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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2016-CP-10-1833
Appellate Case No. 2021001055

Andrew and Kimberly McIntire……. *Appellants*,

v.

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

AND

Seaquest Development Company, Inc. ..... Third-Party Plaintiff/*Appellant*,

v.

Architectural Products of Charleston, LLC, and Sealtight of South Carolina, LLC, Third-Party Defendants,

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

RECORD ON APPEAL
VOL. I

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FORM 4

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

FILED
2017 MAY -1 AM 11:52
JULIE J. ARMSTRONG
CLERK OF COURT

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 **CP**-10-1833

Andrew and Kimberly McIntire,

PLAINTIFF(S)

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

DEFENDANT(S)

Submitted by: Jean H. Toal	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

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

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

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

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.
Additional Information for the Clerk : order attached Dismissing entire action

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge	2758 **Judge Code**	1-17-17 **Date**

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

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

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

ANDREW and KIMBERLY McINTIRE,

Plaintiffs,

v.

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

Defendants.

SEAQUEST DEVELOPMENT COMPANY, INC.,

Third-Party Plaintiff,

v.

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

Third-Party Defendants.

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

ORDER OF DISMISSAL

#1

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

(1) Seaquest's[1] **Motion to Dismiss or Stay Proceedings** filed June 17, 2016 ("Seaquest's Motion to Dismiss");

(2) Red Bay's[2] **Motion to Dismiss or for Stay of Proceedings** filed June 23, 2016 ("Red Bay's Motion to Dismiss");

(3) The McIntires'[3] **Motion to Stay and to Compel Arbitration** filed July 27, 2016 (the "Motion to Compel Arbitration"); and

(4) The McIntires' **Motion for Protective Order as to Requests for Admissions of Seaquest Development Company** filed August 15, 2016 (the "Motion for Protective Order").

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

BACKGROUND

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

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

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

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

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

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

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

DISCUSSION

I. Seaquest's Motion to Dismiss

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

#3

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

[4] As used in the Right to Cure Act,

> "Construction defect" means a deficiency in or a deficiency arising out of the design, specifications, surveying, planning, supervision, or observation of construction or construction of residential improvements that results from any of the following:
>
> (a) defective material, products, or components used in the construction of residential improvements;
>
> (b) violation of the applicable codes in effect at the time of construction of residential improvements;
>
> (c) failure of the design of residential improvements to meet the applicable professional standards of care at the time of

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

---

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

§ 40-59-820(3).

[5] As used in the Right to Cure Act,

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

§ 40-59-820(4).

[6] As used in the Right to Cure Act,

#4

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

§ 40-59-820(2).

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

[8] As used in the Right to Cure Act,

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

§ 40-59-820(1) (emphasis added).

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

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

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

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

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

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

---

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

#6

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

II. The Motion to Compel Arbitration

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

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

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

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

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

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

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

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

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

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

Additionally, the McIntires are contractually barred from demanding arbitration. The McIntires are attempting to invoke provisions in their contract[10] with Seaquest to compel arbitration. Specifically, they claim that Section 4.6 of that contract requires arbitration.

#9

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

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

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

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

#10

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

would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7." The applicable statute of limitations for the claims brought by the McIntires is three years as set forth in S.C. Code Ann. § 15-3-510, *et seq.* Paragraph 13.7.1.3 states, "As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued . . . ." Accordingly, the McIntires' demand for arbitration had to have been made sometime prior to 2012.[11] The statute of limitations to demand arbitration, as calculated by the contract and by the arbitration clause contained therein, has run.

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

#11

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

CONCLUSION

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

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

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

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

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

AND IT IS SO ORDERED.

Jean Hoefer Toal
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina

Jan. 17, 2017

#12

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(D)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Andrew and Kimberly McIntire, Appellants,

v.

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

Of which Seaquest Development Company, Inc. is the Respondent.

Appellate Case No. 2017-001270

Appeal From Charleston County
Jean Hoefer Toal, Circuit Court Judge

Opinion No. 2019-UP-413
Heard November 5, 2019 – Filed December 31, 2019

REVERSED AND REMANDED

Andrew K. Epting, Jr., Jaan Gunnar Rannik, and Michelle N. Endemann, all of Andrew K. Epting, Jr., LLC, of Charleston, for Appellant.

Edward D. Buckley, Jr., Stephen Lynwood Brown, Jason Alan Daigle, and Russell Grainger Hines, all of Young Clement Rivers, LLP, of Charleston, for Respondent.

PER CURIAM: In this residential construction defect case, Andrew and Kimberly McIntire (the McIntires) appeal from the trial court's denial of their motion to compel arbitration with general contractor Seaquest Development Company, Inc. (Seaquest). The McIntires argue the trial court erred in (1) not ordering the dispute to arbitration when the parties' contract contained a valid arbitration clause; (2) addressing issues of statute of limitations, right to cure, and waiver when the court's sole jurisdiction was to decide the question of arbitrability; and (3) dismissing the case for failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act ("Right to Cure Act").[1] We reverse and remand the case for arbitration.

FACTS

The McIntires entered into a written contract with Seaquest for the construction of a home in Mount Pleasant in August 2007. A certificate of occupancy was issued in September 2008. On April 8, 2016, the McIntires filed an action against Seaquest, alleging defects in the home's construction and asserting causes of action for negligence and gross negligence, breach of warranty of habitability, negligent misrepresentation and constructive fraud, and breach of warranty of good and workmanlike work. Prior to bringing the action, the McIntires had discovered a number of alleged construction defects in their home and hired experts and began repairs without notifying Seaquest. The repairs were substantially completed before the lawsuit was filed or were completed soon thereafter.

On June 17, 2016, Seaquest filed a motion to dismiss or stay proceedings, arguing the McIntires failed to comply with the Right to Cure Act. On July 27, 2016, the McIntires filed a motion to stay and compel arbitration. The McIntires also filed a

[1] S.C. Code Ann. § 40-59-810, *et seq*. (2011).

motion on August 15, 2016, seeking an order staying their responses to Seaquest's requests for admission until the court ruled on Seaquest's motion. After a hearing on October 13, 2016, the trial court granted Seaquest's motion to dismiss and denied the McIntires' motion to compel arbitration. This appeal follows.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the trial court's factual findings, this court will not overrule those findings. *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

LAW/ANALYSIS

I. Arbitration

The McIntires argue the trial court erred in not ordering the dispute to arbitration when the parties' contract contained a valid arbitration clause. We agree.

"The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties." *Hous. Auth. of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003). "Arbitration is available only when the parties involved contractually agree to arbitrate." *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a) (2005) ("On application of a party showing an agreement described in § 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied."). "There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

The written contract between the McIntires and Seaquest provides at the top of the contract:

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

The contract further provides, "AIA Document A201 – 1997 General Conditions of the Contract for construction is adopted in this document by reference." AIA Document A201, section 4.6 states that "[a]ny Claim arising out of or related to the Contract . . . shall . . . be subject to arbitration."

The right to enforce an arbitration clause may be waived. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). In *Rhodes*, this court stated three factors our courts consider to determine if a party waived its right to compel arbitration:

> (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others.

Id.

"[T]o establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "To establish prejudice, the non-moving party must show something more than 'mere inconvenience.'" *Rhodes*, 374 S.C. at 127, 647 S.E.2d at 251 (quoting *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76-77 (Ct. App. 2003)). "To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took 'advantage of the judicial system by engaging

in discovery.'" *Id*. (quoting *Evans*, 352 S.C. at 548, 575 S.E.2d at 76). "'[A] substantial length of time' varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration." *Id.* at 126, 647 S.E.2d at 251. "Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts." *Id*. at 127, 647 S.E.2d at 252.

The trial court found the McIntires had "engaged in extensive discovery in that they retained forensic and construction liability and repair experts to investigate, document, and repair the alleged defects at their house." The repairs to the McIntires' home were substantially completed prior to the filing of the motion to compel arbitration, which the court found resulted in material prejudice to Seaquest because it precluded "Seaquest from investigating, inspecting, and/or challenging the McIntires' claims." The trial court also found a "substantial amount of time transpired between the time the McIntires engaged their experts and the time they moved to compel arbitration."

The McIntires argue the trial court erred in finding they waived their arbitration right because hiring a contractor to inspect and repair issues with their residence does not amount to engaging in discovery. The McIntires also argue the trial court erred in focusing on the amount of time between when the McIntires engaged their experts and the filing of the motion to compel arbitration, instead of on the amount of time between the filing of the suit and the filing of the motion as set forth in *Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251.

Based on our review, we find the evidence in the record does not support the trial court's finding that the McIntires participated in discovery, much less "extensive discovery," or retained "forensic and construction liability and repair experts." Also, the McIntires moved to compel arbitration on July 27, 2016, two days after they received notice the last defendant had been served with their complaint.[2] The complaint was filed on April 8, 2016. Thus, we find a "substantial length of time" did not occur between the commencement of the action and the commencement of the motion to compel arbitration. Accordingly, we reverse on this issue and remand the case for arbitration.

---

[2] The McIntires' counsel told the court it took a while to serve all the defendants because many of the defendant companies were out of business.

II. Jurisdiction and Right to Cure Act

The McIntires argue the trial court erred in addressing the issues of statute of limitations, Right to Cure Act, and waiver when the court's sole jurisdiction was to decide the question of arbitrability. The McIntires also argue the trial court erred in dismissing the case for failure to comply with the Right to Cure Act.

Because we already determined the trial court erred in finding the McIntires waived their arbitration right and remand for arbitration, we need not address these issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

CONCLUSION

Accordingly, the decision of the trial court is

REVERSED and REMANDED.

SHORT, THOMAS, and GEATHERS, JJ., concur.

The South Carolina Court of Appeals

Andrew and Kimberly McIntire, Appellants,

v.

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

Of which Seaquest Development Company, Inc. is the Respondent.

Appellate Case No. 2017-001270

ORDER

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

Paula A. Thomas J.

J.

Paul E. Short, Jr. A.J.

Columbia, South Carolina

FILED

March 27, 2020

cc:
Andrew K. Epting, Jr., Esquire
Jaan Gunnar Rannik, Esquire
Edward D. Buckley, Jr., Esquire
Jason Alan Daigle, Esquire
Russell Grainger Hines, Esquire
Stephen Lynwood Brown, Esquire
Michelle Nicole Endemann, Esquire

The Supreme Court of South Carolina

Andrew and Kimberly McIntire, Respondents,

v.

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

Of which Seaquest Development Company, Inc. is the Petitioner.

Appellate Case No. 2020-000648

ORDER

Based on the vote of the Court, the petition for a writ of certiorari to the court of appeals is denied.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

December 11, 2020

cc:
Andrew K. Epting, Jr., Esquire
Jaan Gunnar Rannik, Esquire
Michelle Nicole Endemann, Esquire
Edward D. Buckley, Jr., Esquire
Jason Alan Daigle, Esquire
Russell Grainger Hines, Esquire
Stephen Lynwood Brown, Esquire
The Honorable Jenny Abbott Kitchings

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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FAX: (803) 734-1839
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December 14, 2020

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Andrew McIntire v. Seaquest Development
Lower Court Case No. 2016CP1001833
Appellate Case No. 2017-001270

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V Claire Allen

CLERK

Enclosure

cc: Andrew K. Epting, Jr., Esquire
Jaan Gunnar Rannik, Esquire
Edward D. Buckley, Jr., Esquire
Jason Alan Daigle, Esquire
Russell Grainger Hines, Esquire
Stephen Lynwood Brown, Esquire
Michelle Nicole Endemann, Esquire

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1001833

Andrew Mcintire et al
PLAINTIFF(S)

Seaquest Development Company Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **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:

Plaintiffs' and Seaquest's joint motion for clarification is hereby denied. Defendants requested to submit one proposed formal order for the court's review within 10 days.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/18/2021 .

Carolina Window & Millwork LLC
Coastal Window & Door Center of Charleston LLC
Michigan Prestain Co
Quality Cedar Products Inc of Michigan
Casteen Custom Cabinets
Michael Casteen
Carolina Window & Millwork Omni Glass Industries LLC
Architectural Products of Charleston LLC

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2021 Aug 19 9:51 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2021 Aug 19 9:51 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

ELECTRONICALLY FILED - 2021 Aug 19 9:51 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

Charleston Common Pleas

Case Caption:	Andrew Mcintire , plaintiff, et al VS Seaquest Development Company Inc , defendant, et al
Case Number:	2016CP1001833
Type:	Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

ELECTRONICALLY FILED - 2021 Aug 23 4:23 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2016-CP-10-01833
ANDREW and KIMBERLY MCINTIRE,)	
)	
Plaintiffs,)	**ORDER DENYING PLAINTIFFS' AND SEAQUEST DEVELOPMENT COMPANY, INC.'S JOINT MOTION FOR CLARIFICATION**
)	
vs.)	
)	
SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC n/k/a CAROLINA WINDOW & MILLWORK-OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN d/b/a MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO., INC.; JERRY COMER d/b/a JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; and NEW SOUTH CONSTRUCTION SUPPLY, LLC,)	
)	
Defendants.)	
)	
SEAQUEST DEVELOPMENT COMPANY, INC.,)	
)	
Third-Party Plaintiff,)	
)	
v.)	
)	
ARCHITECTURAL PRODUCTS OF CHARLESTON, LLC; and SEALTIGHT OF SOUTH CAROLINA, LLC,)	
)	
Third-Party Defendants.)	

ELECTRONICALLY FILED - 2021 Aug 23 4:23 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

This matter came before the Court upon Plaintiffs' and Seaquest Development Company, Inc.'s ("Seaquest") joint motion for clarification. For the reasons set forth below, the Court DENIES the joint motion for clarification.

Factual Background & Procedural History

Plaintiffs commenced this construction defect action against the general contractor, Seaquest, and fourteen other subcontractors (collectively, the "Subcontractor Defendants") on or about April 8, 2016. Plaintiffs' complaint contained causes of action against Seaquest and the Subcontractor Defendant for (1) negligence/gross negligence, (2) negligent misrepresentation, (3) constructive fraud, and (4) breach of the implied warranty of workmanship. Seaquest answered and asserted cross-claims against the Subcontractor Defendants for (1) equitable indemnity, (2) contribution, (3) breach of contract, (4) negligence, and (5) breach of express and implied warranties. Seaquest also asserted a third-party complaint against Architectural Products of Charleston, LLC and Sealtight of Charleston, LLC (also referred to collectively herein as "Subcontractor Defendants").[1] The Subcontractor Defendants who appeared in this action each separately filed an answer denying all liability and raising various affirmative defenses.

In conjunction with Seaquest's answer, it also filed a contemporaneous motion to dismiss or, alternatively, to stay proceedings on the basis that Plaintiffs failed to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, codified at S.C. Code Ann. § 40–59–810, et seq. (the "Right to Cure Act"). Plaintiffs filed a cross-motion to refer the case to arbitration. Importantly, the Right to Cure Act issue is dispositive as to all defendants, whereas the arbitration issue only affects Seaquest.

[1] "Subcontractor Defendants" therefore includes all named defendants (other than Seaquest) and third-party defendants.

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Both motions were heard by Chief Justice Toal on October 13, 2016. Chief Justice Toal ruled in favor of Seaquest on both motions. In her Order January 17, 2017 and filed May 1, 2017 (the "Order"), Chief Justice Toal stated that "this case is DISMISSED in its entirety" and that "this case shall be and hereby is DISMISSED." See Order Grant. Mot. to Dismiss at 2 & 12. The Order also provides "the remaining motions (Red Bay's Motion to Dismiss and the McIntires' Motion for Protective Order) are MOOT as this case is DISMISSED in its entirety." See id. at 2 . The Form 4 filed with Order also stated that the Order ended the case and was "dismissing this action." See Form 4 to Order Grant. Mot. to Dismiss at 1. The Plaintiffs and Seaquest concede in the joint motion for clarification that Chief Justice Toal's Order did dismiss the entire case. See Pls.' & Seaquest's Joint Mot. for Clarification at 2.

No party filed a motion to alter or amend or otherwise sought clarification of the Order. Plaintiffs ultimately filed a notice of appeal from the Order naming Seaquest as the only respondent and chose not to join any other party to the appeal. Seaquest did not cross-appeal the Order dismissing its claims against the Subcontractor Defendants. The Subcontractor Defendants did not participate in the appeal in any manner, and no issue framed by Plaintiff or Seaquest addressed the dismissal of the claims against the Subcontractor Defendants. Rather, the only issues framed and argued related to the arbitrability of the issues surrounding the application of the Right to Cure Act and the proper application of those provisions where Plaintiffs had already made repairs prior to bringing suit.[2] No issues decided by the Court of Appeals addressed dismissal of the claims against the Subcontractor Defendants. The Court did not list the Subcontractor Defendants on the docket,

[2] It should be noted that the Subcontractor Defendants are not subject to arbitration as the contracts between Seaquest and the respective Subcontractor Defendants do not contain arbitration provisions. As such, arguments related to arbitrability are and were at all times inconsequential to the Subcontractor Defendants.

ELECTRONICALLY FILED - 2021 Aug 23 4:23 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

provide the notices or letters, or in any other way treat the Subcontractor Defendants as Respondents.

On December 31, 2019, the Court of Appeals issued a per curiam opinion reversing the Order and remanding the case back to the trial court to require arbitration between Plaintiffs and Seaquest. The opinion does not reference the Subcontractor Defendants at all. In the opinion, the Court of Appeals held that "a substantial length of time did not occur between the commencement of the action and the commencement of the motion to compel arbitration," and, therefore, Plaintiffs had not "waived their arbitration right." See Dec. 31, 2019 Ct. App. Order at 5. With respect to the application of the Right to Cure Act, the Court of Appeals held that "[b]ecause we have already determined the trial court erred in finding [Plaintiffs] waived their arbitration right and remand for arbitration, we need not address these issues." Id. at 6. The remittitur from the Court of Appeals was filed on December 17, 2020.

On or about February 16, 2021, Plaintiffs and Seaquest filed the instant joint motion for clarification and seeking the Court "to rule whether the Subcontractors remain parties to this action." See Pls.' & Seaquest's Joint Mot. for Clarification at 2. The motion was fully briefed by the parties, the motion is ripe for the Court's ruling. For the reasons set forth below, this Court finds that the Order dismissing the claims against the Subcontractor Defendants was an unappealed order and, therefore, became the law of the case and foreclosed Plaintiffs' and Seaquest's ability to relitigate these claims. Therefore, the joint motion for clarification is denied.

Applicable Law

I. Law of the Case:

"[A]n unappealed ruling, right or wrong, is the law of the case." Atl. Coast Builders & Contractors, LLC v. Lewis, 730 S.E.2d 282, 285 (S.C. 2012).; see also Rumpf v. Mass. Mut. Life

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Ins. Co., 593 S.E.2d 183, 189 (S.C. Ct. App. 2004) ("Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed."); see also Shirley's Iron Works, Inc. v. City of Union, 743 S.E.2d 778, 785 (S.C. 2013) ("Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case."). "Under the law of the case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." Judy v. Martin, 674 S.E.2d 151, 153 (S.C. 2009).

Chief Justice Toal dismissed the case in its entirety. The propriety of her decision is not at issue; our law is clear that an unappealed decision, "right or wrong," is the law of the case. See Atl. Coast, 730 S.E.2d at 285. Neither Plaintiffs nor Seaquest appealed the dismissal of the claims against the Subcontractor Defendants—none of the Subcontractor Defendants was included as a respondent to the appeal;[3] neither Plaintiffs nor Seaquest served a notice of appeal upon the

[3] Rule 202(a), SCACR, provides that "[t]he party appealing shall be known as the appellant and the adverse party as the respondent." See also Rule 203(c), SCACR ("A respondent may institute a cross-appeal by serving a notice of appeal on all adverse parties . . . ."). Looking to the Court of Appeals' order reversing and remanding the Order, the caption speaks for itself:

> Andrew and Kimberly McIntire, Appellants,
> v.
> Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co., Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Custom Supply, LLC, Defendants,
> ***Of which Seaquest Development Company, Inc. is the Respondent.***

See Dec. 31, 2019 Ct. App. Order at 1. (emphasis added).

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Subcontractor Defendants;[4] the Subcontractor Defendants did not participate in the appeal in any manner whatsoever;[5] and the only issues framed and argued on appeal by Plaintiffs and Seaquest related to the claims by and/or between them and not the claims related to the Subcontractor Defendants. No appeal was taken with respect to the dismissal of the Subcontractor Defendants and, accordingly, the Order dismissing such claims became a final order. See C.I.T. Corp. v. Corley, 13 S.E.2d 440, 441–42 (S.C. 1941) (the trial court's order that a third party should not be made a party to the action became law of the case after no appeal from the order was taken and the trial court was thereafter "wholly without power or jurisdiction to revoke, vacate, overrule or reverse the same.").

