent to subpoena VEREIT, the other side of
18 these documents. To the extent that they are
19 not in our custody and control, presumably,
20 they are in theirs.

21 Q. Yeah. There are also in some place up in the,
22 out west where they are not subject to subpoena
23 power. Subpoenas are no good beyond
24 jurisdictional borders with state.

25 A. They are registered to do business in South

1 Carolina and have a registered agent in South
2 Carolina.

3 Q. Maybe it works and maybe it doesn't.

4 A. I can't, I can't provide you legal advice.

5 Q. I understand. The termination documents that
6 we, we haven't marked them yet, but we can.

7 A. Sure.

8 Q. But, that looks like the document eventually
9 that was recorded to memorialize the end of the
10 lease arrangement; is that correct?

11 A. Yes.

12 Q. Okay. And do you remember why it took from
13 either August or December all the way until
14 March of 2018?

15 A. Yes. There was an interim agreement in place
16 that was subsequently terminated based on the
17 liens.

18 Q. Okay.

19 A. That's my recollection.

20 Q. We don't have that agreement, either, if
21 there's another agreement.

22 A. That's the one we're talking about.

23 Q. Yeah.

24 A. That missing agreement that exists, prior to --

25 Q. Yeah. Well, we're also looking for the

1 termination for that missing agreement.

2 A. Right.

3 MR. LACOUR: Off the record.

4 (The deposition went off the record for a
5 brief period of time.)

6 (LEASE TERMINATIONS MARKED AS PLAINTIFF'S
7 EXHIBIT NO. 15 FOR IDENTIFICATION.)

8 Q. Okay. I'm going to hand you back a stack of
9 documents now that's been marked as Exhibit
10 Fifteen, sir. And as to those documents, it's
11 my understanding, from what you told me
12 earlier, those are the actual, formal
13 termination of the leases?

14 A. Yes.

15 Q. Of record, and they were recorded in each of
16 the counties?

17 A. It is my understanding that the termination of
18 memorandum of lease are the governing documents
19 that terminate the lease relationship between
20 the Steeple entities and ARC CAFEUSA001, LLC,
21 the landlord of the relevant properties.

22 Q. Okay. And so, there's not a lot here,
23 substantively, other than the termination of
24 the lease relationship. Is there any other
25 litigation still pending --

1 A. No.

2 Q. -- between the landlord and any of the entities
3 you have control of?

4 A. No. All actions between them have been
5 resolved.

6 Q. Okay. So, to the extent that there was money
7 owed in arrears --

8 A. It's been resolved.

9 Q. -- it's either been paid or it's been
10 compromised or something has happened to it?

11 A. Yes. All controversy between the parties has
12 been resolved.

13 Q. Okay. And what they got out of it was they got
14 control of the property back?

15 A. Among other things.

16 Q. The landlord?

17 A. Yes.

18 Q. What else did they get? I mean, what was the
19 outline of the --

20 A. They got the releases, Church's agreed to
21 assume other leases. They didn't just get the
22 properties back vacant, Church's took over the
23 properties.

24 Q. Okay.

25 A. Some of them. Others, they got back vacant and

1 subsequently sold.

2 Q. Okay. So, let me just to talk you about this
3 relationship which is just you and landlord.

4 A. Sure.

5 Q. So, the landlord got control the property?

6 A. Yes.

7 Q. And what else did the landlord get, did you pay
8 part of the money you owed them?

9 A. I don't recall the specific financial terms. I
10 don't think --

11 Q. Again, it was either paid or compromised?

12 A. Yes. It was certainly compromised. It was not
13 paid in full.

14 Q. Fair enough. So, did the landlord get anything
15 else?

16 A. From Steeple or from any other parties?

17 Q. Steeple and State Acquisitions and Hamilton.
18 Oh, Hamilton wasn't a part of it?

19 A. No. Well, they actually, they got a release of
20 all claims and what have you.

21 Q. Yeah. Control of the property and the release,
22 they gave a release.

23 A. A limited release.

24 Q. Okay. Is there something they're still holding
25 your feet to the fire on?

1 A. I would have to look through the, I would have
2 to look.

3 Q. All right. Okay. And then, as far as the
4 Church's people, the franchisor, you're saying
5 they basically swooped in and then --

6 A. Yes. They took over the properties.

7 Q. And leased them from ARC?

8 A. Yes. And we consented, we gave, part of what we
9 gave VEREIT was the consent to let them come in
10 without us having, there was no downtime, there
11 was no diminution of the property. We agreed to
12 leave everything in place.