It has been suggested that the reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had ever been rendered. See Brown v. Brown, 331 S.E.2d 793, 793–94 (S.C. Ct. App. 1985) ("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no such judgment had been rendered."); see also Moore v. N. Am. Van Lines, 462 S.E.2d 275. However, the Brown and Moore cases involve completely different factual scenarios which make them distinguishable from and irrelevant to this case. The Brown and Moore cases both dealt with monetary judgments

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[4] See Rule 203(a), SCACR ("A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules. Service and filing are defined by Rule 262. See Rule 203(b), SCACR (A notice of appeal shall be served on all respondents within (30) days after receipt of written notice of entry of the order or judgment.); see also Rule 262(b), SCACR ("Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court."). The Notice of Appeal states the plaintiffs received the Order on May 2, 2017. The Notice of Appeal had to be served on all Respondents by June 1, 2017. No such service was ever effected by Plaintiffs or Seaquest and the deadline can never be extended. See Notice of Appeal and Proof of Service.

[5] No briefs were ever served or filed by the Subcontractor Defendants. See Rule 208(a), SCACR ("Within thirty (30) days after receiving the transcript or, if no transcript is ordered, within thirty (30) days after serving the notice of appeal, appellant shall serve one copy of his brief on all parties to the appeal . . . ."); see also Rule 209(a), SCACR ("At the same time a party serves his initial brief(s) under Rule 208 . . . he shall also serve on all parties to the appeal a Designation of Matter to be Included in the Record on Appeal . . . ."); see also Rule 211(a), SCACR ("Within twenty (20) days after the service of the Record on Appeal, each party shall serve a copy of his final brief(s) on every other party to the appeal . . . .")

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awarded at the trial court level that were subsequently reversed on appeal. When the remittiturs were issued for those appeals, the trial courts thereafter ruled in each case that the party who received payment under the judgments that were subsequently reversed must restore those payments to the other party. Those trial court rulings were then appealed again for a second time, and the appellate courts on the second appeal each held that reversal of the original monetary judgments on the first appeals had the effect of vacating those monetary judgments and leaving the case standing as if no judgments had been rendered. Id.

The proposition that the reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had ever been rendered is correct as applied to the Brown and Moore cases where there were no unappealed issues in the cases. In Brown and Moore, a single issue was decided by the trial courts, was appealed, and was thereafter reversed. Further, there were no parties to the lawsuit in each case that were not included as parties to the appeal. In other words, there were no "unappealed portions" of the lower court's rulings. However, to apply this principle to a case where there were unappealed issues, such as the instant case, is directly contrary to well-established law which states that an unappealed portion of a judgment, whether right or wrong, is the law of the case. See Atl. Coast, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case."; see also Rumpf, 593 S.E.2d at 189 ("Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed."); see also Shirley's Iron Works, 743 S.E.2d at 785 ("Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case."). The important distinction in this case is that there were portions of the Order that were never appealed (i.e., the order dismissing the claims against the Subcontractor Defendants).

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Finally, the suggestion in the joint motion for clarification that the Subcontractor Defendants are not entitled to dismissal because the Subcontractor Defendants did not seek dismissal does not prevent the application of the law of the case doctrine. The Order, as Plaintiffs and Seaquest recognize, clearly dismissed all Subcontractor Defendants from the case. That the dismissal may not have been requested is of no consequence. "A [Rule 59(e)] motion must be made when the trial court either grants relief not requested or rules on an issue not raised [below]." Fryer v. South Carolina Law Enforcement Div., 631 S.E.2d 918, 920 (S.C. Ct. App. 2006). No Rule 59(e) motion was filed, and the dismissal of the Subcontractor Defendants became the law of the case regardless of whether such relief was sought or not. See id. (finding that defendant failed to preserve for appellate review argument that the trial court erred in granting mandamus to the plaintiff even though the plaintiff had not requested such relief because the defendant did not file a post-trial motion on the issue).

Plaintiffs and Seaquest failed to appeal the Order dismissing their respective claims against the Subcontractor Defendants. As such, this unappealed ruling has become the law of the case and Plaintiffs and Seaquest are barred from relitigating these extinct claims.

II. Motion for Clarification:

As an additional ground for denial, this Court finds that there is no procedural mechanism which affords Plaintiffs and Seaquest the right to request clarification of an order almost four years after it was issued. Rule 59(e) of the South Carolina Rules of Civil Procedure is the mechanism for a party to ask the court to issue a ruling on issues raised but not ruled upon, state findings of fact or conclusions of law underpinning the order, address possible misapprehension of an earlier argument, or revisit a previously raised argument. See, e.g., Elam v. S.C. Dep't of Transp., 602 S.E.2d 772, 777 (S.C. 2004). Pursuant to Rule 59(e), SCRCP, "[a] motion to alter or amend a

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judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Id.

Here, Plaintiffs and Seaquest jointly sought clarification of the Order to determine whether the Subcontractor Defendants remain as parties to this action. The Order dismissed the entire case, including those claims asserted by Plaintiffs and Seaquest against the Subcontractor Defendants. To the extent Plaintiffs or Seaquest believed Chief Justice Toal misapprehended arguments of counsel or mistakenly dismissed certain claims, then the parties were required to file a Rule 59(e) motion within ten days of written notice of entry of the judgment. Plaintiffs and Seaquest did not meet the ten-day deadline provided by Rule 59(e) and, therefore, the joint "motion for clarification" is improper. See Leviner v. Sonoco Prods. Co., 530 S.E.2d 127 (S.C. 2000) (holding where neither party filed a Rule 59(e) motion within the ten day time period asking for clarification of the circuit court's order, the circuit court lost jurisdiction to enter any further orders on the matter); see also In re Beard, 597 S.E.2d 835, 838 (S.C. Ct. App. 2004) ("The established case law is that a trial judge loses jurisdiction over a case when the time to file [Rule 59(e) motions] has elapsed.").

Rule 60(a) of the South Carolina Rules of Civil Procedure also does not provide an avenue for the Court to clarify the Order. Rule 60(a) of the South Carolina Rules of Civil Procedure provides, in pertinent part, as follows:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Id. "Generally, a clerical error is defined as a mistake in writing or copying." Dion v. Ravenel, Eiserhardt Assocs., 449 S.E.2d 251, 253 (S.C. Ct. App. 1994) (citing *Black's Law Dictionary* 252 (6th ed. 1990)). "As applied to judgments and decrees, it is a mistake or omission by a clerk,

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counsel, judge or printer which is not the result of exercise of judicial function." Id. "While a court may correct mistakes or clerical errors in its own process to make it conform to the record, ***it cannot change the scope of the judgment***." Id. at 253–54 (emphasis added); see also Brown v. Brown, 709 S.E.2d 679, 683 (S.C. Ct. App. 2011) (holding that the trial judge's modification of an award "did not amount to correction of a clerical error such as misspelling, a misplaced decimal, or a miscalculation" but rather recharacterized the award and imposed additional terms upon the parties that did not exist at the time the order was entered). "Except to correct such clerical errors, a trial judge loses jurisdiction to modify an order at the end of the term during which it is issued." Michel v. Michel, 345 S.E.2d 730, 732 (S.C. Ct. App. 1986). "Therefore, the order is no longer subject to any modification which involves the exercise of judgment or discretion on the merits of the action." Id.

Here, Chief Justice Toal unambiguously dismissed the entire case, and her intent is clear from the multitude of references to same in the Order and accompanying Form 4. See Order at 2 ("this case is DISMISSED in its entirety"); see also id. at 12 ("this case shall be and hereby is DISMISSED."); see also Form 4 at 1 (stating that the Order ended the case and was "dismissing this action"). A request for a further order stating that the Subcontractor Defendants remain as defendants in the within action not only purports to seek clarification of an unambiguous directive by Chief Justice Toal, but its very essence asks the court to change the scope of the judgment from a dismissal of all claims to a dismissal of only some claims. Our case law is clear that Rule 60(a), SCRCP, is an improper vehicle for such a modification. Rather, to the extent such a modification was, in fact, warranted, it should have been requested through a Rule 59(e) order within ten days

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after written notice of the entry of judgment. Plaintiffs and Seaquest are therefore prohibited from seeking clarification of the Order pursuant to either Rule 59(e) or Rule 60(a)[6].

Furthermore, this Court lost jurisdiction following the appeal to presently rule that the Subcontractor Defendants remain parties to the suit notwithstanding their prior dismissal. "After the remittitur is sent down from an appellate court, the trial court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court ruling." Ackerman v, McMillan, 477 S.E.2d 267, 268 (S.C. Ct. App. 1996). "[A] trial court has no authority to exceed the mandate of the appellate court on remand. . . . . The mandate of the appellate court is jurisdictional. . . . The trial court has a duty to follow the appellate court's directions." Prince v. Beaufort Mem'l Hosp., 709 S.E.2d 122, 125 (S.C. Ct. App. 2011) (internal citations omitted). Therefore, "[w]hen [the appellate court] remand[s] a case, the trial court has only the jurisdiction and authority mandated by th[e] court." Id. The Court of Appeals only remanded this case to require arbitration between Plaintiffs and Seaquest. It gave no other instructions in its opinion and did not alter any unappealed rulings, specifically the unchallenged dismissal of the Subcontractor Defendants. This Court no longer has any jurisdiction to alter, revisit, or revoke the rulings in Chief Justice Toal's Order which were unappealed and constitute the law of the case.

Conclusion

NOW, THEREFORE, for the foregoing reasons, it is hereby ORDERED, ADJUDGED AND DECREED that Plaintiffs' and Seaquest's joint motion for clarification is DENIED.

[6] Plaintiffs and Seaquest are also prohibited from seeking any relief under Rule 60(b)(1), SCRCP for "mistake, inadvertence, surprise, or excusable neglect" because a motion under Rule 60(b)(1) must be made "not more than one year after the judgment, order or proceeding was entered or taken." In addition, a party cannot seek relief under Rule 60(b) where it could have pursued the issue on appeal. Relief from a judgment is not a substitute for an appeal. Tench v. South Carolina Dep't of Educ., 553 S.E.2d 451, 453 (S.C. 2001). Plaintiffs and/or Seaquest could have filed a Rule 59(e) motion and then subsequently appealed the dismissal of the Subcontractor Defendants but chose not to do so. Rule 60 cannot now be used as a backdoor to challenge the dismissal of these defendants.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Red Bay Constructors Corp.; Defendant Benzenburg Custom Cabinets, Inc.; Defendant Jonathan Marshall Construction; Defendant Southcoast Exteriors, Inc.; Defendant Coastal Plumbing & Gas, LLC; Defendant Foam Insulation Co., Inc.; Defendant Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Defendant Lowcountry Fireplaces, Inc.; Defendant Carolina Pest Solutions, Inc.; Defendant New South Construction Supply, LLC; Third-Party Defendant Architectural Products of Charleston, LLC; and Third-Party Defendant Sealtight of South Carolina, LLC are not parties to the within action and that this case is ended with respect to these Defendants/Third-Party Defendants.

AND IT IS SO ORDERED.

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Charleston Common Pleas

Case Caption:	Andrew Mcintire , plaintiff, et al VS Seaquest Development Company Inc , defendant, et al
Case Number:	2016CP1001833
Type:	Order/Other

So Ordered

s/Jennifer B. McCoy #2764

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

ANDREW AND KIMBERLY MCINTIRE, **Plaintiff(s)**

vs.

SEAQUEST DEVELOPMENT COMOPANY, INC.; ET AL. **Defendant(s)**

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2016 -CP - 10 - 1833

Submitted By: Andrew K. Epting, Jr.

Address: 46 A State Street

Charleston, SC 29401

SC Bar #: 1908

Telephone #: 8433771871

Fax #: 8433771310

Other:

E-mail: ake@epting-law.com

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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)

RECEIVED APR 31 2016 By

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 (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799) Construction

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) _____
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)

000042

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

Submitting Party Signature: _____ **Date:** 4/4/16

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

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

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

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

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

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

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

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

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

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

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

IN THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

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

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SUMMONS

(JURY TRIAL REQUESTED)

TO: THE DEFENDANTS NAMED ABOVE:

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

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

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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

DATED: April 1, 2016
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

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

Defendants.

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

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COMPLAINT

(JURY TRIAL REQUESTED)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. At all times relevant hereto, SeaQuest and Subcontractors, their agents, servants, employees, and/or subcontractors undertook and were under a duty to construct the Residence in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, free from latent defects. The Defendants failed to meet their contractual and common law duties.

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

a) In failing to follow the plans and specifications;

b) In failing to properly construct the roof;

c) In installing defective or improperly installing shakes;

d) In installing defective window/door units or installing them improperly;

e) In failing to properly install flashing;

f) In installing a defective plumbing system or installing it improperly;

g) In installing defective cabinets or installing them improperly;

h) In installing defective trim or installing it improperly;

i) In installing defective foam insulation or installing it improperly;

j) In installing defective tiles or installing them improperly;

k) In installing defective framing;

l) In installing defective chimneys/fireplaces or installing them improperly;

m) In installing defective foundation/slab and hardscape or installing them improperly;

n) In failing to properly pre-treat and treat for termites;

o) In failing to do good and workmanlike work;

p) In failing to follow the local building codes of the County of Charleston, Town of Mt. Pleasant and the State of South Carolina;

q) In failing to use due care;

r) In failing to properly oversee the construction, including the selection of subcontractors, of the Residence when it planned to sell the home to Owners for profit;

s) In failing to properly investigate the physical condition of the building and make necessary repairs;

t) In negligently misrepresenting the physical condition of the building to the Plaintiffs;

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

29. SeaQuest and Subcontractors, their agents, servants, employees, and/or subcontractors were negligent, careless, reckless, willful and wanton in failing to construct the Residence in accordance with the local building codes of the County of Charleston, Town of Mt. Pleasant and the State of South Carolina, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, free from latent defects, thereby breaching the above-referenced duty by, but not limited to, the particulars set forth above.

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

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

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

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

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

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

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

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

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

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

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

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

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

41. By reason of their special expertise and superior knowledge, Seaquest and its Subcontractors had a duty to communicate truthful information and not to mislead Plaintiffs.

42. Seaquest and its Subcontractors represented that they had completed the work per the Agreement and that all work was up to code.

43. Said representations made by SeaQuest and its Subcontractors were false when made in that SeaQuest and its Subcontractors carelessly and negligently performed inspections, observations, and work and carelessly and negligently approved the defective work .

44. SeaQuest and its Subcontractors either knew or should have known the work was defective at the time the work was approved and that their failure to disclose to Owners the existence of the defective work in place would mislead Owners

45. SeaQuest and its Subcontractors had a pecuniary interest in making the misrepresentations to Plaintiffs.

46. SeaQuest and its Subcontractors made said representations and/or said non-disclosures, with the intent to induce Owners' reliance thereon.

47. Owners justifiably relied upon said misrepresentations and non-disclosures.

48. As a direct and proximate result of the misrepresentations and non-disclosures, Owners have incurred the damages hereinabove alleged and, in addition thereto, are entitled to punitive damages.

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

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

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

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

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

WHEREFORE, Plaintiffs pray for judgment against the Defendants for:

(1) Actual, direct, indirect, incidental, and consequential damages in an amount to be determined at trial;

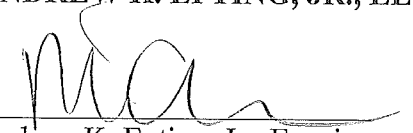
(2) Their attorneys' fees and costs;

(3) Punitive damages; and

(4) Such further relief as this Court may order.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC



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ake@epting-law.com
mne@epting-law.com

ATTORNEYS FOR PLAINTIFFS

On this 4 day of April 2016

YCRLAW
Young Clement Rivers, LLP
CELEBRATING 50 YEARS OF LEGAL SERVICE
50 YEARS

Jason A. Daigle
Associate

Direct Dial: (843) 720-5436
Direct Fax: (843) 579-1324
E-mail: jdaigle@ycrlaw.com

June 16, 2016

VIA COURIER
Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Andrew and Kimberly McIntire v. SeaQuest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork - Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC
Case No.: 2016-CP-10-1833
YCR File: 9795-20160374

Dear Ms. Armstrong:

Enclosed please find the original and one (1) copy of the Third-Party Summons, Defendant Seaquest Development Company, Inc.'s Answer, Cross Claims and Third Party Complaint in the above-referenced case. Upon filing, please return the time-stamped copy of same to the courier.

By copy of this letter to all counsel of record and parties not represented, I am herewith serving them with a copy of same.

Thank you for your assistance and cooperation in this matter, and should you have any questions or comments, please do not hesitate to contact me.

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Jason A. Daigle

JAD/jrh
Enclosures: *As stated herein*

Cc: *VIA E-MAIL AND U.S. MAIL*
Andrew K, Epting, Jr., Esq.
Michelle N. Endemann, Esq.
William "Trey" Watkins, Jr. , Esq.
James H. Elliott, Jr. , Esq.
Samia H. Nettles, Esq.
Christopher A. Majure, Esq.
C. Davi Dyer, Esq.

VIA U.S. MAIL ONLY
Red Bay Constructors Corp.
Carolina Window & Millwork-Omni Glass Industries LLC
Benzenberg Custom Cabinets, Inc.
Coastal Window & Door Center of Charleston LLC
Coastal Plumbing & Gas LLC
Michael Casteen d/b/a Casteen Custom Cabinets
Foam Insulation Co Inc.
Lowcountry Fireplaces, Inc.
Jonathan Marshall Construction LLC
Quality Cedar Products Inc. of Michigan
Southcoast Exteriors, Inc.
Michigan PreStain Co
Sealtight of South Carolina LLC
Architectural Products of Charleston, LLC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
ANDREW AND KIMBERLY MCINTIRE,	)	CASE NO. 2016-CP-10-1833
PLAINTIFFS,	)	
vs.	)	
SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC N/K/A CAROLINA WINDOW & MILLWORK - OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN D/B/A CASTEEN CUSTOM CABINETS; QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN D/B/A MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO. INC.; JERRY COMER D/B/A JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; NEW SOUTH CONSTRUCTION SUPPLY, LLC,	)	**SUMMONS TO THE THIRD-PARTY COMPLAINT**
DEFENDANTS.	)	
SEAQUEST DEVELOPMENT COMPANY, INC.,	)	
THIRD PARTY PLAINTIFFS,	)	
vs.	)	
ARCHITECTURAL PRODUCTS OF	)	

CHARLESTON, LLC; SEALTIGHT OF SOUTH CAROLINA, LLC,

THIRD PARTY DEFENDANTS.

TO: THE THIRD-PARTY DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Third-Party Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer thereto on the below-signed at their office located at 25 Calhoun Street, Suite 400, Charleston, South Carolina 29401, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Third-Party Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Third-Party Complaint.

YOUNG CLEMENT RIVERS, LLP

By: _____

Edward D. Buckley, Jr.
Jason A. Daigle
P.O. Box 993, Charleston, SC 29402
(843) 720-5436
ebuckley@ycrlaw.com
jdaigle@ycrlaw.com
Attorneys for Defendant Seaquest Development Company, Inc.

Charleston, South Carolina

Dated: 6-16-16

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	NINTH JUDICIAL CIRCUIT
ANDREW AND KIMBERLY MCINTIRE, PLAINTIFFS, vs. SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC N/K/A CAROLINA WINDOW & MILLWORK - OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN D/B/A CASTEEN CUSTOM CABINETS; QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN D/B/A MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO. INC.; JERRY COMER D/B/A JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; NEW SOUTH CONSTRUCTION SUPPLY, LLC, DEFENDANTS.	CASE NO. 2016-CP-10-1833 **DEFENDANT SEAQUEST DEVELOPMENT COMPANY, INC.'S ANSWER, CROSS CLAIMS, AND THIRD-PARTY COMPLAINT** **(Jury Trial Demanded)**
SEAQUEST DEVELOPMENT COMPANY, INC., THIRD PARTY PLAINTIFFS, vs. ARCHITECTURAL PRODUCTS OF CHARLESTON, LLC; SEALTIGHT OF SOUTH CAROLINA, LLC,	

THIRD PARTY DEFENDANTS.)
)
)

TO: ANDREW K. EPTING, JR, ESQUIRE AND MICHELLE N. ENDEMANN, ESQUIRE, ATTORNEYS FOR PLAINTIFFS AND ALL DEFENDANTS:

Defendant Seaquest Development Company, Inc. (hereinafter "Seaquest") hereby answers Plaintiffs' Complaint and asserts its cross-claims and Third-Party Claims as follows:

Each and every allegation of Plaintiffs' Complaint not hereinafter expressly admitted, qualified, and/or explained is denied.

PARTIES AND JURISDICTION

1. Seaquest lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 1, and therefore denies the same and demands strict proof thereof.

2. Responding to Paragraph 2, Seaquest admits that it is a South Carolina Corporation doing business in Charleston County as a licensed general contractor. Seaquest denies the remaining allegations contained in Paragraph 2.

3. Responding to Paragraph 3, Seaquest admits that it hired Red Bay to perform certain work at the Residence. Seaquest denies the remaining allegations contained in Paragraph 3.

4. Responding to Paragraph 4, Seaquest admits that it hired Benzenberg to perform certain work at the Residence. Seaquest denies the remaining allegations contained in Paragraph 4.

5. Responding to Paragraph 5, Seaquest admits that it hired Marshall to perform certain work at the Residence. Seaquest denies the remaining allegations contained in Paragraph 5.

6. Seaquest denies Paragraph 6.

7. Responding to Paragraph 7, Seaquest admits that it obtained certain products from Carolina Window for use at the Residence. Seaquest denies the remaining allegations contained in Paragraph 7.

8. Responding to Paragraph 8, Seaquest admits that it hired Southcoast to perform certain work at the Residence. Seaquest denies the remaining allegations contained in Paragraph 8.

9. Responding to Paragraph 9, Seaquest admits that it hired Casteen to perform certain work at the Residence. Seaquest denies the remaining allegations contained in Paragraph 9.

10. Responding to Paragraph 10, Seaquest admits that it obtained certain products from Michigan PreStain for use at the Residence. Seaquest denies the remaining allegations contained in Paragraph 10.

11. Responding to Paragraph 11, Seaquest admits that it hired Coastal Plumbing to perform certain work at the Residence. Seaquest denies the remaining allegations contained in Paragraph 11.

12. Responding to Paragraph 12, Seaquest admits that it hired Foam Insulation to perform certain work at the Residence. Seaquest denies the remaining allegations contained in Paragraph 12.

13. Responding to Paragraph 13, Seaquest admits that it hired Comer to perform certain work at the Residence. Seaquest denies the remaining allegations contained in Paragraph 13.

14. Responding to Paragraph 14, Seaquest admits that it hired Lowcountry Fireplaces to perform certain work at the Residence. Seaquest denies the remaining allegations contained in Paragraph 14.

15. Responding to Paragraph 15, Seaquest admits that it hired Pest Solutions to perform certain work at the Residence. Seaquest denies the remaining allegations contained in Paragraph 15.

16. Responding to Paragraph 16, Seaquest admits that it obtained certain products from New South for use at the Residence. Seaquest denies the remaining allegations contained in Paragraph 16.

17. Responding to Paragraph 17, Seaquest admits that it obtained certain products and/or services for the Residence from the co-defendants named herein. Seaquest denies the remaining allegations contained in Paragraph 17.

18. Responding to Paragraph 18, Seaquest craves reference to the contract referenced therein and denies any allegation inconsistent therewith.

19. Responding to Paragraph 19, Seaquest craves reference to the permit referenced therein and denies any allegation inconsistent therewith.

20. Seaquest denies Paragraphs 20 through 24.

AS TO THE FIRST CAUSE OF ACTION
(Negligence/Gross Negligence as to SeaQuest and Subcontractors)

21. Responding to Paragraph 25, Seaquest re-alleges and reasserts Paragraphs 1 through 20 above.

22. Paragraph 26 sets forth conclusions of law to which Seaquest is not required to respond.

23. Seaquest denies Paragraphs 27 through 34.

AS TO THE SECOND CAUSE OF ACTION
(Breach of Warranty of Habitability as to SeaQuest)

24. Responding to Paragraph 35, Seaquest re-alleges and reasserts Paragraphs 1 through 23 above.

25. Paragraph 36 sets forth conclusions of law to which Seaquest is not required to respond.

26. Seaquest denies Paragraphs 37 through 39.

AS TO THE THIRD CAUSE OF ACTION
(Negligence Misrepresentation & Constructive Fraud as to SeaQuest and Subcontractors)

27. Responding to Paragraph 40, Seaquest re-alleges and reasserts Paragraphs 1 through 26 above.

28. Paragraph 41 sets forth conclusions of law to which Seaquest is not required to respond.

29. Seaquest denies Paragraphs 42 through 48.

AS TO THE FOURTH CAUSE OF ACTION
(Breach of Warranty of Good and Workmanlike Work as to SeaQuest and Subcontractors)

30. Responding to Paragraph 49, Seaquest re-alleges and reasserts Paragraphs 1 through 29 above.

31. Seaquest denies Paragraphs 50 through 52.

FURTHER ANSWERING BY WAY OF AFFIRMATIVE DEFENSES
For a First Affirmative Defense
(Comparative Negligence)

32. Plaintiffs' claims and damages, if any, are barred, or should be reduced, by their own contributory and comparative negligence and recklessness which combined, contributed, and concurred with any alleged negligence on the part of Seaquest, if any, and which is expressly denied.

For a Second Affirmative Defense
(Negligent Acts and Omissions of Others)

33. Plaintiffs' claims and damages, if any, are the result of negligent acts and omissions of other entities or persons over whom Seaquest had no control, barring Plaintiffs' claims against Seaquest.

For a Third Affirmative Defense
(Acceptance)

34. That the final completion and acceptance of the work pursuant to the original contract(s) and all modifications thereto constitutes a complete defense to all claims asserted by Plaintiffs.

For a Fourth Affirmative Defense
(Setoff)

35. Any recovery by Plaintiffs must be reduced or offset by amounts Plaintiffs have received or will recover from others for the same and/or injuries/damages claimed in this suit.

For a Fifth Affirmative Defense
(Economic Loss)

36. Plaintiff cannot recover in tort for purely economic losses.

For a Sixth Affirmative Defense
(Failure to State a Claim)

37. One or more of the Plaintiffs' Causes of Action fails to state facts sufficient to constitute a cause of action against Seaquest and therefore should be dismissed under Rule 12 (b)(6).

For a Seventh Affirmative Defense
(Intervening/Superseding Negligence of Others)

38. That the injury or damage suffered by Plaintiffs, if any, was due to, and caused by, and was the direct and proximate result of the intervening and superseding negligence, willfulness, wantonness and recklessness of the defendants/third-party defendants/others, and such constitutes a complete defense to the claims of Plaintiffs.

For an Eighth Affirmative Defense
(Mitigation of Damages)

39. Plaintiffs had an obligation to mitigate their damages but have failed to do so.

For a Ninth Affirmative Defense
(Laches, Waiver, and Estoppel)

40. Plaintiffs' claims are barred by the doctrines of laches, waiver and/or estoppel.

For a Tenth Affirmative Defense
(Statute of Limitations/Statute of Repose)

41. That all claims asserted against Seaquest are barred by the applicable statute of limitations and/or the applicable statute of repose.

For an Eleventh Affirmative Defense
(Unclean Hands)

42. Plaintiffs' equitable claims are barred by the doctrine of unclean hands.

For a Twelfth Affirmative Defense
(Betterment)

43. Any amount recovered by Plaintiffs from Seaquest should be offset or reduced under the betterment doctrine. .

For a Thirteenth Affirmative Defense
(Lack of Notice)

44. Any claim advanced as a warranty claim for which the claimant failed to give Defendant timely and reasonable notice as required by law is barred.

For a Fourteenth Affirmative Defense
(Spoliation of Evidence)

45. Plaintiffs' claims are barred by the doctrine of spoliation of evidence.

For a Fifteenth Affirmative Defense
(Punitive Damages)

46. The imposition of punitive or exemplary damages against the Defendant would violate their constitutional rights under the Due Process clauses in the Fifth and Fourteenth Amendments to the Constitution of the United States, the Excessive Fines clause in the Eighth Amendment to the Constitution of the United States, the Double Jeopardy clause in the Fifth Amendment to the Constitution of the United States, similar provisions in applicable State

Constitutions, and/or the common law and public policies of pertinent States, and/or applicable statutes and court rules, in the circumstances of this litigation, including but not limited to:

a. imposition of such punitive damages by a jury which (1) is not provided standards of sufficient clarity for determining the appropriateness, and the appropriate size, of such a punitive damages award, (2) is not adequately and clearly instructed on the limits on punitive damages imposed by the principles of deterrence and punishment, (3) is not expressly prohibited from awarding punitive damages, or determining the amount of an award thereof, in whole or in part, on the basis of invidiously discriminatory characteristics, including the corporate status, wealth, or state or residence of the Defendant, (4) is permitted to award punitive damages under a standard for determining liability for such damages which is vague and arbitrary and does not define with sufficient clarity the conduct or mental state which makes punitive damages permissible, and (5) is not subject to trial court and appellate judicial review for reasonableness and the furtherance of legitimate purposes on the basis of objective standards;

b. imposition of such punitive damages, and determination of the amount of an award thereof, where applicable state law is impermissibly vague, imprecise, or inconsistent;

c. imposition of such punitive damages and determination of the amount of an award thereof, employing a burden of proof less than clear and convincing evidence;

d. imposition of such punitive damages, and determination of the amount of an award thereof, without bifurcating the trial and trying all punitive damages issues only if and after the liability of Defendant has been found on the merits;

e. imposition of such punitive damages, and determination of the amount of an award thereof, under any state's law subject to no predetermined limit, such as a maximum multiple of compensatory damages or a maximum amount;

f. imposition of such punitive damages, and determination of the amount of any award thereof, based on anything other than Defendant's conduct in connection with the sale of the products alleged in this litigation, or in any other way subjecting Defendant to impermissible multiple punishment for the same alleged wrong; and/or

g. imposition of punitive damages by the jury as opposed to the Court, as the issues of the imposition and amount of punitive damages are matters of constitutional fact that must be determined by the Court, not the jury.

For a Sixteenth Affirmative Defense
(Right to Cure)

47. Plaintiffs had an obligation to offer the opportunity to cure any and all construction defects under the Opportunity to Cure Construction Dwelling Defects Act S.C. Code §40-59-810-860. Seaquest reserves all of its statutory rights under the Act.

For a Seventeenth Affirmative Defense
(Additional Defense Reservation and Non-Waiver)

48. Seaquest hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

FURTHER ANSWERING AND FOR A FIRST CAUSE OF ACTION AND ASSERTING CROSS CLAIMS AGAINST THE FOLLOWING:
Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC
(Equitable/Contractual Indemnity and Contribution)

49. Seaquest re-alleges and reasserts Paragraphs 1 through 48 above.

50. If Seaquest is compelled to pay damages for any reason in this matter, it alleges that any liability it has for the damages would be an imputation of liability upon it as a result of wrongful acts or omissions committed by Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC.

51. Seaquest is entitled to full indemnification and/or contribution from Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC for any liability it is found to have to Plaintiffs in this action and it is entitled to recover from Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC the amount of any monies it is

adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending the claims including reasonable attorney's fees.

52. Seaquest is informed and believes that it is entitled to a judgment against Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC for the full amount of any judgment Plaintiffs obtain against it in this matter and in addition, all costs of investigating and defending this claim including reasonable attorney's fees.

FURTHER ANSWERING AND FOR A SECOND CAUSE OF ACTION AND ASSERTING CROSS CLAIMS AGAINST THE FOLLOWING:
Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC
(Breach of Contract)

53. Seaquest re-alleges and reasserts Paragraphs 1 through 52 above.

54. Seaquest entered into contracts with Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas,

LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC who agreed to perform certain services and/or provide certain products and/or materials related to the design, construction, inspection, and/or repair of the Residence at issue for an agreed upon price.

55. Seaquest honored all of its obligations under the contracts, however, Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC did not honor their obligations and have provided Seaquest with incomplete and/or defective design, construction, inspection, products, material, workmanship, and/or repair in breach of their contracts.

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

57. As a direct and proximate result of the breach, Seaquest is entitled to recover actual and consequential damages from Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina

Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC in an amount to be determined.

FURTHER ANSWERING AND FOR A THIRD CAUSE OF ACTION AND ASSERTING CROSS CLAIMS AGAINST THE FOLLOWING:
Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC
(Negligence)

58. Seaquest re-alleges and reasserts Paragraphs 1 through 57 above.

59. Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC are in the business of designing, constructing, inspecting, repairing, and/or supplying materials for the construction of structures.

60. Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.;

Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC performed design, construction, inspection, repairs, and/or supplied materials on the Residence at issue.

61. Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC knew or should have known of the existence of certain construction/material defects on the Residence at issue.

62. Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC knew or should have known their work and/or materials was/were negligent, defective, improper and/or incomplete.

63. Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.;

Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC had a duty to design, inspect, construct, repair, and/or supply materials to the Project in a workmanlike manner with suitable materials in accordance with applicable building codes and industry standards.

64. The deficiencies outlined by Plaintiffs evidence that Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC breached their duties to Seaquest.

65. The wrongful acts and omissions by Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC above-described have resulted in building deficiencies and consequential damages.

66. Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork,

LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC were negligent, careless, reckless, willful and wanton in the particulars including, but not limited to, those set forth in Plaintiffs' Complaint.

67. Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC were further negligent in failing to disclose the defective conditions/materials of the Project to Seaquest, failing to take proper steps to correct the defective conditions/materials, and failing to exercise the degree of care and prudence which a reasonable person should exercise under the same or similar circumstances.

68. The failures above-described have proximately caused damages to Seaquest in an amount to be determined.

FURTHER ANSWERING AND FOR A FOURTH CAUSE OF ACTION AND ASSERTING CROSS CLAIMS AGAINST THE FOLLOWING:
Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC
(Breach of Express and Implied Warranty)

69. Seaquest re-alleges and reasserts Paragraphs 1 through 68 above.

70. Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC held themselves out to the general public as qualified to perform the respective work that each undertook and did perform in the design, construction, inspection, repair, and/or supply of materials for the Residence and expressly and/or impliedly warranted the work performed and material supplied in the design, construction, inspection, and/or repair of the project would be performed in a careful, diligent and workmanlike manner in accordance with industry standards and the applicable building codes.

71. Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc., and/or; New South Construction Supply, LLC breached these express and/or implied warranties by designing, constructing, inspecting, repairing, and/or supplying materials for the Residence insufficiently in that: the Residence was not fit for its intended purpose of habitation; the Residence was not designed, constructed, inspected, and/or repaired in a workmanlike manner, and; the Project was not designed, constructed, inspected, and/or repaired with quality material.

72. The breaches of express and/or implied warranty above-described have proximately caused damages to Seaquest in an amount to be determined.

FURTHER ANSWERING BY WAY OF THIRD-PARTY COMPLAINT AGAINST ARCHITECTURAL PRODUCTS OF CHARLESTON, LLC; SEALTIGHT OF SOUTH CAROLINA, LLC :

73. Seaquest re-alleges and reasserts Paragraphs 1 through 72 above.

74. Plaintiffs have instituted an action arising out of the construction of a residence alleged to be located at 821 Bridgetown Pass, Mt. Pleasant, South Carolina ("Residence").

75. Seaquest was at all times relevant to the pending litigation a construction company incorporated and existing under the laws of South Carolina and as a general contractor performed work through subcontractors, suppliers, and material men to Residence.

76. Upon information and belief, Architectural Products of Charleston, LLC was at all times relevant to this litigation a South Carolina corporation doing business in Charleston County, South Carolina and was responsible for supplying certain doors and windows used in the construction of the Residence.

77. Upon information and belief, Sealtight of South Carolina, LLC was at all times relevant to this litigation a South Carolina corporation doing business in Charleston County, South Carolina and was responsible for supplying and installing backer rod and sealant around windows and doors during the construction of the Residence.

FOR A FIRST CAUSE OF ACTION:
(Equitable/Contractual Indemnity and Contribution)

78. Seaquest re-alleges and reasserts Paragraphs 1 through 77 above.

79. If Seaquest is compelled to pay damages for any reason in this matter, it alleges that any liability it has for the damages would be an imputation of liability upon it as a result of wrongful acts or omissions committed by Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC.

80. Seaquest is entitled to full indemnification and/or contribution from Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC for any liability it is found to have to Plaintiffs in this action and it is entitled to recover from Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC the amount of any monies it is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending the claims including reasonable attorney's fees.

81. Seaquest is informed and believes that it is entitled to a judgment against Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC for the full amount of any judgment Plaintiffs obtain against it in this matter and in addition, all costs of investigating and defending this claim including reasonable attorney's fees.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)

82. Seaquest re-alleges and reasserts Paragraphs 1 through 81 above.

83. Seaquest entered into contracts with Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC who agreed to perform certain services and/or provide certain products and/or materials related to the design, construction, inspection, and/or repair of the Residence at issue for an agreed upon price.

84. Seaquest honored all of its obligations under the contracts, however, Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC did not honor their obligations and have provided Seaquest with incomplete and/or defective design, construction, inspection, products, material, workmanship, and/or repair in breach of their contracts.

85. Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC are in breach of contract.

86. As a direct and proximate result of the breach, Seaquest is entitled to recover actual and consequential damages from Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC in an amount to be determined.

FOR A THIRD CAUSE OF ACTION
(Negligence)

87. Seaquest re-alleges and reasserts Paragraphs 1 through 86 above.

88. Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC are in the business of designing, constructing, inspecting, repairing, and/or supplying materials for the construction of structures.

89. Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC performed design, construction, inspection, repairs, and/or supplied materials on the Residence at issue.

90. Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC knew or should have known of the existence of certain construction/material defects on the Residence at issue.

91. Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC knew or should have known their work and/or materials was/were negligent, defective, improper and/or incomplete.

92. Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC had a duty to design, inspect, construct, repair, and/or supply materials to the Project in a workmanlike manner with suitable materials in accordance with applicable building codes and industry standards.

93. The deficiencies outlined by Plaintiffs evidence that Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC breached their duties to Seaquest.

94. The wrongful acts and omissions by Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC above-described have resulted in building deficiencies and consequential damages.

95. Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC were negligent, careless, reckless, willful and wanton in the particulars including, but not limited to, those set forth in Plaintiffs' Complaint.

96. Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC were further negligent in failing to disclose the defective conditions/materials of the Project to Seaquest, failing to take proper steps to correct the defective conditions/materials, and failing to exercise the degree of care and prudence which a reasonable person should exercise under the same or similar circumstances.

97. The failures above-described have proximately caused damages to Seaquest in an amount to be determined.

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

98. Seaquest re-alleges and reasserts Paragraphs 1 through 97 above.

99. Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC held themselves out to the general public as qualified to perform the respective work that each undertook and did perform in the design, construction, inspection, repair, and/or supply of materials for the Residence and expressly and/or impliedly warranted the work performed and material supplied in the design, construction, inspection, and/or repair of the project would be performed in a careful, diligent and workmanlike manner in accordance with industry standards and the applicable building codes.

100. Architectural Products of Charleston, LLC and/or Sealtight of South Carolina, LLC breached these express and/or implied warranties by designing, constructing, inspecting, repairing,

and/or supplying materials for the Residence insufficiently in that: the Residence was not fit for its intended purpose of habitation; the Residence was not designed, constructed, inspected, and/or repaired in a workmanlike manner, and; the Project was not designed, constructed, inspected, and/or repaired with quality material.

101. The breaches of express and/or implied warranty above-described have proximately caused damages to Seaquest in an amount to be determined.

WHEREFORE, having fully answered Plaintiffs' Complaint, Seaquest Development Company, Inc. prays that the same be dismissed, together with the costs and disbursements of this action, and for such other and further relief as this Court deems proper.

WHEREFORE, having fully answered Plaintiff's Complaint, Seaquest Development Company, Inc. prays that the Court render judgment in its favor on its Cross Claims, for attorney's fees, and costs of defending this action, and for such other and further relief as this Court deems just and appropriate in this matter.

WHEREFORE, having fully answered Plaintiff's Complaint, Seaquest Development Company, Inc. prays that the Court render judgment in its favor on its Third-Party Claims, for attorney's fees, and costs of defending this action, and for such other and further relief as this Court deems just and appropriate in this matter

YOUNG CLEMENT RIVERS, LLP

By: _____

Edward D. Buckley, Jr.
Jason A. Daigle
P.O. Box 993, Charleston, SC 29402
(843) 720-5436
ebuckley@ycrlaw.com
jdaigle@ycrlaw.com
Attorneys for Defendant Seaquest Development Company, Inc.