13 Q. Yeah. Okay.

14 A. Church's, we let Church's hire all of our
15 employees.

16 Q. Okay. And then, y'all swapped releases, beyond
17 that?

18 A. Yes.

19 Q. And again, past due amounts were either paid or
20 compromised?

21 A. Yes. Compromised.

22 Q. Okay. Well, that puts State and the Steeple
23 entities perhaps out from under some of the
24 debt?

25 A. Yes.

1 Q. Okay.

2 A. But, at a considerably lower price than if they
3 would have been able to sell the properties,
4 sell the business in the ordinary course.

5 Q. Right.

6 A. The precipitating factor of selling the
7 business or handing the business back to
8 Church's versus being able to restructure,
9 refinance, renegotiate was based on the liens.

10 Q. Yeah. Okay. Well, to the extent that there's a
11 counterclaim in this case for damages, you may
12 claim you've lost some money because of one
13 circumstance, but you would have to give credit
14 for where you got exonerated from debt in other
15 circumstance. When the discovery responses were
16 provided, we weren't given any calculation of
17 damages. Do you have any today?

18 A. Not yet.

19 Q. Not yet. Okay. What is the holdup?

20 A. We're still assessing the final liabilities.

21 Q. This case has been around for a year. How long
22 is it going to take?

23 A. I don't have that answer.

24 Q. Okay. What are you waiting on? What's the
25 holdup? What's not yet resolved? What's unknown

1 now a year after?

2 A. I don't know.

3 Q. Okay. What's preventing you from giving us
4 final numbers?

5 A. I don't, I don't have the underlying
6 information with me.

7 Q. Okay.

8 A. We've not closed out tax year 2018 yet, which
9 was the year in which the properties were
10 transferred over.

11 Q. Okay.

12 A. So, we don't have the final accounting of that
13 year, nor do we have an assessment of the
14 liabilities. So, to come up with a number for
15 the diminution of value, we won't have that.
16 Presumably, by the time the 2018 tax returns,
17 which are on extension, are filed, we would
18 have a complete accounting of 2018.

19 Q. Okay. Fair enough. When do expect that's going
20 to happen?

21 A. Those tax returns are due September 15th, 2019.

22 Q. All right. There are three letters here. Well,
23 that's an email, so we'll go with two letter, I
24 guess.

25 (MARSH LICENSURE LETTERS MARKED AS

1 PLAINIFF'S EXHIBIT NO. 16 FOR IDENTIFICATION.)

2 Q. Take a look at these.

3 A. Okay. Sure.

4 Q. So, let me state for the record we marked two
5 letters --

6 A. Sixteen.

7 Q. We marked two letters as one exhibit, Sixteen.
8 One is dated October 31st, 2017, and the other
9 is December 19th, 2017. Did you write both of
10 those letters?

11 A. I did.

12 Q. Did you say in both of those letters that Marsh
13 Waterproofing out of Texas was your general
14 contractor?

15 A. I did.

16 Q. Okay. And why did you say that?

17 A. Based upon my information and belief, Marsh
18 Waterproofing was acting as my general
19 contractor.

20 Q. Okay. Was there anything about that in the
21 proposal we marked earlier?

22 A. No. The basis of my belief as to the nature of
23 their work was informed by the engineering
24 proposal or the engineering recommendations,
25 which I don't remember which exhibit it is.

1 Q. You read something into the engineering report?

2 A. Yes.

3 Q. I'll hand you back the one from Dorchester Road
4 you looked at earlier.

5 A. Thank you.

6 Q. Okay. So, the first thing -- Well, first look
7 at what you want to, and then I'll ask you some
8 questions.

9 A. Okay. So, with relation to the structural
10 repair or are you just asking about the
11 contracting work?

12 Q. The first question I want to ask you is, you
13 said that there was something in the
14 engineering proposal that made you think Marsh
15 was a general contractor; is that right?

16 A. No. There's something in here that indicated
17 the work they were providing, and that work --

18 Q. Okay. Go ahead. And what is that?

19 A. So, the nature of the work being, the nature of
20 what was required to be done by Marsh.

21 Q. Okay.

22 A. Similarly, Marsh's web site referred to their
23 contracting services, and my discussion with
24 Church's referred to them as providing general
25 contractor services.

1 Q. What about the nature of the work that they
2 performed?

3 A. Structural repairs to the foundation.

4 Q. Okay. I asked you a series of questions
5 earlier, and we talked about the fact that the
6 last work was the work done by Marsh?

7 A. Yes.

8 Q. Which was to put the foam underneath there?

9 A. The Alchemy Polymers Lift 430 foam.

10 Q. That fancy foam. That's right. I asked you a
11 series of questions.

12 A. Yes, sir.

13 Q. And I asked you, was there any grading or
14 filling or mucking or any changes to the soil,
15 and you said no. And I asked you about plumbing
16 and electrical work, and you said no. I asked
17 you about repairs to the steel joists or
18 girders, I asked you about the block and brick
19 on stem walls and piers, and asked you about
20 concrete repairs, crack repairs.

21 A. Sure.

22 Q. And the only one of those you were the least
23 bit confused about was the concrete. So, what
24 specific work do you think Marsh did that they
25 would have to be a general contractor to do?

1 A. The Alchemy Polymers Lift foam, in review of
2 the specifications, the compressive strength of
3 the foam is adequate to support the
4 superstructure. As such, my belief is that if
5 they were applying foam for the purpose of
6 holding up the building, that that work was a
7 structural repair to the foundation.

8 Q. Right. Okay. Anything else?

9 MR. OLSON: Object to the form.

10 Q. Anything else, besides that?

11 A. That the work related to the foam and the
12 concrete constitute work of a general
13 contractor, that the work was done for the
14 purpose of holding up the building, that there
15 was no other work that was being done related
16 to improving the structural load bearing
17 members, the high density foam, that that was
18 the sole method required for remediation.

19 Q. Okay.

20 A. That there were no other requirements, other
21 than that the foam be applied to hold up the
22 superstructure.

23 Q. Yeah. That's the engineer's plan.

24 A. Yes. And so, by doing that, they were going to
25 be repairing the structure of the foundation,

1 that the work they were doing was part and
2 parcel to the repair of the structure of the
3 foundation, and that the sole work that needed
4 to be done to repair the structure of the
5 foundation was the application of the foam and
6 the concrete. That was how you repair the
7 foundation. All of the other work were things
8 you needed to do prior to the repairs. I read
9 them as preconditions to repair.

10 Q. Yes. I agree.

11 A. So, again, my basis for my assertion that they
12 were general contractors, they were providing
13 structural repair work to the foundation of a
14 commercial property.

15 Q. By installing foam?

16 MR. OLSON: Object to the form.

17 A. High density structural foam and concrete.

18 Q. And they put it in an open space?

19 MR. OLSON: Object to the form.

20 A. Yes.

21 Q. The foam went into the crawl space --

22 A. I don't, I am not prepared to speculate as to
23 how the foam was applied.

24 Q. -- the open space? No. I said where.

25 MR. OLSON: Object to the form.

1 Q. It went into the open space underneath the
2 slab, so it could hold it up?

3 A. Yes.

4 Q. Okay.

5 A. To repair the structure, for the purpose of
6 repairing the structure.

7 Q. I get that. For the purpose of holding the slab
8 up?

9 A. Yes.

10 Q. Because the floor caved in in the one in Texas,
11 right?

12 A. Yes.

13 Q. So, they put the foam in the bottom down there
14 to hold the slab up, so the floor can't cave
15 in?

16 A. So, they repaired the superstructure of the
17 building. Yes.

18 Q. Well, that's the basis of you saying that they
19 were the general contractor?

20 A. Yes.

21 Q. Which was a brainstorm you had at some point
22 after all the work was done and billed but not
23 paid for; is that right?

24 MR. OLSON: Object to the form.

25 A. I don't know that it was a brainstorm.

1 Q. Well, you got the idea from someplace. You
2 don't have to tell me if it was counsel, but
3 you got the idea after the work was done, the
4 bills were sent, and it wasn't paid for?

5 A. Yes.

6 Q. Okay. Have you told me every reason you have
7 for believing that Marsh was your general
8 contractor?

9 A. Marsh was not working as a, under anyone else's
10 supervision. Hamilton Management is certainly
11 not a general contractor, nor did it hold
12 itself out to be.

13 Q. Well, who did we coordinate with?

14 A. The management company of the franchise. You
15 also coordinated with the construction
16 department of Church's Chicken, who is not a
17 general contractor.