Charleston, South Carolina

Dated: 6-16-16

CERTIFICATE OF SERVICE

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

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

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

Jaime R. Hiott
Paralegal
Young Clement Rivers, LLP
25 Calhoun Street, Suite #400
Charleston, South Carolina 29401

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-1833
Andrew and Kimberly McIntire	)	
	)	
☐ Plaintiff(s)	)	
	)	MOTION AND ORDER INFORMATION
vs.	)	FORM AND COVER SHEET
	)	
SeaQuest Development Company, Inc.; et al.	)	
	)	
☒ Defendant(s)	)	
Check box above indicating submitting party	)	

Name, SC Bar No. and Address of Plaintiff's Attorney	Name, SC Bar No. and Address of Defendant's Attorney
Andrew K. Epting, Jr. Address: Andrew K. Epting, Jr., LLC 46A State Street Charleston, SC 29401 Telephone: (843) 377-1871 fax: (843) 377-1310 e-mail: ake@epting-law.com	Jason A. Daigle SC Bar #:73308 Address: Young Clement Rivers, LLP Post Office Box 993 Charleston, SC 29402-0993 Telephone: (843) 720-5436 fax: (843) 579-1324 e-mail: jdaigle@ycrlaw.com

☒ MOTION HEARING REQUESTED (attach *written* motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (COMPLETE SECTIONS II and III)

SECTION I: HEARING INFORMATION

Nature of Motion: Motion to Dismiss or Stay Proceedings
Estimated Time Needed: Court Reporter Needed?: ☐ YES ☐ NO

SECTION II: MOTION TYPE

☒ Written Motion Attached
☐ Form Motion –
I hereby move for relief or action by the Court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff (s) ☒ Defendant(s) Dated: 6-17-16

SECTION III: MOTION FEE

☒ PAID – AMOUNT $ 25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency w. Indigent Party
- ☐ Sexually Violent Predator Act
- ☐ Post-Conviction Relief
- ☐ Motion for Stay Bankruptcy
- ☐ Motion for Publication
- ☐ Motion for Execution (Rule 69, *SCRCP*)
- ☐ Proposed order submitted at request of the Court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other:

JUDGE'S SECTION	JUDGE: _____
☐ Motion Fee to be paid upon filing of the attached order ☐ Other: _____	CODE: _____ DATE: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
(print name)

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE:

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	NINTH JUDICIAL CIRCUIT
ANDREW AND KIMBERLY MCINTIRE, PLAINTIFFS, vs. SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC N/K/A CAROLINA WINDOW & MILLWORK - OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN D/B/A CASTEEN CUSTOM CABINETS; QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN D/B/A MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO. INC.; JERRY COMER D/B/A JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; NEW SOUTH CONSTRUCTION SUPPLY, LLC, DEFENDANTS.	CASE NO. 2016-CP-10-1833 **NOTICE OF MOTION AND MOTION TO DISMISS OR STAY PROCEEDINGS**
SEAQUEST DEVELOPMENT COMPANY, INC., THIRD PARTY PLAINTIFFS, vs. ARCHITECTURAL PRODUCTS OF	

CHARLESTON, LLC; SEALTIGHT OF SOUTH CAROLINA, LLC,

THIRD PARTY DEFENDANTS.

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

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

YOUNG CLEMENT RIVERS, LLP

By: _____

Edward D. Buckley, Jr.
Jason A. Daigle
P.O. Box 993, Charleston, SC 29402
(843) 720-5436
ebuckley@ycrlaw.com
jdaigle@ycrlaw.com
Attorneys for Defendant Seaquest Development Company, Inc.

Charleston, South Carolina

Dated: 6-17-16

CERTIFICATE OF SERVICE

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

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

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

Jaime R. Hiott
Paralegal
Young Clement Rivers, LLP
25 Calhoun Street, Suite #400
Charleston, South Carolina 29401

STATE OF SOUTH CA ROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
ANDREW MCINTIRE AND KIMBERLY MCINTIRE, Plaintiffs, vs. SEAQUEST DEVELOPMENT COMPANY, INC., RED BAY CONSTRUCTORS CORP., BENZENBERG CUSTOM CABINETS, INC., JONATHAN MARSHALL CONSTRUCTION, COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC, CAROLINA WINDOW & MILLWORK, LLC N/K/A CAROLINA WINDOW & MILLWORK- OMNI GLASS INDUSTRIES, LLC, SOUTHCOAST EXTERIORS, INC., MICHAEL CASTEEN D/B/A CASTEEN CUSTOM CABINETS, QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN D/B/A MICHIGAN PRESTAIN CO., COASTAL PLUMBING & GAS, LLC, FOAM INSULATION CO., INC., JERRY COMER D/B/A JERRY'S TILE & MARBLE, LLC, LOWCOUNTRY FIREPLACES, INC., CAROLINA PEST SOLUTIONS, INC., NEW SOUTH CONSTRUCTION SUPPLY, LLC, Defendants.	Civil Action No. 2016-CP-10-01833 **DEFENDANT RED BAY CONSTRUCTORS CORP.'S NOTICE OF MOTION AND MOTION TO DISMISS OR FOR STAY OF PROCEEDINGS**

TO: PLAINTIFF AND ANDREW K. EPTING, JR. AND MICHELLE N. ENDEMANN ATTORNEY FOR PLAINTIFF:

Defendant, Red Bay Constructors Corp., through its undersigned counsel, hereby move this Honorable Court for an Order to dismiss this action or to stay the continuation of this action. This Motion is based on the Plaintiffs' violation of the Notice and Opportunity to Cure

Construction Dwelling Defect Act. Plaintiffs failed to comply with §§ 40-59-810 to 860, SCRCP, and Defendant is, therefore, entitled to an Order dismissing the case or a Motion to Stay this action pursuant to §40-59-830. Specifically, Plaintiffs failed to contact Defendant ninety days prior to filing the action and serve a written notice of their claim on it. Therefore, Defendant is entitled to the dismissal of this action against it.

Counsel for Defendant, Red Bay Constructors Corp., attempted to consult with Plaintiffs' Counsel and did not receive a response regarding this motion prior to filing same.

MCANGUS, GOUDELOCK & COURIE, L.L.C.

Danielle F. Payne
Bar No: 73142
Post Office Box 650007
735 Johnnie Dodds Blvd, Suite 200 (29464)
Mt. Pleasant, South Carolina 29465
(843) 576-2900

ATTORNEYS FOR DEFENDANT, RED BAY CONSTRUCTORS CORP.

6/22, 2016

STATE OF SOUTH CA ROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
ANDREW MCINTIRE AND KIMBERLY MCINTIRE, Plaintiffs, vs. SEAQUEST DEVELOPMENT COMPANY, INC., RED BAY CONSTRUCTORS CORP., BENZENBERG CUSTOM CABINETS, INC., JONATHAN MARSHALL CONSTRUCTION, COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC, CAROLINA WINDOW & MILLWORK, LLC N/K/A CAROLINA WINDOW & MILLWORK- OMNI GLASS INDUSTRIES, LLC, SOUTHCOAST EXTERIORS, INC., MICHAEL CASTEEN D/B/A CASTEEN CUSTOM CABINETS, QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN D/B/A MICHIGAN PRESTAIN CO., COASTAL PLUMBING & GAS, LLC, FOAM INSULATION CO., INC., JERRY COMER D/B/A JERRY'S TILE & MARBLE, LLC, LOWCOUNTRY FIREPLACES, INC., CAROLINA PEST SOLUTIONS, INC., NEW SOUTH CONSTRUCTION SUPPLY, LLC, Defendants.	Civil Action No. 2016-CP-10-01833 **CERTIFICATE OF SERVICE**

I certify that on this date, I have served a copy of **Defendant Red Bay Constructors Corp.'s Motion to Dismiss or for Stay of Proceedings** in this action on counsel of record by

☐ Delivering it to him/her personally;

☒ Mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Andrew K. Epting, Jr., Esquire
Michelle N. Endemann, Esquire
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, South Carolina 29401
Attorneys for Andrew McIntire and Kimberly McIntire

Edward D. Buckley, Jr. Esquire
Jason A. Daigle, Esquire
Young Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402
Attorneys for Seaquest Development Company

Catherine D. Dyer, Esquire
Kernodle, Root and Coleman
Post Office Box 13897
Charleston, South Carolina 29422
Attorney for Carolina Pest Solutions, Inc.

James H. Elliott, Jr. Esquire
Samia Hanafi Nettles, Esquire
Richardson, Plowden & Robinson, P.A.
Post Office Box 21203
Charleston, South Carolina 29413
Attorneys for New South Construction Supply, Inc.

6/22/16
Date

Yana D. Kalinina
Legal Assistant to Danielle F. Payne

IN THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

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

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

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

TO: THE DEFENDANTS NAMED ABOVE:

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

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

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

2. Seaquest served Requests for Admission on with answers due on July 22, 2016.

3. The issues raised by Seaquest's Requests for Admission are themselves for the arbitration panel.

4. Further, responding to defendant's Request for Admissions may cause plaintiffs' to waive their arbitration rights under its contract with Sequest.

5. Until this court rules on defendant's motion, plaintiffs should not be required to respond to the Requests for Admission.

Wherefore plaintiffs ask this Court to grant this Protective Order.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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

ATTORNEYS FOR PLAINTIFFS

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

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

DATED: July 22, 2016
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

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

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

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

TO: THE DEFENDANTS NAMED ABOVE:

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

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

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

2. Seaquest served Requests for Admission on with answers due on July 22, 2016.

3. The issues raised by Seaquest's Requests for Admission are themselves for the arbitration panel.

4. Further, responding to defendant's Request for Admissions may cause plaintiffs' to waive their arbitration rights under its contract with Sequest.

5. Until this court rules on defendant's motion, plaintiffs should not be required to respond to the Requests for Admission.

Wherefore plaintiffs ask this Court to grant this Protective Order.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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

ATTORNEYS FOR PLAINTIFFS

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

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

DATED: July 22, 2016
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

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

PLAINTIFFS' MOTION TO STAY & TO COMPEL ARBITRATION

FILED
2016 JUL 27 AM 11:39
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: THE DEFENDANTS NAMED ABOVE:

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

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

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

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

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

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

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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

ATTORNEYS FOR PLAINTIFFS

On this 13 day of July 2015
Charleston, SC

...ERSIGNED HEREBY CERTIFIES that true
...ect copies of the pleading or paper to which
...rtificate is affixed was served upon the party(s)
...s action in accord with the applicable Court Rules
...electronic transmission, by hand delivery or by
...gular U.S. Mail, ... properly addressed
to the attorney(s) ... party(s).

Signed this 15 day of ... 20 ... at
Charleston, South Carolina

1997 EDITION

AIA DOCUMENT

A101-1997

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

A Revised Version Of The -

Standard Form of Agreement Between Owner and Contractor

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

AGREEMENT made as of this 22th day of August in the year 3007

BETWEEN the Owner: Andrew and Kim McIntire

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

and the Contractor: SeaQuest Development Company, Inc.

(Name, address and other information) *529 Country Place Rd, Mt. Pleasant, SC, 29464*

The Project is: The McIntire Residence

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

The Architect is New Urbanist Design

This document has important legal consequences. Consultation with an Attorney is encouraged with respect to its completion or modification.
AIA Document A201 – 1997 General Conditions of the Contract for construction is adopted in this document by reference. Do not use with other general conditions unless this document is modified.
This document has been approved by the Associate General Contractors of America.

The Owner and Contractor agree as follows.

The American Institute of Architects 1735 New York Avenue, N.W. Washington, D.C. 20006-5292
Copyright 1915, 1918, 1925, 1937, 1951, 1958, 1961, 1963, 1967, 1974, 1977, 1987, 1997 by The American Institute of

Bindertek #CLEX

ARTICLE 1 THE CONTRACT DOCUMENTS

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

ARTICLE 2 THE WORK OF THIS CONTRACT

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

ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

3.1 The date of commencement of the Work shall be the date fixed in a "Notice To Proceed" issued by the Owner.

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

if, prior to the commencement of the Work, the Owner requires time to file mortgages, mechanic's liens and other security interests, the Owner's time requirement shall be as follows:

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

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

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

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

Interior Trim
- Trim for interior openings
- Crown Molding
- Baseboard
- Closet Shelving
- Interior Stairs
Cabinetry
- Kitchen Cabinetry
- Bath Cabinetry
- Laundry Room, Mudroom Cabinetry
- Other Built-ins
Tile and Glass
- Tile
- Glass shower enclosures and Mirrors
Specialties
- Bath Accessories
Plumbing Finish/Fixtures
Electrical Finish/Fixtures
Kitchen Appliances
Painting
- Interior Painting
- Exterior Painting
Flooring
- Wood Flooring
- Tile
Landscaping
- Final Grade
- Fencing
- Driveways
- Swimming Pool
Trash Removal
- Dumpsters
- Site Clean-up
- Final Clean-up

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

(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date when that amount expires.)

4.3 Unit prices, if any, are as follows:

ARTICLE 5 PAYMENTS
5.1 PROGRESS PAYMENTS

5.1.1 Based upon Applications for Payment submitted to the Bank by the Contractor, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.

5.1.2 The period covered by each Application for Payment shall based upon : A limit of seven draws will be made by the Contractor during the construction process and will be in keeping with standard bank policy. Payment will be made to the Contractor in no more than seven (7) working days. Payments will be made directly to the Contractor from bank sources.

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

5.1.4 Applications for Payment shall indicate the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment.

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

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

1st Payment – Upon completion of Clearing and rough grade, footings, Foundation and slab
2nd Payment – Upon completion of house framing (Flooring/Subflooring, Wall Sheathing, Roof Sheathing, Exterior Doors and Windows
3rd Payment - Upon completion of Trade Rough-ins (Plumbing, Electrical, HVAC, Fireplace)
4th Payment – Upon completion of Exterior trim/sheetrock (Exterior Veneer, Cornice & Facia, Roofing, Exterior Paint, Insulation, Sheetrock
5th Payment – Upon Completion of Interior finishes (Trim, Interior doors, Tile, Cabinets, Interior Paint, Flooring Install)
6th Payment – Upon Completion of Interior Trim-outs (Plumbing Fixtures, Electrical Fixtures, HVAC, Appliances, Hardware)
Final Draw – This payment will be held until Certificate of Occupancy is issued and contractor and owner are in agreement that home is complete. (Stoops & Decks, Driveways and Walks, Finish Grade, Landscaping, Final Clean)

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

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

5.1.7 Except with the Owner's prior approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

5.2 FINAL PAYMENT (see final draw above section 5.1.5

5.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when:

1. the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as identified in a final work agreement. This final work , known as the "punch list", will be assigned a fair value and will be held by a mutually agreed party, and will be released as each item is completed to satisfactory standards by owner and contractor.
.2 a final Certificate of Occupancy has been issued by the Town of Mt. Pleasant

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

ARTICLE 6 TERMINATION OR SUSPENSION

6.1 The Contract may be terminated by the Owner or the Contractor as provided in Article 14 of AIA Document A201-1997.

6.2 The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201-1997.

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

ARTICLE 7 MISCELLANEOUS PROVISIONS

7.1 Where reference is made in this Agreement to a provision of AIA Document A201-1997 or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

7.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.) 10%

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

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

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

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

7.6 Other provisions:

ARTICLE 8 ENUMERATION OF CONTRACT DOCUMENTS

8.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated as follows:

8.1.1 The Agreement is this executed 1997 edition of the Standard Form of Agreement Between Owner and Contractor, AIA Document A101-1997.

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

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

Document	Title	Pages
Exhibit A	AIA Document 101-1997	7
AIA Exhibit B	Specifications Part One	10
Exhibit C	Drawings	13

Site
First Floor Plan
Second Floor Plan
Door and Window Schedule
Front Elevations
Right Side Elevations
Rear Elevations
Left Side Elevations
Wall Sections
Miscellaneous Wall Details
Details/Sections
First Floor Electrical
Second Floor Electrical

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

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

16.1.6 [ ].

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

8.1.6 The Addenda, if any, are as follows:

Addenda No.1 – Contract Note Date _____ Pages 1

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 8.

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

(List here any additional documents that are intended to form part of the Contract Documents.

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

OWNER	CONTRACTOR
8/22/07	8/22/07
(Signature and date)	*(Signature and date)*
ANDREW R. McINTIRE	PRESIDENT CRAIG HINES
Printed name and title)	*(Printed name and title)*

Craig C. Hines President Seabest Development Company Inc.

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OWNER-CONTRACTOR AGREEMENT

The American Institute of Architects 1735 New York Avenue, N.W. Washington, D.C. 20006-5292

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ARTICLE 4 CONTRACT SUM

4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum is a cost estimate of _$1,600,000_. This estimate and contract are based on a cost plus arrangement. The ultimate contract price will be based on cost plus 12.5%, with a minimum fee of $125,000. Costs will be determined by any and all costs associated with the construction of the residence as defined by the approved plans at 821 Bridgetown Pass including the following:

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

Site Preparation
- Termite Pretreatment
- Site Clearing (including unsatisfactory dirt and replacement with compacted soil)

Excavation
- Site Drainage/Grading

Concrete
- Batterboards/footings/Steel
- Concrete footings
- Rebar

Masonary
- Block walls/piers
- Brickwork or Stucco
- Lentils, Sand, Mortar

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

Roofing
- Roofing material and Labor

Windows and Exterior Doors

Plumbing Rough
- Water & Sewer Lines
- Plumbing Rough –in

HVAC
- Heat and AC
- HVAC Venting

Electrical Rough

Exterior Trim

Siding

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

Wall and Ceiling Finish
- Drywall

Interior Doors and Hardware
- Interior Pre-hung Doors
- Door Hardware

*ANY COSTS ABOVE ESTIMATED COST OF $1,623,333.33 WILL BE REASONABLY OF OWNER 9/21/07

ANDREW MCINTIRE 9/21/07

CRAIG HIMES 9/21/07

Trade/Category	Budget	Supplier/Comments
Water Tap/Water	1000	
Permit	4500	
Builder license fee	1500	
Survey	2000	Trico - Steve Parker 843-740-7700 Drew Wadsworth 843-849-3799 Benchmark, Hub, Site Plan, Foundation Survey, Final Survey
Soil Testing	500	Coastal Engineering 843-723-3999
Architect Fees		
General plans	7500	New Urbanist Design
Engineered drawings	2400	
Lot preperation	33668	Chad
Site Prep	1000	silt rock, silt fence, permit box
	450	port potty @ $50 per month
	3000	Dumpster
Foundation		
House	33000	
Garage	0	
Stucco/Brick	7000	Foundation, chimney
Frame		
Labor	44693.5	
Windows	38000	Ron Fazzio - 843-297-2723
Doors	17200	
Lumber	248000	Includes Siding Material
Termite Treatment	600	
Roof		
House - Materials and Labor	30000	Metal
Garage - Materials and Labor	10000	
Porch Treatment	1500	
Siding		
Installation	44361	
Material	0	See Lumber
deck material	4458	
Electric		
Rough-in/trim	24645	
Fixtures	7000	
Structured Wiring	4500	
Plumbing		
Rough-in/trim	22180.5	East Coast Plumbing
Fixtures	20000	Mukuffs
HVAC	22180.5	B&D Heating Air
Insulation	7393.5	
Drywall	19716	
Flooring		
wood	32611.75	Ron Fazzio
tile	14100	
carpet	0	
		Mercer Tile 843-744-5345
Trim		
Labor	24645	
Lumber	14787	
Interior Doors	6250	
Stairs	1500	treads
	3000	newell posts, hand rail, balusters
Kitchen Cabinets	55000	
Counter Tops	12000	
Appliances		
Appliance package	25000	Wholesale Appliance
Installation	800	KJ's Appliance Installation
Paint - Interior/Exterior	39432	
Fireplace	15000	
Landscaping	19750	Irrigation, sod, plantings,pine straw

Framing	sq ft		cost
house	4929	7.5	36968
porch	743	6	4458
Garage	528	6	3168
	6200		

Lumber	$ sq ft	
6200	40	248000

Windows	$ per unit	
85	450	38250

Ext. Doors	#	$ per unit	
High	4	2800	11200
Mid	3	2000	6000
low	0	1000	0

Siding	$ sq ft	
4929	9	44361

Deck	$ sq ft	
743	6	4458

Electric	$ sq ft	
4929	5	24645

Plumbing	$ sq ft	
4929	4.5	22180.5

HVAC	$ sq ft	
4929	4.5	22180.5

Insulation	$ sq ft	
4929	1.5	7393.5

Drywall	$ sq ft	
4929	4	19716

Flooring	sq ft	labor	mat	total
1st hardwood	2637	3.75	4	20436.75
1st Tile	350	7	5	4200
2nd hardwood	1500	4.25	4	12375
2nd Tile	400	7	4	4400
Bonus	550	6	4	5500
2nd Carpet	0	1	2.5	0
3rd Carpet	0	1	2.5	0

Trim Labor	$ sq ft	
4929	5	24645

Trim mat	$ sq ft		Treads
4929	3	14787	20

Interior doors	$ per unit	
25	250	6250

Paint	$ sq ft	
4929	8	39432

Fireplace	$ per unit	
5	3000	15000

Landscaping

Trade/Category	Budget	Supplier/Comments					
Backfill and grade lot	1000		Irrigation Zones	5	550	2750	
Gas	3000		Sod Pallets	8	250	2000	
			Plant allowance	1	15000	15000	
Sidewalk, driveway	12050						
Garage Doors	6000						
Hardware							
Door knobs/lock sets	$500	East Cooper Lock and Safe - Pauline 843-881-2044					
cabinet hardware	400						
Glass/Mirrors							
Shower door	4000						
Mirrors	500						
Towel bars, etc	700						
Closet	3500						
Punch out	2000						
Misc Lowe's	2000						
Nails	2500						
Cleaning	1000						
Shutters	0		Shutters	$ per unit			
			0	600	0		
HOA Dues	450						
Builder's Risk Insurance	3000						
General Liability Insurance	2000						
Pool	115000						1125000
COST OF CONSTRUCTION	1038861.75	Interest to date on lot	224.1121424				290000
Lot purchase + interest to date	390000	25000					835000
Sub Total	$ 1,449,861.75						
13%	$ 188,482.03						
Total	$ 1,638,343.78						
Interest Expense	$ -						
Commission/closing costs	$ 47,282.85				4829		
Grand Total	$ 1,685,626.63		$ 329.95				

9/21/07
ANDREW MCINTIRE DATE

9/21/07
CRAIG HINES DATE

EXHIBIT B - SPECIFICATIONS

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

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

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

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

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

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

Allowances

Explanation of Allowance Items:

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

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

Schedule of Allowance Items:

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

Exterior:

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

Kitchen:

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

Appliances:

Item	Manufacturer	Description	Finish/Color
Gas Range/Hood	Wolf or French equivalent	Cook-top and hood	Stainless
Refrigerator	Sub Zero	42" built-in	Stainless
Dishwasher	Pfisher Pykel	Double drawer	Stainless
Disposal	Insinkerator	¾ horsepower	
Microwave	TBD		Stainless

Floor Finishes:

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

Trim:

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

Plumbing Fixtures

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

HVAC

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

Allowances:

Tile	◦ $5.00 per square foot plus labor ◦ $15 per linear foot for shower borders in Master Bath
Wood	◦ 4.00 per square foot plus labor
Carpet	◦ $30 Yd
Granite	◦ $12,000
Plumbing Fixtures	◦ $20,000(Toilets, sinks, faucets, shower valves, Disposal, Tub/Shower inserts)
Lighting Fixtures	◦ $7000 (Interior and Exterior Lighting Fixtures)
Appliances	◦ $25,000 (Refrigerator, ovens, cook-top/range, range-hood, microwave, dishwasher)
Structured Wiring	◦ 1 Cat5, 1 Cable each room with a central SMC panel
Landscaping	◦ $19,500 Landscaping plus irrigation and sod, grading
Trim	◦ 2 Piece Crown 1st floor, 1 Piece crown 2nd floor, windows/casings 4 ¼" ◦ 8"or 10" base with cap – outlets in the base boards when appropriate
Cabinets	◦ $55,000 – Kitchen, bath, mudroom, laundry, built-ins includes cabinet knobs
Locks	◦ $4,200 – interior and exterior lock sets, towel bars, tp holders, etc

EXHIBIT B - SPECIFICATIONS - PART ONE

Division A General Conditions

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

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

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

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

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

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

Division B - Site Preparation

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

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

Division C Excavation

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

Division D Concrete

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

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

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

Division E Masonry

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

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

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

Division F Framing

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

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

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

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

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

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

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

Division H Roofing

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

Division I Windows and Exterior Doors

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

Division J Plumbing Rough.

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

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

Division K HVAC

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

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

Division L Electrical Rough

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

Division M Exterior Trim

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

Division N Siding

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

Division O Insulation

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

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

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

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

Division P Wall and Ceiling Finish

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

Division Q Interior Doors and Hardware

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

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

Division R Interior Trim

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

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

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

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

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

Division S Cabinetry

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

Division T Tile and Glass

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

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

Division U Specialties

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

Division W Plumbing Finish

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

Division X Electrical Finish

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

Division Y Kitchen Appliances

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

Division Z Painting

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

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

Division AA Flooring

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

Division BB Landscaping

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

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

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

Division CC Trash Removal

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

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

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

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
ANDREW AND KIMBERLY MCINTIRE,)
)
PLAINTIFFS,)
)
vs.)
)
SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC N/K/A CAROLINA WINDOW & MILLWORK - OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN D/B/A CASTEEN CUSTOM CABINETS; QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN D/B/A MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO. INC.; JERRY COMER D/B/A JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; NEW SOUTH CONSTRUCTION SUPPLY, LLC,)
)
DEFENDANTS.)
SEAQUEST DEVELOPMENT COMPANY, INC.,)
)
THIRD PARTY PLAINTIFF,)
)
vs.)
)
ARCHITECTURAL PRODUCTS OF CHARLESTON, LLC; SEALTIGHT OF)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO. 2016-CP-10-1833

DEFENDANT SEAQUEST DEVELOPMENT COMPANY, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO STAY AND TO COMPEL ARBITRATION

FILED
2016 OCT 13 AM 9:57
JULIE J. ARMSTRONG
CLERK OF COURT
BY

SOUTH CAROLINA, LLC,)
)
THIRD PARTY DEFENDANTS.)

Defendant Seaquest Development Company, Inc. (hereinafter "Defendant"), by and through its undersigned attorneys, respectfully submits this Memorandum in Opposition to Plaintiffs' Motion to Stay and to Compel Arbitration. Defendant is entitled to an Order denying Plaintiffs' motion as there is no agreement to arbitrate the disputes outlined in Plaintiffs' Complaint, and Plaintiffs have waived any right they may have had to compel arbitration.

Background

On or about August 22, 2007 Defendant and Plaintiffs entered into a contract for the construction of a single family residence located at 821 Bridgetown Pass in Mt. Pleasant. (Contract attached hereto as Exhibit "A"). Defendants acted as the general contractor and work was performed through subcontractors, the majority of which are named as direct defendants or third-party defendants to this action. The Certificate of Occupancy for the residence was issued on September 25, 2008. (Certificate of Occupancy attached hereto as Exhibit "B"). Plaintiffs filed this lawsuit on April 8, 2016 wherein they set forth the following causes of action against Defendant: Negligence and Gross Negligence; Breach of Warranty of Habitability; Negligent Misrepresentation and Constructive Fraud, and; Breach of Warranty of Good and Workmanlike Work. (Complaint attached hereto as Exhibit "C"). On or about July 15, 2016 Plaintiffs moved to stay there own action to compel arbitration.

Standard

South Carolina has codified the enforceability of arbitration agreements is S.C. Code Ann. Sec 15-48-10(a), which states:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter

> arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

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

Argument

I. Waiver

Plaintiffs have waived any right they may have had to demand arbitration. Although South Carolina favors arbitration, the right to enforce an arbitration clause may be waived. Rhodes v. Benson Chrysler–Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct.App.2007). "[T]o establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." Gen. Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct.App.2001). No set rule exists "as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct.App.1999) (quoting Hyload, Inc. v. Pre–Engineered Prods., Inc., 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct.App.1992)). Our courts consider the following three factors when determining whether a party has waived its right to compel arbitration:

(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. Rhodes, 374 S.C. at 126, 647 S.E.2d at 251.

"To establish prejudice, the non-moving party must show something more than 'mere inconvenience.' " Id. at 127, 647 S.E.2d at 251 (quoting Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct.App.2003)). "Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts." Rhodes, 374 S.C. at 127, 647 S.E.2d at 251–52 (internal citation omitted).

Upon information and belief, Plaintiff engaged Applied Building Sciences as their liability experts to investigate and document the alleged defects at the home. Upon information and belief, Applied Building Sciences performed destructive testing and documented the results with photographs and/or field notes in anticipation of litigation. Upon information and belief, Applied Building Sciences produced a scope of repair for the alleged defects in the home. Upon information and belief, Plaintiff engaged a contractor or contractors to perform the repairs to the alleged defects at the home. Plaintiff undertook these actions related to litigation without demanding arbitration and without complying with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. § 40-59-810, *et seq.* Upon information and belief, the repairs to Plaintiffs' home are completed.

Plaintiffs' actions do not pass the first two factors of the Court's test for determining whether a party has waived its right to compel arbitration: 1) A substantial amount of time transpired between the time Plaintiffs engaged liability and repair experts and the time they moved to compel arbitration. In fact, Plaintiffs waited until the repairs to their home were substantially completed before they (improperly) demanded arbitration. 2) Prior to moving to compel arbitration, Plaintiffs engaged in extensive discovery through their liability expert, Applied Building Sciences.

Plaintiffs' delay in seeking arbitration has prejudiced Defendant, thereby failing the third factor of the Court's test for determining whether a party has waived its right to compel arbitration. Plaintiffs engaged in extensive investigation, discovery, and repairs to their home without giving notice to Defendant and without demanding arbitration. As it stands now, Defendant cannot inspect, investigate, or test the alleged defects which Plaintiffs have forever destroyed. Furthermore, Defendant will be resigned to rely on the inspections and investigations of Plaintiffs' experts. Relying on an opposing party's experts is an undue burden and the very definition of prejudice. Had Plaintiffs demanded arbitration when they first discovered alleged defects or when they first engaged liability experts to perform their investigation, then Defendants would have had the opportunity to inspect, investigate, or test the alleged defects. Plaintiffs' delay in demanding arbitration is not just mere inconvenience, but it has significantly and substantially prejudiced Defendant.

The sum effect of Plaintiffs' actions is that they have waived any and all rights they may have had to demand arbitration.

II. S.C. Code Ann. Sec 15-48-10(a) is Inapplicable to Plaintiffs' Tort and Warranty Claims

Section 8.1.2 of the Contract attached hereto as Exhibit "A" makes reference to and incorporates AIA Document A201-1997. (AIA Document A201-1997 Exemplar attached hereto as Exhibit "D"). Section 4.6.1 of Exhibit "D" states that "[a]ny Claim arising out of or related to the Contract ... be subject to arbitration." Section 4.3.1 defines "Claim" as "a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract."

Based on the language of the arbitration provision and the definition of "claim" it is clear that the arbitration provision is meant only apply to issues and disputes related to the contract itself, not to disputes related to alleged defective construction which sound in tort and/or warranty.

Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit. Zabinski at 596. "Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." Id. at 596-97. Our Supreme Court has noted that the following test has been used to determine whether a particular tort claim falls within the scope of an agreement to arbitrate:

> The test is based on a determination whether the particular tort claim is so interwoven with the contract that it could not stand alone. If the tort and contract claims are so interwoven, both are arbitrable. On the other hand, if the tort claim

is completely independent of the contract and could be maintained without reference to the contract, the tort claim is not arbitrable.

Id. at 597 n. 4.

Plaintiffs' tort and warranty claims stand alone in this litigation. In fact, Plaintiffs' tort and warranty claims are so completely independent of the contract, that Plaintiffs did not even sue under a breach of contract theory. Clearly, Plaintiffs' tort and warranty claims can be maintained without reference to the contract, thereby rendering the tort and warranty claims not arbitrable.

III. Plaintiffs are Contractually Barred From Demanding Arbitration

Plaintiffs are attempting to invoke provisions in the contract to compel arbitration. Specifically, Plaintiffs claim that Section 4.6 of Exhibit "D" requires arbitration between them and Defendant. Plaintiffs have failed to demand arbitration in accordance with the very section of which they are attempting to avail themselves. Paragraph 4.6.2 states that a demand for arbitration must be filed in writing with the opposing party and with the American Arbitration Association. Plaintiffs have done neither and, therefore, any purported demand for arbitration to date is improper and invalid.

Paragraph 4.6.3 of Exhibit "D" states that a "demand for arbitration shall be made ... within a reasonable time after the claim has arisen..." Plaintiffs still have not made a demand for arbitration pursuant to the contract. As it stands now, Plaintiffs could not possibly comply with the "reasonable time" requirement because they have already discovered alleged defects that could have given rise to a "Claim", investigated that claim, retained counsel, retained experts, and completely repaired all the alleged defects they believe to be arbitrible. Accordingly, they are barred from demanding arbitration.

Paragraph 4.6.3 of Exhibit "D" goes on to reference statutes of limitations for demanding arbitration. Specifically, Paragraph 4.6.3 states that "in no event shall [an arbitration demand] be made after the date when the institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7." The applicable statute of limitations for the claims brought by Plaintiffs is three years as set forth in S.C. Code Ann. § 15-3-510, *et seq*. Paragraph 13.7.1.3 states that "As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued..." Accordingly, Plaintiffs' demand for arbitration had to have been made sometime prior to 2013. Here we are in October of 2016 and no proper demand for arbitration has been made by Plaintiffs. The statute of limitations to demand arbitration, as calculated by the contract and by the arbitration clause contained therein, has run. Plaintiffs are therefore barred by the statute of limitations from demanding arbitration.

Conclusion

Based on the above arguments, authorities, and evidence, Defendant Seaquest Development Company, Inc. is entitled to an Order denying Plaintiffs' Motion to Stay and to Compel Arbitration.

[Signature Block to Follow]

YOUNG CLEMENT RIVERS, LLP

By: _____
Edward D. Buckley, Jr.
Jason A. Daigle
P.O. Box 993, Charleston, SC 29402
(843) 720-5436
ebuckley@ycrlaw.com
jdaigle@ycrlaw.com
Attorneys for Defendant Seaquest Development Company, Inc.

Charleston, South Carolina

Dated: 10-13-16

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing memorandum was emailed and hand delivered to all counsel of record in this proceeding this 10 day of October, 2016.

_____

1997 EDITION

AIA DOCUMENT

A101-1997

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

A Revised Version Of The -

Standard Form of Agreement Between Owner and Contractor

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

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

BETWEEN the Owner: Andrew and Kim McIntire

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

and the Contractor: SeaQuest Development Company, Inc.

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

The Project is: The McIntire Residence

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

The Architect is New Urbanist Design

This document has important legal consequences. Consultation with an Attorney is encouraged with respect to its completion or modification.
AIA Document A201 – 1997 General Conditions of the Contract for construction is adopted in this document by reference. Do not use with other general conditions unless this document is modified.
This document has been approved by the Associate General Contractors of America.

The Owner and Contractor agree as follows.

The American Institute of Architects 1735 New York Avenue, N.W. Washington, D.C. 20006-5292
Copyright 1915, 1918, 1925, 1937, 1951, 1958, 1961, 1963, 1967, 1974, 1977, 1987, 1997 by The American Institute of

EXHIBIT
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ARTICLE I THE CONTRACT DOCUMENTS

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

ARTICLE 2 THE WORK OF THIS CONTRACT

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

ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

3.1 The date of commencement of the Work shall be the date fixed in a "Notice To Proceed" issued by the Owner.

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

if, prior to the commencement of the Work, the Owner requires time to file mortgages, mechanic's liens and other security interests, the Owner's time requirement shall be as follows:

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

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

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

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

ARTICLE 4 CONTRACT SUM

4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum is a cost estimate of _$1,600,000_. This estimate and contract are based on a cost plus arrangement. The ultimate contract price will be based on cost plus 12.5%, with a minimum fee of $125,000. Costs will be determined by any and all costs associated with the construction of the residence as defined by the approved plans at 821 Bridgetown Pass including the following:

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

Site Preparation
- Termite Pretreatment
- Site Clearing (including unsatisfactory dirt and replacement with compacted soil)

Excavation
- Site Drainage/Grading

Concrete
- Batterboards/footings/Steel
- Concrete footings
- Rebar

Masonary
- Block walls/piers
- Brickwork or Stucco
- Lentils, Sand, Mortar

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

Roofing
- Roofing material and Labor

Windows and Exterior Doors

Plumbing Rough
- Water & Sewer Lines
- Plumbing Rough –in

HVAC
- Heat and AC
- HVAC Venting

Electrical Rough

Exterior Trim

Siding

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

Wall and Ceiling Finish
- Drywall

Interior Doors and Hardware
- Interior Pre-hung Doors
- Door Hardware

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

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

Tile and Glass
- Tile
- Glass shower enclosures and Mirrors

Specialties
- Bath Accessories

Plumbing Finish/Fixtures

Electrical Finish/Fixtures

Kitchen Appliances

Painting
- Interior Painting
- Exterior Painting

Flooring
- Wood Flooring
- Tile

Landscaping
- Final Grade
- Fencing
- Driveways
- Swimming Pool

Trash Removal
- Dumpsters
- Site Clean-up
- Final Clean-up

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

(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount -for each and the date when that amount expires.)

4.3 Unit prices, if any, are as follows:

ARTICLE 5 PAYMENTS

5.1 PROGRESS PAYMENTS

5.1.1 Based upon Applications for Payment submitted to the Bank by the Contractor, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.

5.1.2 The period covered by each Application for Payment shall based upon : A limit of seven draws will be made by the Contractor during the construction process and will be in keeping with standard bank policy. Payment will be made to the Contractor in no more than seven (7) working days. **Payments will be made directly to the Contractor from bank sources.**

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

5.1.4 Applications for Payment shall indicate the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment.

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

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

1st Payment – Upon completion of Clearing and rough grade, footings, Foundation and slab
2nd Payment – Upon completion of house framing (Flooring/Subflooring, Wall Sheathing, Roof Sheathing, Exterior Doors and Windows
3rd Payment - Upon completion of Trade Rough-ins (Plumbing, Electrical, HVAC, Fireplace)
4th Payment – Upon completion of Exterior trim/sheetrock (Exterior Veneer, Cornice & Facia, Roofing, Exterior Paint, Insulation, Sheetrock
5th Payment – Upon Completion of Interior finishes (Trim, Interior doors, Tile, Cabinets, Interior Paint, Flooring Install)
6th Payment – Upon Completion of Interior Trim-outs (Plumbing Fixtures, Electrical Fixtures, HVAC, Appliances, Hardware)
Final Draw – This payment will be held until Certificate of Occupancy is issued and contractor and owner are in agreement that home is complete. (Stoops & Decks, Driveways and Walks, Finish Grade, Landscaping, Final Clean)

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

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

5.1.7 Except with the Owner's prior approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

5.2 FINAL PAYMENT (see final draw above section 5.1.5

5.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when:

1. the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as identified in a final work agreement. This final work , known as the "punch list", will be assigned a fair value and will be held by a mutually agreed party, and will be released as each item is completed to satisfactory standards by owner and contractor.
.2 a final Certificate of Occupancy has been issued by the Town of Mt. Pleasant

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

ARTICLE 6 TERMINATION OR SUSPENSION

6.1 The Contract may be terminated by the Owner or the Contractor as provided in Article 14 of AIA Document A201-1997.

6.2 The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201-1997.

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

ARTICLE 7 MISCELLANEOUS PROVISIONS

7.1 Where reference is made in this Agreement to a provision of AIA Document A201-1997 or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

7.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.) ***10%***

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or m odificat ions, and also regarding requirements such as written disclosures or waivers.)

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

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

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

7.6 Other provisions:

ARTICLE 8 ENUMERATION OF CONTRACT DOCUMENTS

8.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated as follows:

8.1.1 The Agreement is this executed 1997 edition of the Standard Form of Agreement Between Owner and Contractor, AIA Document A101-1997.

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

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

Document	Title	Pages
Exhibit A	AIA Document 101-1997	7
AIA Exhibit B	Specifications Part One	10
Exhibit C	Drawings	13

Site
First Floor Plan
Second Floor Plan
Door and Window Schedule
Front Elevations
Right Side Elevations
Rear Elevations
Left Side Elevations
Wall Sections
Miscellaneous Wall Details
Details/Sections
First Floor Electrical
Second Floor Electrical

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

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

16.1.6 [ ].

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

8.1.6 The Addenda, if any, are as follows:

Addenda No.1 – Contract Note **Date** _____ **Pages** **1**

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 8.

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

(List here any additional documents that are intended to form part of the Contract Documents.