18 Q. Why were we coordinating with the construction
19 people at Church's?

20 A. They were the ones who originally made the
21 introduction, and they were involved.

22 Q. Yeah.

23 A. They were the ones who provided the -- We
24 didn't suggest the Alchemy Polymers, they did.

25 Q. Well, actually --

1 A. No. Actually, respectfully.

2 Q. Actually, the engineer did.

3 A. No. The engineer, it was provided to. I'll have
4 the quote from the report, if I may.

5 Q. Sure.

6 A. "The Alchemy Polymers AP Lift 430 product has
7 been reviewed. It is our understanding the
8 Church's Chicken has used the solution in the
9 past with other crawl spaces and achieved
10 favorable results." We did not provide that
11 information to the engineers, Church's did, or
12 Marsh. We had no idea that the foam was a
13 viable solution. So, again, the discussion of
14 what foam --

15 Q. You missed the point, once again. The question
16 is --

17 A. What is the basis --

18 Q. No. We've kind of gotten off on a tangent. What
19 I was trying to find out was why you were
20 asserting to the LLR that we were your general
21 contractor, other than the obvious reason, to
22 try and not have to pay us, and you had said
23 because, and you just explained, because you
24 felt that we were making a structural repair to
25 the building?

1 A. Yes.

2 Q. I get that.

3 A. Okay.

4 Q. So, then the next question, you had to say, you
5 said that we were not --

6 A. And that Marsh holds itself out, otherwise, as
7 a general contractor.

8 Q. You said we were not being supervised by
9 anyone, and I said, who were we coordinating
10 with.

11 A. Coordination and supervision are two separate
12 things.

13 Q. I understand that.

14 A. Okay.

15 Q. So, who were we coordinating with?

16 A. You were coordinating with Church's
17 construction department and Hamilton
18 Management.

19 Q. And why were we coordinating with Hamilton?

20 A. To provide access to the site.

21 Q. Great. Now, why were we coordinating with
22 Church's?

23 MR. OLSON: Object to the form.

24 A. Because they provided, they introduced the
25 general contractor.

1 Q. I'm talking about the work. What coordination
2 were we doing with Church's during the work?
3 We're not talking about before.

4 MR. OLSON: Object to the form.

5 Q. Tell me about the work. What part of that do
6 you not understand? In performing the work, are
7 you saying --

8 A. Church's made the recommendation of the
9 product.

10 Q. Are you saying that in installing the foam, we
11 had to talk to the people at Church's before we
12 started work on location?

13 MR. OLSON: Object to the form.

14 A. Yes.

15 Q. Well, tell me why.

16 A. Because the product recommendation --

17 Q. No, sir.

18 MR. OLSON: Object to the form.

19 Q. It has nothing to do with the product.

20 A. With all due respect, I'm answering your
21 question.

22 Q. No, you're not. You're going, you're dancing
23 around it. The question is, with whom did we
24 have to coordinate to get the work done? You
25 said Hamilton, for access?

1 A. Yes.

2 Q. That has to do with getting the work done at
3 the job, on the day, and that's all it has to
4 do with.

5 A. Yes.

6 Q. Okay. What did we have to communicate with
7 Church's about on the day at the job to get the
8 work done?

9 MR. OLSON: Object to the form.

10 A. Nothing.

11 Q. That's what I thought. Now, is there something
12 else you wanted to tell me.

13 A. That Marsh communicated with Church's regarding
14 the product specification, what was going to be
15 used. We did not provide any information
16 regarding the size of the crawl space or
17 anything of the sort.

18 Q. Sure. I don't know that Marsh provided anything
19 to anybody. Marsh was provided the same
20 engineering reports to come up with a price.
21 What makes you think Marsh had any upfront
22 involvement with any of this?

23 A. We were not a party to the discussion. So,
24 Marsh provided us the pricing, prior. We didn't
25 say, hey, Marsh, go use the AP foam.

1 Q. No. You sent them the reports.

2 A. Right.

3 Q. And they came up with a price by the report,
4 which said to use the AP foam.

5 A. To meet the engineer's recommendations.

6 Q. Am I missing something here? Are you saying
7 that you did not send the engineering reports
8 to Marsh for the locations he was supposed to
9 repair?

10 A. No. That's not what I'm saying.

11 Q. Because my understanding was you did.

12 A. We did.

13 Q. Not you, Mr. Vaughn sent them.

14 A. I agree that the, I agree that the reports were
15 sent to Marsh prior to, following the reports
16 be completed by the engineers, prior to Marsh
17 sending over a quote. I agree.