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

OWNER	CONTRACTOR
_____	
(Signature and date)	
_____	_____
(Signature and date)	*(Signature and date)*
_____	_____
Printed name and title)	*(Printed name and title)*

CAUTION: *You should sign an original AIA document or a licensed reproduction. Originals contain the AIA logo printed in red; licensed reproductions are those produced in accordance with the Instructions to this document.*

(D 1997 A I A @ AIA DOCUMENT A101-1997

OWNER-CONTRACTOR
AGREEMENT

The American Institute of Architects 1735 New York Avenue, N.W. Washington, D.C. 20006-5292

WARNING Unlicensed photocopying violates U.S. copyright laws and will subject the violator to legal prosecution.

TOWN OF MOUNT PLEASANT
BUILDING INSPECTIONS DIVISION

CERTIFICATE OF OCCUPANCY

09/25/2008

PERMIT #	RN-07-070268
PROJECT NAME:	Charlest Himes
ADDRESS:	821 Bridgetown Pass
CITY, ST ZIP:	Mt Pleasant, SC 29465

Contractor's Name Seaquest Development Co.Inc.
27 Rutledge Blvd
Charleston SC 29401

CONSTRUCTION TYPE: New Single Family Dwelling 2003 IRC

PROPOSED USE:

OCCUPANCY TYPE: R-3 and IRC Residential, one and two family

SQUARE FOOTAGE: 4929

SPECIAL PROVISIONS:

This certificate is issued upon completion of inspections for compliance with the Town of Mount Pleasant Code of Ordinances. The building may only be occupied in accordance with the classification listed above.

BUILDING OFFICIAL

EXHIBIT
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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

ANDREW AND KIMBERLY MCINTIRE,)
Plaintiff(s))

vs.)

SEAQUEST DEVELOPMENT COMOPANY, INC.; ET AL,)
Defendant(s))

CIVIL ACTION COVERSHEET

2016 -CP- 10 - 1833

FILED
2016 APR -8 PM 4:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Submitted By: Andrew K. Epting, Jr. SC Bar #: 1908

Address: 46 A State Street Telephone #: 8433771871

Charleston, SC 29401 Fax #: 8433771310

Other:

E-mail: ake@epting-law.com

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

DOCKETING INFORMATION (*Check all that apply*)

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

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

NATURE OF ACTION (*Check One Box Below*)

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

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

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

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

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

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

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

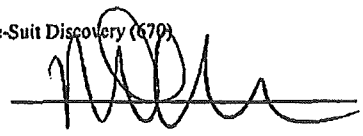
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Submitting Party Signature:  **Date:** 4/4/16

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

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

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

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

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

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

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

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

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

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

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

IN THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2016-CP-10-1833

FILED
2016 APR -8 PM 4:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY

SUMMONS

(JURY TRIAL REQUESTED)

TO: THE DEFENDANTS NAMED ABOVE:

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

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

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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

DATED: April 4, 2016
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

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

Defendants.

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

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
BY

COMPLAINT

(JURY TRIAL REQUESTED)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. At all times relevant hereto, SeaQuest and Subcontractors, their agents, servants, employees, and/or subcontractors undertook and were under a duty to construct the Residence in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, free from latent defects. The Defendants failed to meet their contractual and common law duties.

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

a) In failing to follow the plans and specifications;

b) In failing to properly construct the roof;

c) In installing defective or improperly installing shakes;

d) In installing defective window/door units or installing them improperly;

e) In failing to properly install flashing;

f) In installing a defective plumbing system or installing it improperly;

g) In installing defective cabinets or installing them improperly;

h) In installing defective trim or installing it improperly;

i) In installing defective foam insulation or installing it improperly;

j) In installing defective tiles or installing them improperly;

k) In installing defective framing;

l) In installing defective chimneys/fireplaces or installing them improperly;

m) In installing defective foundation/slab and hardscape or installing them improperly;

n) In failing to properly pre-treat and treat for termites;

o) In failing to do good and workmanlike work;

p) In failing to follow the local building codes of the County of Charleston, Town of Mt. Pleasant and the State of South Carolina;

q) In failing to use due care;

r) In failing to properly oversee the construction, including the selection of subcontractors, of the Residence when it planned to sell the home to Owners for profit;

s) In failing to properly investigate the physical condition of the building and make necessary repairs;

t) In negligently misrepresenting the physical condition of the building to the Plaintiffs;

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

29. SeaQuest and Subcontractors, their agents, servants, employees, and/or subcontractors were negligent, careless, reckless, willful and wanton in failing to construct the Residence in accordance with the local building codes of the County of Charleston, Town of Mt. Pleasant and the State of South Carolina, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, free from latent defects, thereby breaching the above-referenced duty by, but not limited to, the particulars set forth above.

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

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

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

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

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

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

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

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

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

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

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

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

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

41. By reason of their special expertise and superior knowledge, Seaquest and its Subcontractors had a duty to communicate truthful information and not to mislead Plaintiffs.

42. Seaquest and its Subcontractors represented that they had completed the work per the Agreement and that all work was up to code.

43. Said representations made by SeaQuest and its Subcontractors were false when made in that SeaQuest and its Subcontractors carelessly and negligently performed inspections, observations, and work and carelessly and negligently approved the defective work .

44. SeaQuest and its Subcontractors either knew or should have known the work was defective at the time the work was approved and that their failure to disclose to Owners the existence of the defective work in place would mislead Owners

45. SeaQuest and its Subcontractors had a pecuniary interest in making the misrepresentations to Plaintiffs.

46. SeaQuest and its Subcontractors made said representations and/or said non-disclosures, with the intent to induce Owners' reliance thereon.

47. Owners justifiably relied upon said misrepresentations and non-disclosures.

48. As a direct and proximate result of the misrepresentations and non-disclosures, Owners have incurred the damages hereinabove alleged and, in addition thereto, are entitled to punitive damages.

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

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

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

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

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

WHEREFORE, Plaintiffs pray for judgment against the Defendants for:

(1) Actual, direct, indirect, incidental, and consequential damages in an amount to be determined at trial;

(2) Their attorneys' fees and costs;

(3) Punitive damages; and

(4) Such further relief as this Court may order.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC



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

ATTORNEYS FOR PLAINTIFFS

On this 4 day of April 2016

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

April 4, 2016

The Honorable Julie Armstrong
Charleston County Clerk of Court
100 Broad Street
Charleston, SC 29401

Re: *Andrew McIntire and Kimberly McIntire v. Seaquest Development Company, et al.*
Case No.: 2016-CP-10-_____

Dear Ms. Armstrong:

Enclosed please find the original and one copy of the Civil Action Cover Sheet, Summons and Complaint together with the $150 filing fee in the above-referenced matter. I would greatly appreciate your filing the originals and returning the file-stamped copies to me in the self-addressed, stamped envelope provided. Thank you.

With kindest regards,

ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr.

AKE, Jr./agg

Enclosures

Andrew K. Epting, Jr. · ake@epting-law.com
Michelle N. Endemann · mne@epting-law.com
46A State Street · Charleston · South Carolina · 29401
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1997 EDITION

AIA DOCUMENT A201-1997

General Conditions of the Contract for Construction

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

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

TABLE OF ARTICLES

1. GENERAL PROVISIONS
2. OWNER
3. CONTRACTOR
4. ADMINISTRATION OF THE CONTRACT
5. SUBCONTRACTORS
6. CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS
7. CHANGES IN THE WORK
8. TIME
9. PAYMENTS AND COMPLETION
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14. TERMINATION OR SUSPENSION OF THE CONTRACT

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GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

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ALL-STATE LEGAL®
EXHIBIT
D

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ARTICLE 1 GENERAL PROVISIONS

1.1 BASIC DEFINITIONS

1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents consist of the Agreement between Owner and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents such as bidding requirements (advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of Addenda relating to bidding requirements).

1.1.2 THE CONTRACT

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor, (3) between the Owner and Architect or (4) between any persons or entities other than the Owner and Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

1.1.3 THE WORK

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

1.1.4 THE PROJECT

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors.

1.1.5 THE DRAWINGS

The Drawings are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

1.1.6 THE SPECIFICATIONS

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

1.1.7 THE PROJECT MANUAL

The Project Manual is a volume assembled for the Work which may include the bidding requirements, sample forms, Conditions of the Contract and Specifications.

1.2 CORRELATION AND INTENT OF THE CONTRACT DOCUMENTS

1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are

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complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

1.2.2 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

1.2.3 Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

1.3 CAPITALIZATION

1.3.1 Terms capitalized in these General Conditions include those which are (1) specifically defined, (2) the titles of numbered articles and identified references to Paragraphs, Subparagraphs and Clauses in the document or (3) the titles of other documents published by the American Institute of Architects.

1.4 INTERPRETATION

1.4.1 In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

1.5 EXECUTION OF CONTRACT DOCUMENTS

1.5.1 The Contract Documents shall be signed by the Owner and Contractor. If either the Owner or Contractor or both do not sign all the Contract Documents, the Architect shall identify such unsigned Documents upon request.

1.5.2 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

1.6 OWNERSHIP AND USE OF DRAWINGS, SPECIFICATIONS AND OTHER INSTRUMENTS OF SERVICE

1.6.1 The Drawings, Specifications and other documents, including those in electronic form, prepared by the Architect and the Architect's consultants are Instruments of Service through which the Work to be executed by the Contractor is described. The Contractor may retain one record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by the Architect or the Architect's consultants, and unless otherwise indicated the Architect and the Architect's consultants shall be deemed the authors of them and will retain all common law, statutory and other reserved rights, in addition to the copyrights. All copies of Instruments of Service, except the Contractor's record set, shall be returned or suitably accounted for to the Architect, on request, upon completion of the Work. The Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants, and copies thereof furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor or any Subcontractor, Sub-subcontractor or material or equipment supplier on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner, Architect and the Architect's consultants. The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are authorized to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants appropriate to and for use in

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ARTICLE 2 OWNER

2.1 GENERAL

2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Subparagraph 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

2.1.2 The Owner shall furnish to the Contractor within fifteen days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

2.2.1 The Owner shall, at the written request of the Contractor, prior to commencement of the Work and thereafter, furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

2.2.2 Except for permits and fees, including those required under Subparagraph 3.7.1, which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

2.2.3 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

2.2.4 Information or services required of the Owner by the Contract Documents shall be furnished by the Owner with reasonable promptness. Any other information or services relevant to the Contractor's performance of the Work under the Owner's control shall be furnished by the Owner after receipt from the Contractor of a written request for such information or services.

2.2.5 Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, such copies of Drawings and Project Manuals as are reasonably necessary for execution of the Work.

2.3 OWNER'S RIGHT TO STOP THE WORK

2.3.1 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents as required by Paragraph 12.2 or persistently fails to carry out Work in

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accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Subparagraph 6.1.3.

2.4 OWNER'S RIGHT TO CARRY OUT THE WORK

2.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period give the Contractor a second written notice to correct such deficiencies within a three-day period. If the Contractor within such three-day period after receipt of such second notice fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

ARTICLE 3 CONTRACTOR

3.1 GENERAL

3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Contractor" means the Contractor or the Contractor's authorized representative.

3.1.2 The Contractor shall perform the Work in accordance with the Contract Documents.

3.1.3 The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor.

3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

3.2.1 Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Subparagraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, any errors, inconsistencies or omissions discovered by the Contractor shall be reported promptly to the Architect as a request for information in such form as the Architect may require.

3.2.2 Any design errors or omissions noted by the Contractor during this review shall be reported promptly to the Architect, but it is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents. The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Architect.

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3.2.3 If the Contractor believes that additional cost or time is involved because of clarifications or instructions issued by the Architect in response to the Contractor's notices or requests for information pursuant to Subparagraphs 3.2.1 and 3.2.2, the Contractor shall make Claims as provided in Subparagraphs 4.3.6 and 4.3.7. If the Contractor fails to perform the obligations of Subparagraphs 3.2.1 and 3.2.2, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. The Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents unless the Contractor recognized such error, inconsistency, omission or difference and knowingly failed to report it to the Architect.

3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any resulting loss or damage.

3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.

3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

3.4 LABOR AND MATERIALS

3.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

3.4.2 The Contractor may make substitutions only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order.

3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

3.5 WARRANTY

3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract

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Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

3.6 TAXES

3.6.1 The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

3.7 PERMITS, FEES AND NOTICES

3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work which are customarily secured after execution of the Contract and which are legally required when bids are received or negotiations concluded.

3.7.2 The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities applicable to performance of the Work.

3.7.3 It is not the Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations. However, if the Contractor observes that portions of the Contract Documents are at variance therewith, the Contractor shall promptly notify the Architect and Owner in writing, and necessary changes shall be accomplished by appropriate Modification.

3.7.4 If the Contractor performs Work knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations without such notice to the Architect and Owner, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

3.8 ALLOWANCES

3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

3.8.2 Unless otherwise provided in the Contract Documents:

.1 allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

.2 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances;

.3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Clause 3.8.2.1 and (2) changes in Contractor's costs under Clause 3.8.2.2.

3.8.3 Materials and equipment under an allowance shall be selected by the Owner in sufficient time to avoid delay in the Work.

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3.9 SUPERINTENDENT

3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

3.10.2 The Contractor shall prepare and keep current, for the Architect's approval, a schedule of submittals which is coordinated with the Contractor's construction schedule and allows the Architect reasonable time to review submittals.

3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Architect.

3.11 DOCUMENTS AND SAMPLES AT THE SITE

3.11.1 The Contractor shall maintain at the site for the Owner one record copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to record field changes and selections made during construction, and one record copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work.

3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES

3.12.1 Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

3.12.3 Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. The purpose of their submittal is to demonstrate for those portions of the Work for which submittals are required by the Contract Documents the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by the Architect is subject to the limitations of Subparagraph 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals which are not required by the Contract Documents may be returned by the Architect without action.

3.12.5 The Contractor shall review for compliance with the Contract Documents, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by

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the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors. Submittals which are not marked as reviewed for compliance with the Contract Documents and approved by the Contractor may be returned by the Architect without action.

3.12.6 By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

3.12.7 The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect.

3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's approval thereof.

3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Architect on previous submittals. In the absence of such written notice the Architect's approval of a resubmission shall not apply to such revisions.

3.12.10 The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Subparagraph 3.12.10, the Architect will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.



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3.13 USE OF SITE

3.13.1 The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

3.14 CUTTING AND PATCHING

3.14.1 The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly.

3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

3.15 CLEANING UP

3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the cost thereof shall be charged to the Contractor.

3.16 ACCESS TO WORK

3.16.1 The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

3.17 ROYALTIES, PATENTS AND COPYRIGHTS

3.17.1 The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Architect. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.

3.18 INDEMNIFICATION

3.18.1 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Paragraph 11.3, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be

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construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.

3.18.2 In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Subparagraph 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

ARTICLE 4 ADMINISTRATION OF THE CONTRACT

4.1 ARCHITECT

4.1.1 The Architect is the person lawfully licensed to practice architecture or an entity lawfully practicing architecture identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Architect" means the Architect or the Architect's authorized representative.

4.1.2 Duties, responsibilities and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor and Architect. Consent shall not be unreasonably withheld.

4.1.3 If the employment of the Architect is terminated, the Owner shall employ a new Architect against whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the former Architect.

4.2 ARCHITECT'S ADMINISTRATION OF THE CONTRACT

4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents, and will be an Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the one-year period for correction of Work described in Paragraph 12.2. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified in writing in accordance with other provisions of the Contract.

4.2.2 The Architect, as a representative of the Owner, will visit the site at intervals appropriate to the stage of the Contractor's operations (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Subparagraph 3.3.1.

4.2.3 The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

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4.2.4 Communications Facilitating Contract Administration. Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other through the Architect about matters arising out of or relating to the Contract. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

4.2.5 Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

4.2.6 The Architect will have authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Subparagraphs 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

4.2.7 The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Paragraphs 3.3, 3.5 and 3.12. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

4.2.8 The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor changes in the Work as provided in Paragraph 7.4.

4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion, will receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor, and will issue a final Certificate for Payment upon compliance with the requirements of the Contract Documents.

4.2.10 If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

4.2.11 The Architect will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor.

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The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If no agreement is made concerning the time within which interpretations required of the Architect shall be furnished in compliance with this Paragraph 4.2, then delay shall not be recognized on account of failure by the Architect to furnish such interpretations until 15 days after written request is made for them.

4.2.12 Interpretations and decisions of the Architect will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and initial decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith.

4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

4.3 CLAIMS AND DISPUTES

4.3.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

4.3.2 Time Limits on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

4.3.3 Continuing Contract Performance. Pending final resolution of a Claim except as otherwise agreed in writing or as provided in Subparagraph 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

4.3.4 Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

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4.3.5 Claims for Additional Cost. If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.6.

4.3.6 If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with this Paragraph 4.3.

4.3.7 CLAIMS FOR ADDITIONAL TIME

4.3.7.1 If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.

4.3.7.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction.

4.3.8 Injury or Damage to Person or Property. If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

4.3.9 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

4.3.10 Claims for Consequential Damages. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.

4.4 RESOLUTION OF CLAIMS AND DISPUTES

4.4.1 Decision of Architect. Claims, including those alleging an error or omission by the Architect but excluding those arising under Paragraphs 10.3 through 10.5, shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a

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condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. The Architect will not decide disputes between the Contractor and persons or entities other than the Owner.

4.4.2 The Architect will review Claims and within ten days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Architect is unable to resolve the Claim if the Architect lacks sufficient information to evaluate the merits of the Claim or if the Architect concludes that, in the Architect's sole discretion, it would be inappropriate for the Architect to resolve the Claim.

4.4.3 In evaluating Claims, the Architect may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Architect in rendering a decision. The Architect may request the Owner to authorize retention of such persons at the Owner's expense.

4.4.4 If the Architect requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either provide a response on the requested supporting data, advise the Architect when the response or supporting data will be furnished or advise the Architect that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Architect will either reject or approve the Claim in whole or in part.

4.4.5 The Architect will approve or reject Claims by written decision, which shall state the reasons therefor and which shall notify the parties of any change in the Contract Sum or Contract Time or both. The approval or rejection of a Claim by the Architect shall be final and binding on the parties but subject to mediation and arbitration.

4.4.6 When a written decision of the Architect states that (1) the decision is final but subject to mediation and arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

4.4.7 Upon receipt of a Claim against the Contractor or at any time thereafter, the Architect or the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Architect or the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

4.4.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the Claim by the Architect, by mediation or by arbitration.

4.5 MEDIATION

4.5.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5 shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be

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subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

4.5.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to the Contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

4.5.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

4.6 ARBITRATION

4.6.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.

4.6.2 Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect.

4.6.3 A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

4.6.4 Limitation on Consolidation or Joinder. No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

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4.6.5 Claims and Timely Assertion of Claims. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

4.6.6 Judgment on Final Award. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 5 SUBCONTRACTORS

5.1 DEFINITIONS

5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect will promptly reply to the Contractor in writing stating whether or not the Owner or the Architect, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection.

5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

5.2.4 The Contractor shall not change a Subcontractor, person or entity previously selected if the Owner or Architect makes reasonable objection to such substitute.

5.3 SUBCONTRACTUAL RELATIONS

5.3.1 By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the

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Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner provided that:

.1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Paragraph 14.2 and only for those subcontract agreements which the Owner accepts by notifying the Subcontractor and Contractor in writing; and

.2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

5.4.2 Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

6.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Paragraph 4.3.

6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules when directed to do so. The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the

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Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

6.2 MUTUAL RESPONSIBILITY

6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

6.2.3 The Owner shall be reimbursed by the Contractor for costs incurred by the Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of the Contractor. The Owner shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.

6.2.4 The Contractor shall promptly remedy damage wrongfully caused by the Contractor to completed or partially completed construction or to property of the Owner or separate contractors as provided in Subparagraph 10.2.5.

6.2.5 The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Subparagraph 3.14.

6.3 OWNER'S RIGHT TO CLEAN UP

6.3.1 If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

ARTICLE 7 CHANGES IN THE WORK

7.1 GENERAL

7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

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7.2 CHANGE ORDERS

7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

.1 change in the Work;

.2 the amount of the adjustment, if any, in the Contract Sum; and

.3 the extent of the adjustment, if any, in the Contract Time.

7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in Subparagraph 7.3.3.

7.3 CONSTRUCTION CHANGE DIRECTIVES

7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

.1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;

.2 unit prices stated in the Contract Documents or subsequently agreed upon;

.3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or

.4 as provided in Subparagraph 7.3.6.