18 Q. And it may be the disconnect here is, I tried
19 to ask you about your background, but I'm not
20 going to be allowed to go there, but maybe you
21 don't know anything about construction, but in
22 the world of construction, engineers design
23 things, contractors just build them. Okay?

24 A. Great. And the contractor that is responsible
25 for building it is a general contractor.

1 Q. No. That just doesn't follow. It has nothing to
2 do with anything. You can be licensed at much
3 less than a general contractor or no license at
4 all and perform work in the State of South
5 Carolina.

6 MR. OLSON: Object to the form.

7 A. Are you asking me a question or telling me
8 about the law?

9 Q. I'm trying to figure out why you took it upon
10 yourself to write these two letters here, and
11 we're coming back around full circle, and the
12 only thing you can tell me is you think that
13 what Marsh did resulted in a structural repair
14 to the building?

15 A. I do.

16 Q. And I get that. But, that's how we got off on
17 that tangent. All right. Were there any
18 concrete repairs to the building, other than
19 where you take the door off of that entrance
20 hole to get under the building?

21 A. Other than the four inches of concrete applied
22 after completion?

23 Q. Yeah.

24 A. I'm not aware of any other concrete.

25 Q. Got you. Okay. All right. And you don't have

1 any idea what the value of that concrete work
2 is, do you?

3 A. the I believe the total price for the work is
4 \$36,800.

5 Q. Correct.

6 A. There was no itemization provided. It was all
7 part and parcel.

8 Q. So, you don't have any clue about what the
9 concrete portion of that repair is, do you?

10 A. There was no itemization.

11 Q. Do you have any idea what the concrete portion
12 of the repair was, yes or no?

13 A. No.

14 Q. Thank you.

15 A. It was not itemized. It is not possible to be
16 discerned. We could not buy them separately.

17 Q. It's really possible for it to be determined.
18 All you need to know is what the cost of that
19 work was, which you can get a lot of different
20 ways. My question is, did you ever get it?

21 A. No.

22 Q. Okay. And the last thing, I guess, is some of
23 these earlier ones but I've got to find it.

24 A. I wish to supplement my answer to why I thought
25 they were a contractor.

1 Q. Sure. You can.

2 A. Per my letter, I confirmed the requirement that
3 all contractors engaging in contracting work
4 with a total cost of construction in excess of
5 \$5,000 are required to be licensed as general
6 contractors. My definition of general
7 contractor was taken from that.

8 Q. Fair enough. Well, \$5,000 is the easy part. Do
9 you know what and where you find what's the
10 work of a general contractor in the State of
11 South Carolina?

12 A. I don't understand the question.

13 Q. Well, a \$5,000 minimum amount is one part of
14 the puzzle.

15 MR. OLSON: Object to the form.

16 Q. Do you know where you look to find out what is
17 considered --

18 A. South Carolina Annotated Code.

19 Q. Yes, sir. Do you know what section?

20 A. I do not.

21 Q. Okay. Have you ever looked it up?

22 A. I have.

23 Q. And what did you find?

24 A. That the contracting work with a total cost of
25 construction in excess of \$5,000. I'm not going

1 to be able to provide a more specific
2 definition, based upon my review. I don't have
3 that, I don't know the working definition off
4 the top of my head from the South Carolina
5 code. But, I have answered your question that
6 that was where I consulted.

7 Q. There's two components, and you looked at the
8 right section. And that statement says, general
9 contracting work, \$5,000. Given it's more than
10 \$5,000, my question is, did you ever look up
11 the part of the code that defines what is
12 general contracting?

13 A. Yes.

14 Q. And what did you find?

15 MR. OLSON: Object to the form.

16 A. I don't recall.

17 Q. Okay.

18 A. I found that the work completed by Marsh met
19 the definition.

20 Q. Not if you looked it up.

21 MR. OLSON: Object to the form.

22 A. With all the respect, I've testified.

23 Q. You have. But, you didn't look in the right
24 place, apparently.

25 A. With all due respect, that's not a question.

1 Q. I'm looking for one more email, I promise, and
2 then we'll be done. But, I've got to find it. I
3 thought I marked it, but I don't see it in the
4 stack of what we marked. So, if I don't find it
5 here, I'll go back through that stack.

6 (The deposition went off the record for a
7 brief period of time.)

8 Q. Okay. It was Exhibit Ten, and we've already
9 talked about it.

10 A. Okay.

11 Q. Nothing we've talked about changes any
12 testimony you gave or what you think about
13 Exhibit Ten, does it?

14 A. I don't believe so.

15 Q. I mean, whatever is there. It goes back to an
16 original --

17 A. Right. I agree. Exhibit.

18 Q. Yeah.

19 A. I accept Exhibit Ten.

20 Q. You were talking about, it says, your
21 contractor, but you were talking about Osiris
22 going ahead of us.

23 A. And Roto-Rooter.

24 Q. And Roto-Rooter.

25 A. Yes.

1 Q. Okay. Well, it only says contractor, singular.

2 A. Again, we --

3 Q. Well, it changed.

4 A. Right.

5 Q. You said it changed because you started with
6 Osiris and then you changed to Roto-Rooter?

7 A. Yes. That's correct.

8 Q. Got it, got it. I understand. Okay. I think
9 that's all the questions I have.

10 MR. OLSON: I have like two follow-up
11 questions, and I don't think they will create
12 more questions.

13 MR. LACOUR: Careful.

14 CROSS EXAMINATION BY MR. OLSON:

15 Q. Alex, is it your position that when a
16 contractor presents itself as doing work and
17 agrees to do work in a particular state, that
18 it is fairly reasonable to assume that they are
19 licensed in that state?

20 A. Yes, particularly when they had given
21 indication that they had licenses in their
22 trade marketing.

23 Q. Is in your opinion that the due diligence
24 should fall upon you to determine whether
25 they're licensed before the work is performed

1 or on them to be forthwith as to whether they
2 are or not, at that same time?

3 MR. LACOUR: Object to the form.

4 A. The obligation for licensure would remain on
5 the licensee, as opposed to their client, and
6 further, that the diligence that we might have
7 otherwise engaged in with a contractor that we
8 found, say on Craigslist, we didn't undertake
9 based upon the fact that they were Church's
10 recommended contractor, and that gave us a
11 degree of comfort that they had due inquiry and
12 experience.

13 Q. Last question, as far as the forbearance
14 agreement that has been entered into evidence,
15 is it your position that the mechanic's lien
16 caused that agreement to blow up or
17 negotiations of that agreement to blow up?

18 A. Based upon the conversation that I had with
19 Glenn Kindred of VEREIT, he made clear to me in
20 no uncertain terms that the straw that broke
21 the camel's back or the precipitating event or
22 the determining reason why VEREIT was no longer
23 willing to continue on in forbearance or help
24 us negotiate was because a lien was filed
25 against their property and that was something

1 that had other implications for them and
2 required them to take prompt action, that but
3 for those liens, we would not have been in the
4 position that we were in with regard to
5 termination.

6 Q. Now, did Glenn elaborate as to certain
7 pressures that they might, may or may not be
8 feeling due to lien being filed?

9 A. Yes. He indicated that the lien was a source of
10 stress for VEREIT because it created an
11 encumbrance on their properties that they
12 owned, as we were simply tenants. And so, but
13 for the lien filing, they would have been in a
14 position to work out and provide us more
15 flexibility, but that they had to terminate
16 once the lien was filed.

17 Q. Is Glenn the best person to talk to about the
18 rationale behind the opinion he communicated to
19 you?

20 A. Yes. Glenn was the senior officer at VEREIT who
21 engaged in all of the substantive negotiations
22 and was the point of contact for all things
23 related to the landlord/tenant discussions,
24 negotiations. Debbie Hester provided certain
25 administrative information, but Glenn was, my

1 understanding, the go-to person.

2 Q. That's all I have.

3 THE WITNESS: I'm going to stand up, but
4 then you're going to ask me a question, right?

5 MR. LACOUR: Well, yeah. I get to follow up.

6 RE-DIRECT EXAMINATION BY MR. LACOUR:

7 Q. So, in your discussions with Glenn --

8 A. Yes. Kindred at VEREIT.

9 Q. Did you have any discussion and all with Glenn
10 about the distinction between the lien
11 attaching to the fee interest in the property
12 and a lien attaching to your leasehold interest
13 in the property?

14 A. No.

15 Q. Do you know if Glenn understood the difference?

16 A. I would have no way of knowing what Glenn's
17 understanding was.

18 Q. Okay. Fair enough. And with regard to the basis
19 for your answer the second question where you
20 expressed an opinion, I objected to the
21 opinion. So, you need to tell me about your
22 experience in hiring contractors to make
23 repairs to buildings. Is this the first time
24 you've ever done it?