7.3.4 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

7.3.5 A Construction Change Directive signed by the Contractor indicates the agreement of the Contractor therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

7.3.6 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Architect on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Clause 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Subparagraph 7.3.6 shall be limited to the following:

.1 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;

.2 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;

.3 rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;

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.4 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and

.5 additional costs of supervision and field office personnel directly attributable to the change.

7.3.7. The amount of credit to be allowed by the Contractor to the Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

7.3.8 Pending final determination of the total cost of a Construction Change Directive to the Owner, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs. For any portion of such cost that remains in dispute, the Architect will make an interim determination for purposes of monthly certification for payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a claim in accordance with Article 4.

7.3.9 When the Owner and Contractor agree with the determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

7.4 MINOR CHANGES IN THE WORK

7.4.1 The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

ARTICLE 8 TIME

8.1 DEFINITIONS

8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

8.1.2 The date of commencement of the Work is the date established in the Agreement.

8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 9.8.

8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

8.2 PROGRESS AND COMPLETION

8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by the Contract Documents or a notice to proceed given

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by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of morgages, mechanic's liens and other security interests.

8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

8.3 DELAYS AND EXTENSIONS OF TIME

8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Paragraph 4.3.

8.3.3 This Paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

ARTICLE 9 PAYMENTS AND COMPLETION

9.1 CONTRACT SUM

9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

9.2 SCHEDULE OF VALUES

9.2.1 Before the first Application for Payment, the Contractor shall submit to the Architect a schedule of values allocated to various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

9.3 APPLICATIONS FOR PAYMENT

9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment for operations completed in accordance with the schedule of values. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of requisitions from Subcontractors and material suppliers, and reflecting retainage if provided for in the Contract Documents.

9.3.1.1 As provided in Subparagraph 7.3.8, such applications may include requests for payment on account of changes in the Work which have been properly authorized by Construction Change Directives, or by interim determinations of the Architect, but not yet included in Change Orders.

9.3.1.2 Such applications may not include requests for payment for portions of the Work for which the Contractor does not intend to pay to a Subcontractor or material supplier, unless such Work has been performed by others whom the Contractor intends to pay.

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9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

9.4 CERTIFICATES FOR PAYMENT

9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Subparagraph 9.5.1.

9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of the Architect's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

9.5 DECISIONS TO WITHHOLD CERTIFICATION

9.5.1 The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Subparagraph 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Subparagraph 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's

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opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Subparagraph 3.3.2, because of:

.1 defective Work not remedied;

.2 third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor;

.3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;

.4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;

.5 damage to the Owner or another contractor;

.6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or

.7 persistent failure to carry out the Work in accordance with the Contract Documents.

9.5.2 When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

9.6 PROGRESS PAYMENTS

9.6.1 After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect.

9.6.2 The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of such Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

9.6.3 The Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.

9.6.4 Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor except as may otherwise be required by law.

9.6.5 Payment to material suppliers shall be treated in a manner similar to that provided in Subparagraphs 9.6.2, 9.6.3 and 9.6.4.

9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

9.6.7 Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.

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9.7 FAILURE OF PAYMENT

9.7.1 If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

9.8 SUBSTANTIAL COMPLETION

9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

9.8.3 Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion.

9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

9.9 PARTIAL OCCUPANCY OR USE

9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Clause 11.4.1.5 and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and

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have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Subparagraph 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

9.9.2 Immediately prior to such partial occupancy or use, the Owner, Contractor and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

9.10 FINAL COMPLETION AND FINAL PAYMENT

9.10.1 Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Subparagraph 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that

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portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from:

.1 liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;

.2 failure of the Work to comply with the requirements of the Contract Documents; or

.3 terms of special warranties required by the Contract Documents.

9.10.5 Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

10.1 SAFETY PRECAUTIONS AND PROGRAMS

10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

10.2 SAFETY OF PERSONS AND PROPERTY

10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

.1 employees on the Work and other persons who may be affected thereby;

.2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and

.3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

10.2.2 The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Clauses 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Clauses 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 3.18.

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10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

10.2.7 The Contractor shall not load or permit any part of the construction or site to be loaded so as to endanger its safety.

10.3 HAZARDOUS MATERIALS

10.3.1 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Architect in writing.

10.3.2 The Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to verify that it has been rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. The Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shut-down, delay and start-up, which adjustments shall be accomplished as provided in Article 7.

10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Subparagraph 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.

10.4 The Owner shall not be responsible under Paragraph 10.3 for materials and substances brought to the site by the Contractor unless such materials or substances were required by the Contract Documents.

10.5 If, without negligence on the part of the Contractor, the Contractor is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall indemnify the Contractor for all cost and expense thereby incurred.

10.6 EMERGENCIES

10.6.1 In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or

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extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Paragraph 4.3 and Article 7.

ARTICLE 11 INSURANCE AND BONDS

11.1 CONTRACTOR'S LIABILITY INSURANCE

11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

.1 claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;

.2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;

.3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;

.4 claims for damages insured by usual personal injury liability coverage;

.5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;

.6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;

.7 claims for bodily injury or property damage arising out of completed operations; and

.8 claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph 3.18.

11.1.2 The insurance required by Subparagraph 11.1.1 shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

11.1.3 Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These certificates and the insurance policies required by this Paragraph 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph 9.10.2. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.

11.2 OWNER'S LIABILITY INSURANCE

11.2.1 The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance.

11.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE

11.3.1 Optionally, the Owner may require the Contractor to purchase and maintain Project Management Protective Liability insurance from the Contractor's usual sources as primary coverage for the Owner's, Contractor's and Architect's vicarious liability for construction operations under the Contract. Unless otherwise required by the Contract Documents, the Owner

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shall reimburse the Contractor by increasing the Contract Sum to pay the cost of purchasing and maintaining such optional insurance coverage, and the Contractor shall not be responsible for purchasing any other liability insurance on behalf of the Owner. The minimum limits of liability purchased with such coverage shall be equal to the aggregate of the limits required for Contractor's Liability Insurance under Clauses 11.1.1.2 through 11.1.1.5.

11.3.2 To the extent damages are covered by Project Management Protective Liability insurance, the Owner, Contractor and Architect waive all rights against each other for damages, except such rights as they may have to the proceeds of such insurance. The policy shall provide for such waivers of subrogation by endorsement or otherwise.

11.3.3 The Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insureds on the Contractor's Liability Insurance coverage under Paragraph 11.1.

11.4 PROPERTY INSURANCE

11.4.1 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph 11.4 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

11.4.1.1 Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss.

11.4.1.2 If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance which will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor in writing, then the Owner shall bear all reasonable costs properly attributable thereto.

11.4.1.3 If the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles.

11.4.1.4 This property insurance shall cover portions of the Work stored off the site, and also portions of the Work in transit.

11.4.1.5 Partial occupancy or use in accordance with Paragraph 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial

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occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

11.4.2 Boiler and Machinery Insurance. The Owner shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

11.4.3 Loss of Use Insurance. The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.

11.4.4 If the Contractor requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, the Owner shall, if possible, include such insurance, and the cost thereof shall be charged to the Contractor by appropriate Change Order.

11.4.5 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.4.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

11.4.6 Before an exposure to loss may occur, the Owner shall file with the Contractor a copy of each policy that includes insurance coverages required by this Paragraph 11.4. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire, and that its limits will not be reduced, until at least 30 days' prior written notice has been given to the Contractor.

11.4.7 Waivers of Subrogation. The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

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11.4.8 A loss insured under Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Subparagraph 11.4.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

11.4.9 If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or in accordance with an arbitration award in which case the procedure shall be as provided in Paragraph 4.6. If after such loss no other special agreement is made and unless the Owner terminates the Contract for convenience, replacement of damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with Article 7.

11.4.10 The Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection is made, the dispute shall be resolved as provided in Paragraphs 4.5 and 4.6. The Owner as fiduciary shall, in the case of arbitration, make settlement with insurers in accordance with directions of the arbitrators. If distribution of insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

11.5 PERFORMANCE BOND AND PAYMENT BOND

11.5.1 The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

11.5.2 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall permit a copy to be made.

ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

12.1 UNCOVERING OF WORK

12.1.1 If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if required in writing by the Architect, be uncovered for the Architect's examination and be replaced at the Contractor's expense without change in the Contract Time.

12.1.2 If a portion of the Work has been covered which the Architect has not specifically requested to examine prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such Work is not in accordance with the Contract Documents, correction shall be at the Contractor's expense unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.

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12.2 CORRECTION OF WORK

12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION

12.2.1.1 The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense.

12.2.2 AFTER SUBSTANTIAL COMPLETION

12.2.2.1 In addition to the Contractor's obligations under Paragraph 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Subparagraph 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Paragraph 2.4.

12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work.

12.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Paragraph 12.2.

12.2.3 The Contractor shall remove from the site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

12.2.4 The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

12.2.5 Nothing contained in this Paragraph 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the one-year period for correction of Work as described in Subparagraph 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

12.3 ACCEPTANCE OF NONCONFORMING WORK

12.3.1 If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

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ARTICLE 13 MISCELLANEOUS PROVISIONS

13.1 GOVERNING LAW

13.1.1 The Contract shall be governed by the law of the place where the Project is located.

13.2 SUCCESSORS AND ASSIGNS

13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Subparagraph 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

13.2.2 The Owner may, without consent of the Contractor, assign the Contract to an institutional lender providing construction financing for the Project. In such event, the lender shall assume the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate such assignment.

13.3 WRITTEN NOTICE

13.3.1 Written notice shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by registered or certified mail to the last business address known to the party giving notice.

13.4 RIGHTS AND REMEDIES

13.4.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

13.4.2 No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

13.5 TESTS AND INSPECTIONS

13.5.1 Tests, inspections and approvals of portions of the Work required by the Contract Documents or by laws, ordinances, rules, regulations or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. The Owner shall bear costs of tests, inspections or approvals which do not become requirements until after bids are received or negotiations concluded.

13.5.2 If the Architect, Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Subparagraph 13.5.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. Such costs, except as provided in Subparagraph 13.5.3, shall be at the Owner's expense.

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13.5.3 If such procedures for testing, inspection or approval under Subparagraphs 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses shall be at the Contractor's expense.

13.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

13.5.5 If the Architect is to observe tests, inspections or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

13.5.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

13.6 INTEREST

13.6.1 Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

13.7.1 As between the Owner and Contractor:

.1 Before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion;

.2 Between Substantial Completion and Final Certificate for Payment. As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and

.3 After Final Certificate for Payment. As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any Warranty provided under Paragraph 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

14.1 TERMINATION BY THE CONTRACTOR

14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

.1 issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped;

.2 an act of government, such as a declaration of national emergency which requires all Work to be stopped;

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.3 because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Subparagraph 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or

.4 the Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Subparagraph 2.2.1.

14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

14.1.3 If one of the reasons described in Subparagraph 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Subparagraph 14.1.3.

14.2 TERMINATION BY THE OWNER FOR CAUSE

14.2.1 The Owner may terminate the Contract if the Contractor:

.1 persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;

.2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;

.3 persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or

.4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

14.2.2 When any of the above reasons exist, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

.1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;

.2 accept assignment of subcontracts pursuant to Paragraph 5.4; and

.3 finish the Work by whatever reasonable method the Owner may deem expedient. Upon request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

14.2.3 When the Owner terminates the Contract for one of the reasons stated in Subparagraph 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

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14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract.

14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Subparagraph 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent:

.1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or

.2 that an equitable adjustment is made or denied under another provision of the Contract.

14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall:

.1 cease operations as directed by the Owner in the notice;

.2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and

.3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

14.4.3 In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	NINTH JUDICIAL CIRCUIT
ANDREW AND KIMBERLY MCINTIRE, PLAINTIFFS, vs. SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC N/K/A CAROLINA WINDOW & MILLWORK - OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN D/B/A CASTEEN CUSTOM CABINETS; QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN D/B/A MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO. INC.; JERRY COMER D/B/A JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; NEW SOUTH CONSTRUCTION SUPPLY, LLC, DEFENDANTS.	CASE NO. 2016-CP-10-1833
SEAQUEST DEVELOPMENT COMPANY, INC., THIRD PARTY PLAINTIFF, vs. ARCHITECTURAL PRODUCTS OF CHARLESTON, LLC; SEALTIGHT OF	**DEFENDANT SEAQUEST DEVELOPMENT COMPANY, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS OR STAY PROCEEDINGS**

FILED
2016 OCT 13 AM 9:56
JULIE J. ARMSTRONG
CLERK OF COURT

SOUTH CAROLINA, LLC,)
)
THIRD PARTY DEFENDANTS.)

Defendant Seaquest Development Company, Inc. (hereinafter "Defendant"), by and through its undersigned attorneys, respectfully submits this Memorandum in Support of its Motion to Dismiss or Stay Proceedings. Defendant is entitled to an Order granting its motion as Plaintiffs have failed to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. § 40-59-810, *et seq*. ("Right to Cure Act").

Background

On or about August 22, 2007 Defendant and Plaintiffs entered into a contract for the construction of a single family residence located at 821 Bridgetown Pass in Mt. Pleasant. (Contract attached hereto as Exhibit "A"). Defendants acted as the general contractor and work was performed through subcontractors, the majority of which are named as direct defendants or third-party defendants to this action. The Certificate of Occupancy for the residence was issued on September 25, 2008. (Certificate of Occupancy attached hereto as Exhibit "B"). Plaintiffs filed this lawsuit on April 8, 2016 wherein they set forth the following causes of action against Defendant: Negligence and Gross Negligence; Breach of Warranty of Habitability; Negligent Misrepresentation and Constructive Fraud, and; Breach of Warranty of Good and Workmanlike Work. (Complaint attached hereto as Exhibit "C"). On June 17, 2016 Defendant filed its Answer to Plaintiffs' Complaint. On June 17; 2016 Defendant filed this Motion to Dismiss or Stay Proceedings pursuant to S.C. Code Ann. § 40-59-810, *et seq*. On or about July 15, 2016 Plaintiffs moved to stay this action to compel arbitration.

Applicable Law

South Carolina has codified the right of a builder to inspect and cure alleged construction defects to a residence in S.C. Code Ann. § 40-59-810, *et seq*. These statutory provisions are referred to as the "South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act." S.C. Code Ann. § 40-59-810. Ninety days prior to filing an action against a builder which seeks damages allegedly caused by construction defects, Plaintiff "must serve a written notice of claim on the contractor. The notice of claim must contain the following:

(1) a statement that the claimant asserts a construction defect;

(2) a description of the claim or claims in reasonable detail sufficient to determine the general nature of the construction defect; and

(3) a description of any results of the defect, if known."

S.C. Code Ann. § 40-59-840.

This written notice must be served by "personal service or delivery by certified mail to the last known address of the addressee." S.C. Code Ann. § 40-59-820(5).

"If the claimant files an action in court before first complying with the requirements of this article, on motion of a party to the action, the court shall stay the action until the claimant has complied with the requirements of this article" (emphasis added). S.C. Code Ann. § 40-59-830. It should be noted that "action" means any civil lawsuit or action or arbitration proceeding. S.C. Code Ann. § 40-59-820(1).

Argument

Our Supreme Court has recognized that the Right to Cure Act affords substantial substantive rights to the builder. In Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 571, 703 S.E.2d 197, 200-01 (2010) the Court held that S.C. Code Ann. § 40-59-840

"imposes an absolute condition precedent to the filing of lawsuits that qualify under the Right to Cure Act. Subsection 840, as provided above, encompasses civil lawsuits filed against a contractor or subcontractor, and *requires* the claimant to serve written notice no later than ninety days before filing the action" (emphasis in original). In fact, the express public intent of the Right to Cure Act is: (1) addressing the need for an alternative dispute resolution method to promote settlement of construction disputes without litigation, while adequately protecting the rights of homeowners; and (2) requiring a would-be plaintiff in certain construction defect matters to file a notice of claim with the would-be defendant and provide an opportunity to resolve the claim without litigation. Grazia at 572 (citing 2003 South Carolina Laws Act 82 (S.B. 433). "The stated public policy, therefore, is not abridged when a court, on motion, is required to stay a proceeding in order to *require compliance* with the Right to Cure Act's notice provisions" (emphasis in original). Grazia at 572.

These rights under the Right to Cure Act are not new substantive rights, but instead represent an effort by the General Assembly to provide the contractors/subcontractors a new procedural timeline for asserting existing litigation rights. In other words, the right of entry onto and inspection of the claimant's dwelling is now permitted to occur prior to the filing of the action under the notice provisions of §§ 40–59–840 and 850, as opposed to during an action's normal discovery period. Id. at 573. More specifically, the rights afforded to the builder include: the right to request clarification of the alleged defects (§ 40–59–840); the right to inspect the alleged defects (§ 40–59–850); the right to offer to remedy the alleged defect (§ 40–59–850); the right to offer to settle the claims related to the alleged defects (§ 40–59–850), and; the right to deny the claim (§ 40–59–850).

Plaintiffs have categorically failed to comply with any part of the Right to Cure Act. Plaintiffs have not served Defendant with written notice of the alleged defects as required by S.C. Code Ann. §§ 40-59-820(5) and 40-59-840. Plaintiffs' failure to comply with the notice provision of the statute has denied Defendant its rights to request clarification of the alleged defects, to inspect the alleged defects, to offer to remedy the alleged defect, to offer to settle the claims related to the alleged defects, and/or to deny the claim.

A stay pursuant to the Right to Cure Act is not discretionary, it is mandatory as S.C. Code Ann. §§ 40-59-830 directs that "...on motion of a party to the action, the court shall stay the action until the claimant has complied with the requirements of this article." Unless and until Plaintiffs can comply with the Right to Cure Act, this action must be stayed pursuant to S.C. Code Ann. §§ 40-59-830.

The mandatory stay in the case cannot be lifted unless and until Plaintiffs comply with the Right to Cure Act. It is impossible for Plaintiffs to comply with the act at this point. Upon information and belief, Plaintiffs have completely repaired and remodeled their home, thereby destroying the alleged defects without giving notice to Defendants of those defects and without giving Defendant an opportunity to inspect the alleged defects – as is Defendant's right under the Right to Cure Act. Plaintiffs have permanently and irreversibly denied Defendant its rights under the Right to Cure Act. Specifically, Plaintiffs have denied Defendant its statutory rights to request clarification of the alleged defects, to inspect the alleged defects, and to offer to remedy the alleged defect. As such, Plaintiffs will never be able to comply with the Right to Cure Act and their Complaint should be stricken and/or dismissed as to this Defendant.

Conclusion

Based on the above arguments, authorities, and evidence, Defendant Seaquest Development Company, Inc. is entitled to an Order granting its Motion to Dismiss or to Stay Proceedings.

YOUNG CLEMENT RIVERS, LLP

By: _____

Edward D. Buckley, Jr.
Jason A. Daigle
P.O. Box 993, Charleston, SC 29402
(843) 720-5436
ebuckley@ycrlaw.com
jdaigle@ycrlaw.com
Attorneys for Defendant Seaquest Development Company, Inc.

Charleston, South Carolina

Dated: 10-13-16

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing memorandum was emailed and hand delivered to all counsel of record in this proceeding this 13 day of October, 2016.

_____

1997 EDITION

AIA DOCUMENT

A101-1997

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

A Revised Version Of The -

Standard Form of Agreement Between Owner and Contractor

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

AGREEMENT made as of this 22[b] day of August in the year 2007.

BETWEEN the Owner: Andrew and Kim McIntire

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

and the Contractor: SeaQuest Development Company, Inc.

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

The Project is: The McIntire Residence

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

The Architect is New Urbanist Design

This document has important legal consequences. Consultation with an Attorney is encouraged with respect to its completion or modification.
AIA Document A201 – 1997 General Conditions of the Contract for construction is adopted in this document by reference. Do not use with other general conditions unless this document is modified.
This document has been approved by the Associate General Contractors of America.

The Owner and Contractor agree as follows.