25 A. No.

1 Q. Okay. And what type of repairs have you hired
2 people to do in the past?

3 A. Numerous.

4 Q. Okay.

5 A. Electrical, plumbing, drywall.

6 Q. Okay.

7 A. Alterations, roofing repair.

8 Q. Okay. Electrical and plumbing and drywall, none
9 of those were involved in this scope of work by
10 Marsh Waterproofing, correct?

11 A. That's correct.

12 Q. And neither was any roofing?

13 A. Correct.

14 Q. Alterations in the nature of walls, changes in
15 walls or ceilings or floors, we didn't do that,
16 either, did we?

17 MR. OLSON: Object to the form.

18 A. Agreed.

19 Q. All right. So, when you had, in your previous
20 experience, hired people to make the types of
21 repairs you're talking about, had you hired
22 general contractors?

23 A. Yes.

24 Q. Okay. Fair enough. That's all the questions I
25 have.

1 A. Thank you for your time.

2 Q. You're welcome. Thank you. I appreciate it.

3

4 (Deposition concluded at 1:47 p.m.)

5

6

* * *

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 STATE OF SOUTH CAROLINA)
2 : C-E-R-T-I-F-I-C-A-T-E
3 COUNTY OF CHARLESTON)

4
5
6 I, John P. Crawford, Jr., Court Reporter and Notary
7 Public, certify that I did have Alexander Chatfield
8 Burns to appear before me at 10:20 a.m. on Wednesday,
9 May 15th, 2019, at Clawson and Staubes, LLC, 126th, Seven
10 Farms Drive, Suite 200, Charleston, South Carolina; that
11 the witness was sworn and cautioned to tell the truth,
12 and that the pages constitute a true and accurate
13 transcript of the statement given at that time and
14 place.

15 I further certify that I am not of counsel or kin to
16 any of the parties to this cause of action, nor am I
17 interested in any manner in its outcome.

18 IN WITNESS WHEREOF, I have hereunto set my hand and
19 seal this the 20th day of May 2019.

20
21
22
23
24
25

Notary Public for South Carolina
My Commission Expires: April 4th, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Circuit Case No. 2018-CP-10-00262

Marsh Waterproofing, Inc.

Respondent,

v.

Steeple Dorchester, Ltd. and
Hamilton Management
Services Company, Inc,

Appellants.

NOTICE OF APPEAL

Appellants, Steeple Dorchester, Ltd. and Hamilton Management Services Company, Inc., hereby serves their Notice of Appeal in the matter captioned above as to the Final Order of the Honorable Frank R. Addy, Jr., dated March 11, 2020.

Appellants received written notice of entry of Honorable Frank R. Addy, Jr.'s Form Four Order on February 12, 2020. See Appellants' Exhibit No. 1. On February 24, 2020, Appellants, by and through the undersigned counsel, and pursuant to Rules 59(a) and (e), SCRCF, timely filed their Motion to Alter or Amend the Court's Order dated February 12, 2020, which, upon information and belief, was not considered by the Court, as a formal Final Order had not yet been filed. See Appellants' Exhibit No. 2. On March 9, 2020, the Court issued a Final Order, which was amended on March 11, 2020, at the request of the Plaintiff/Respondent by its Motion to Alter or Amend the Judgment. On March 23, 2020, Appellants, by and through the undersigned counsel, and pursuant to Rules 59(a) and (e), SCRCF, timely filed their Motion for an Order to Alter or Amend the Court's Final Order filed on March 11th, 2020. See Appellants' Exhibit No. 3. On May 11, 2020, Appellants received written notice of the Court's Order denying the Appellants' Rule 59 Motion to Alter or Amend Judgment of the March 11, 2020 Final Order. See Appellants' Exhibit No. 4. As such, Appellants timely files this Notice of Appeal of the Honorable Frank R. Addy, Jr.'s March 11, 2020, Final Order.

ROA000344

June 10, 2019



C. Clay Olson, SC Bar No. 17007
Harper Little, PLLC
164 Market Street Suite 139
Charleston, SC 29401
clay@harperlittlelaw.com
Attorney for Appellants

cc: Albert A. Lacour, III., Esq.
CLAWSON and STAUBES, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
alacour@clawsonandstaubes.com
Attorney for Respondent