The American Institute of Architects 1735 New York Avenue, N.W. Washington, D.C. 20006-5292
Copyright 1915, 1918, 1925, 1937, 1951, 1958, 1961, 1963, 1967, 1974, 1977, 1987, 1997 by The American Institute of

EXHIBIT tabbies A

ARTICLE I THE CONTRACT DOCUMENTS

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

ARTICLE 2 THE WORK OF THIS CONTRACT

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

ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

3.1 The date of commencement of the Work shall be the date fixed in a "Notice To Proceed" issued by the Owner.

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

if, prior to the commencement of the Work, the Owner requires time to file mortgages, mechanic's liens and other security interests, the Owner's time requirement shall be as follows:

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

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

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

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

ARTICLE 4 CONTRACT SUM

4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum is a cost estimate of _$1,600,000_. This estimate and contract are based on a cost plus arrangement. The ultimate contract price will be based on cost plus 12.5%, with a minimum fee of $125,000. Costs will be determined by any and all costs associated with the construction of the residence as defined by the approved plans at 821 Bridgetown Pass including the following:

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

Site Preparation
- Termite Pretreatment
- Site Clearing (including unsatisfactory dirt and replacement with compacted soil)

Excavation
- Site Drainage/Grading

Concrete
- Batterboards/footings/Steel
- Concrete footings
- Rebar

Masonary
- Block walls/piers
- Brickwork or Stucco
- Lentils, Sand, Mortar

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

Roofing
- Roofing material and Labor

Windows and Exterior Doors

Plumbing Rough
- Water & Sewer Lines
- Plumbing Rough –in

HVAC
- Heat and AC
- HVAC Venting

Electrical Rough

Exterior Trim

Siding

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

Wall and Ceiling Finish
- Drywall

Interior Doors and Hardware
- Interior Pre-hung Doors
- Door Hardware

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

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

Tile and Glass
- Tile
- Glass shower enclosures and Mirrors

Specialties
- Bath Accessories

Plumbing Finish/Fixtures

Electrical Finish/Fixtures

Kitchen Appliances

Painting
- Interior Painting
- Exterior Painting

Flooring
- Wood Flooring
- Tile

Landscaping
- Final Grade
- Fencing
- Driveways
- Swimming Pool

Trash Removal
- Dumpsters
- Site Clean-up
- Final Clean-up

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

(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount -for each and the date when that amount expires.)

4.3 Unit prices, if any, are as follows:

ARTICLE 5 PAYMENTS

5.1 PROGRESS PAYMENTS

5.1.1 Based upon Applications for Payment submitted to the Bank by the Contractor, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.

5.1.2 The period covered by each Application for Payment shall based upon : A limit of seven draws will be made by the Contractor during the construction process and will be in keeping with standard bank policy. Payment will be made to the Contractor in no more than seven (7) working days. **Payments will be made directly to the Contractor from bank sources.**

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

5.1.4 Applications for Payment shall indicate the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment.

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

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

1st Payment – Upon completion of Clearing and rough grade, footings, Foundation and slab
2nd Payment – Upon completion of house framing (Flooring/Subflooring, Wall Sheathing, Roof Sheathing, Exterior Doors and Windows
3rd Payment - Upon completion of Trade Rough-ins (Plumbing, Electrical, HVAC, Fireplace)
4th Payment – Upon completion of Exterior trim/sheetrock (Exterior Veneer, Cornice & Facia, Roofing, Exterior Paint, Insulation, Sheetrock
5th Payment – Upon Completion of Interior finishes (Trim, Interior doors, Tile, Cabinets, Interior Paint, Flooring Install)
6th Payment – Upon Completion of Interior Trim-outs (Plumbing Fixtures, Electrical Fixtures, HVAC, Appliances, Hardware)
Final Draw – This payment will be held until Certificate of Occupancy is issued and contractor and owner are in agreement that home is complete. (Stoops & Decks, Driveways and Walks, Finish Grade, Landscaping, Final Clean)

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

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

5.1.7 Except with the Owner's prior approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

5.2 FINAL PAYMENT (see final draw above section 5.1.5

5.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when:

1. the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as identified in a final work agreement. This final work , known as the "punch list", will be assigned a fair value and will be held by a mutually agreed party, and will be released as each item is completed to satisfactory standards by owner and contractor.
.2 a final Certificate of Occupancy has been issued by the Town of Mt. Pleasant

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

ARTICLE 6 TERMINATION OR SUSPENSION

6.1 The Contract may be terminated by the Owner or the Contractor as provided in Article 14 of AIA Document A201-1997.

6.2 The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201-1997.

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

ARTICLE 7 MISCELLANEOUS PROVISIONS

7.1 Where reference is made in this Agreement to a provision of AIA Document A201-1997 or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

7.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.) *10%*

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or in odificat ions, and also regarding requirements such as written disclosures or waivers.)

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

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

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

7.6 Other provisions:

ARTICLE 8 ENUMERATION OF CONTRACT DOCUMENTS

8.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated as follows:

8.1.1 The Agreement is this executed 1997 edition of the Standard Form of Agreement Between Owner and Contractor, AIA Document A101-1997.

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

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

Document	Title	Pages
Exhibit A	AIA Document 101-1997	7
AIA Exhibit B	Specifications Part One	10
Exhibit C	Drawings	13

Site
First Floor Plan
Second Floor Plan
Door and Window Schedule
Front Elevations
Right Side Elevations
Rear Elevations
Left Side Elevations
Wall Sections
Miscellaneous Wall Details
Details/Sections
First Floor Electrical
Second Floor Electrical

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

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

16.1.6 [ ].

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

8.1.6 The Addenda, if any, are as follows:

Addenda No.1 – Contract Note **Date** _____ **Pages** **1**

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 8.

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

(List here any additional documents that are intended to form part of the Contract Documents.

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

OWNER	CONTRACTOR
_____	
(Signature and date)	
_____	_____
(Signature and date)	*(Signature and date)*
_____	_____
Printed name and title)	*(Printed name and title)*

CAUTION: *You should sign an original AIA document or a licensed reproduction. Originals contain the AIA logo printed in red; licensed reproductions are those produced in accordance with the Instructions to this document.*

(D 1997 A I A @ AIA DOCUMENT A101-1997

OWNER-CONTRACTOR
AGREEMENT

The American Institute of Architects 1735 New York Avenue, N.W. Washington, D.C. 20006-5292

WARNING Unlicensed photocopying violates U.S. copyright laws and will subject the violator to legal prosecution.

TOWN OF MOUNT PLEASANT
BUILDING INSPECTIONS DIVISION

CERTIFICATE OF OCCUPANCY

09/25/2008

PERMIT #	RN-07-070268
PROJECT NAME:	Charlest Himes
ADDRESS:	821 Bridgetown Pass
CITY, ST ZIP:	Mt Pleasant, SC 29465
Contractor's Name	Seaquest Development Co.Inc.
	27 Rutledge Blvd
	Charleston SC 29401
CONSTRUCTION TYPE:	New Single Family Dwelling 2003 IRC
PROPOSED USE:	
OCCUPANCY TYPE:	R-3 and IRC Residential, one and two family
SQUARE FOOTAGE:	4929

SPECIAL PROVISIONS:

This certificate is issued upon completion of inspections for compliance with the Town of Mount Pleasant Code of Ordinances. The building may only be occupied in accordance with the classification listed above.

BUILDING OFFICIAL

EXHIBIT B

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

ANDREW AND KIMBERLY MCINTIRE, Plaintiff(s)

vs.

SEAQUEST DEVELOPMENT COMOPANY, INC.; ET AL., Defendant(s)

CIVIL ACTION COVERSHEET

2016 -CP- 10 - 1833

FILED
2016 APR -8 PM 4:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Submitted By: Andrew K. Epting, Jr. SC Bar #: 1908

Address: 46 A State Street Telephone #: 8433771831

Charleston, SC 29401 Fax #: 8433771310

Other:

E-mail: ake@epting-law.com

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

DOCKETING INFORMATION (*Check all that apply*)

If Action is Judgment/Settlement do not complete

☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.

☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.

☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.

☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

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

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

Previous Notice of Intent Case # 20___-NI-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

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

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

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

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

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799) Construction

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) _____
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)

SCCA / 234 (03/2016)

EXHIBIT C

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

Submitting Party Signature: _____ **Date:** 4/4/16

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

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

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

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

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

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

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

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

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

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

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

IN THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

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

FILED
2016 APR -8 PM 4:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY

SUMMONS

(JURY TRIAL REQUESTED)

TO: THE DEFENDANTS NAMED ABOVE:

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

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

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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ATTORNEYS FOR PLAINTIFFS

DATED: April 4, 2016
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

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

Defendants.

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

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CLERK OF COURT
BY

COMPLAINT

(JURY TRIAL REQUESTED)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. At all times relevant hereto, SeaQuest and Subcontractors, their agents, servants, employees, and/or subcontractors undertook and were under a duty to construct the Residence in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, free from latent defects. The Defendants failed to meet their contractual and common law duties.

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

a) In failing to follow the plans and specifications;

b) In failing to properly construct the roof;

c) In installing defective or improperly installing shakes;

d) In installing defective window/door units or installing them improperly;

e) In failing to properly install flashing;

f) In installing a defective plumbing system or installing it improperly;

g) In installing defective cabinets or installing them improperly;

h) In installing defective trim or installing it improperly;

i) In installing defective foam insulation or installing it improperly;

j) In installing defective tiles or installing them improperly;

k) In installing defective framing;

l) In installing defective chimneys/fireplaces or installing them improperly;

m) In installing defective foundation/slab and hardscape or installing them improperly;

n) In failing to properly pre-treat and treat for termites;

o) In failing to do good and workmanlike work;

p) In failing to follow the local building codes of the County of Charleston, Town of Mt. Pleasant and the State of South Carolina;

q) In failing to use due care;

r) In failing to properly oversee the construction, including the selection of subcontractors, of the Residence when it planned to sell the home to Owners for profit;

s) In failing to properly investigate the physical condition of the building and make necessary repairs;

t) In negligently misrepresenting the physical condition of the building to the Plaintiffs;

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

29. SeaQuest and Subcontractors, their agents, servants, employees, and/or subcontractors were negligent, careless, reckless, willful and wanton in failing to construct the Residence in accordance with the local building codes of the County of Charleston, Town of Mt. Pleasant and the State of South Carolina, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, free from latent defects, thereby breaching the above-referenced duty by, but not limited to, the particulars set forth above.

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

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

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

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

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

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

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

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

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

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

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

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

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

41. By reason of their special expertise and superior knowledge, Seaquest and its Subcontractors had a duty to communicate truthful information and not to mislead Plaintiffs.

42. Seaquest and its Subcontractors represented that they had completed the work per the Agreement and that all work was up to code.

43. Said representations made by SeaQuest and its Subcontractors were false when made in that SeaQuest and its Subcontractors carelessly and negligently performed inspections, observations, and work and carelessly and negligently approved the defective work .

44. SeaQuest and its Subcontractors either knew or should have known the work was defective at the time the work was approved and that their failure to disclose to Owners the existence of the defective work in place would mislead Owners

45. SeaQuest and its Subcontractors had a pecuniary interest in making the misrepresentations to Plaintiffs.

46. SeaQuest and its Subcontractors made said representations and/or said non-disclosures, with the intent to induce Owners' reliance thereon.

47. Owners justifiably relied upon said misrepresentations and non-disclosures.

48. As a direct and proximate result of the misrepresentations and non-disclosures, Owners have incurred the damages hereinabove alleged and, in addition thereto, are entitled to punitive damages.

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

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

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

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

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

WHEREFORE, Plaintiffs pray for judgment against the Defendants for:

(1) Actual, direct, indirect, incidental, and consequential damages in an amount to be determined at trial;

(2) Their attorneys' fees and costs;

(3) Punitive damages; and

(4) Such further relief as this Court may order.

Respectfully submitted:

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ATTORNEYS FOR PLAINTIFFS

On this 4 day of April 2016

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

April 4, 2016

The Honorable Julie Armstrong
Charleston County Clerk of Court
100 Broad Street
Charleston, SC 29401

Re: *Andrew McIntire and Kimberly McIntire v. Seaquest Development Company, et al.*
Case No.: 2016-CP-10-_____

Dear Ms. Armstrong:

Enclosed please find the original and one copy of the Civil Action Cover Sheet, Summons and Complaint together with the $150 filing fee in the above-referenced matter. I would greatly appreciate your filing the originals and returning the file-stamped copies to me in the self-addressed, stamped envelope provided. Thank you.

With kindest regards,

ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr.

AKE, Jr./agg

Enclosures

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	NINTH JUDICIAL CIRCUIT
ANDREW AND KIMBERLY MCINTIRE, PLAINTIFFS, vs. SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC N/K/A CAROLINA WINDOW & MILLWORK - OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN D/B/A CASTEEN CUSTOM CABINETS; QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN D/B/A MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO. INC.; JERRY COMER D/B/A JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; NEW SOUTH CONSTRUCTION SUPPLY, LLC, DEFENDANTS.	CASE NO. 2016-CP-10-1833 **DEFENDANT SEAQUEST DEVELOPMENT COMPANY, INC.'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO STAY AND TO COMPEL ARBITRATION**
SEAQUEST DEVELOPMENT COMPANY, INC., THIRD PARTY PLAINTIFF, vs. ARCHITECTURAL PRODUCTS OF CHARLESTON, LLC; SEALTIGHT OF	

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JULIE J. ARMSTRONG
CLERK OF COURT
BY

SOUTH CAROLINA, LLC,)
)
THIRD PARTY DEFENDANTS.)

Defendant Seaquest Development Company, Inc. (hereinafter "Defendant"), by and through its undersigned attorneys, respectfully submits this Supplemental Memorandum in Opposition to Plaintiffs' Motion to Stay and to Compel Arbitration. Defendant is entitled to an Order denying Plaintiffs' motion as the contract which Plaintiffs purport to compel arbitration is not properly before the court. Defendant hereby incorporates by reference herein, in its entirety, its Memorandum in Opposition to Plaintiffs' Motion to Stay and to Compel Arbitration which it filed on October 13, 2016.

Argument

I. Plaintiffs Have Not Sued on the Contract

Arbitration is a matter of contract. Episcopal Housing Corp. v. Federal Ins. Co., 269 S.C. 631, 239 S.E.2d 647 (1977). Arbitration rests on the agreement of the parties. Simmons v. Lucas & Stubbs Assocs., Ltd., 283 S.C. 326, 322 S.E.2d 467 (Ct.App.1984). Plaintiffs have only sued Defendant under tort and warranty theories. Plaintiffs have not sued Defendant on the contract which they purport compels arbitration. Plaintiffs are attempting to use the Court to enforce terms of a contract, specifically, an arbitration clause contained in the contract, when there is neither a contract nor an arbitration clause properly before it.

It is clear from the case law that an agreement to arbitrate is strictly a matter of contract. A perceived failure to comply with part of a contract, including an arbitration clause, could constitute a breach of that contract or give rise to a contract dispute. When a perceived breach of contract or contract dispute exists, the aggrieved party must sue on the contract itself to for the

court to enforce the terms of that contract. Accordingly, there is no contract and no arbitration clause before the Court which it can enforce.

II. Federal Arbitration Act is Inapplicable

Even if it is determined that arbitration should be compelled, the South Carolina Uniform Arbitration Act, not the Federal Arbitration Act ("FAA"), would apply. First, the Contract attached to Defendant's original memorandum as Exhibit "A" has the following heading:

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

It is clear from the Contract that the agreement would be subject to the South Carolina Uniform Arbitration Act, not the FAA. Additionally, Section 4.6.2 of Exhibit "D" to Defendant's original memorandum invokes the Construction Industry Arbitration Rules of the American Arbitration Association. This further shows that the parties did not intend to proceed under the FAA.

Parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 n. 2 (2001). If the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is consistent with the goals of the FAA, even if the result is that arbitration is stayed where the FAA would otherwise permit it to go forward. Volt Info. Scis. Inc. v. Board of Trs., 489 U.S. 468, 479, 109 S.Ct. 1248, 1256, 103 L.Ed.2d 488 (1989). See also Ford v. NYLCare Health Plans, 141 F.3d 243 (5th Cir.1998) (finding that parties may designate state law to govern the scope of an arbitration clause in an agreement otherwise covered by the FAA). According to the Supreme Court in Volt:

> [I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that

private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.

Volt, 489 U.S. at 479, 109 S.Ct. at 1256. (citations omitted).

As such, should arbitration be compelled, it should proceed under the terms of the contract between the parties, not the FAA.

Conclusion

Based on the above arguments, authorities, and evidence, Defendant Seaquest Development Company, Inc. is entitled to an Order denying Plaintiffs' Motion to Stay and to Compel Arbitration.

YOUNG CLEMENT RIVERS, LLP

By: _____

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Attorneys for Defendant Seaquest Development Company, Inc.

Charleston, South Carolina

Dated: 10-19-16

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing memorandum was emailed to all counsel of record in this proceeding this 19 day of October 2016.

_____

IN THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

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

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JULIE J. ARMSTRONG
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PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO STAY AND COMPEL ARBITRATION

The McIntires submit the following in support of their motion to stay and compel arbitration:

I. S.C. CODE § 40-59-810, ET SEQ. IS SUPERSEDED BY THE FAA

SeaQuest argues that the S.C. Notice and Opportunity to Cure Construction Dwelling Defect Act, S.C. Code § 40-59-810, et seq, requires a mandatory stay of this litigation and prohibits

the Court's granting of the McIntires' motion to stay and compel arbitration. However, if the Act does operate as a perquisite to arbitration as SeaQuest suggests, (in its memorandum, SeaQuest argued that the Act operates as a complete bar to the McIntires' lawsuit because they will not be able to comply with the Act as the repairs have already been made; it appears, this argument was withdrawn at the October 13, 2016 hearing), it is superseded by the FAA.

The federal policy favoring arbitration, as expressed in the FAA, is binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590-91, 553 S.E.2d 110, 115 (2001). The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements. *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995). Further, an arbitration clause may be invalidated under a state law only if that law governs the enforceability of all contracts generally. *Hous. Auth. of Columbia v. Cornerstone Hous., L.L.C.*, 356 S.C. 328, 339-40, 588 S.E.2d 617, 623 (Ct. App. 2003) *citing Perry v. Thomas*, 482 U.S. 483, 492 n.9, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987).

In *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001), the Plaintiff argued that the Consumer Protection Code rendered an arbitration provision in the parties' agreement invalid. The Court found that because the Consumer Protection Code does not govern contracts generally but applies only to certain consumer transactions, it may be raised on the merits of the contract's enforceability as a consumer credit transaction, but does not apply to determine the validity of the arbitration clause itself. *Id.*

Similarly, in *Hous. Auth. of Columbia v. Cornerstone Hous., L.L.C.*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003), The Plaintiff argued that section because the contractor was not licensed pursuant to S.C. Code § 40-11-370(c), the contract and therefore the arbitration provision

was invalid. The Court held that because S.C. Code § 40-11-370(c) only applies to certain construction contracts and does not govern contracts generally, the arbitration agreement could not be invalidated based on the requirements of the statute. *Hous. Auth. of Columbia*, 356 S.C. 328, 338-339. The Court went on to hold that arbitration was the proper place to raise the issue of statutory licensing requirements as a defense to the enforcement of the contract generally. *Id. citing Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451, 123 S. Ct. 2402, 2407 (2003) (holding that except for "certain gateway matters, such as whether the parties have a valid arbitration agreement," the parties to an arbitration agreement have agreed that an arbitrator would decide disputes covered by the agreement).

Munoz and *Hous. Auth. of Columbia* are applicable here. To the extent that the S.C. Notice and Opportunity to Cure Construction Dwelling Defect Act is applicable in this case and operates to prevent this Court from staying this litigation and compelling arbitration, the Act is inconsistent with the FAA and is superseded by federal law. Further, under *Bazzle,* the Court's inquiry is limited to whether the parties have a valid enforceable arbitration provision – all other matters are for the arbitrator.

II. THE FEDERAL ARBITRATION ACT ("FAA") APPLIES & ARBITRATION MUST BE ORDERED

In determining whether or not the FAA applies, our Supreme Court *in Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 637, 239 S.E.2d 647, 650 (1977) adopted the following guidelines: First, that there is a written provision for arbitration in the contract. [9 U.S.C. § 2]. Second, that the contract evidences a transaction involving commerce. [9 U.S.C. §§ 1 and 2]. Third, the Court is satisfied that the issue involved in suit is referable to arbitration under the written agreement. [9 U.S.C. § 2] and Fourth, the applicant for the stay is not in default in proceeding with such arbitration. [9 U.S.C. § 3]. *Id.* (internal citations omitted).

A. The Construction Contract at Issue Contains a Written Arbitration Provision

On the first page of the agreement between the McIntires and SeaQuest appears the following language: **THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO 15-48-10, ET SEQ**. The statement is bold, underlined and in all capital letters. The contract further states that the contract between the parties consists of all "Contract Documents" to include the drawings and specifications and the current edition of AIA Document A201, entitled "General Conditions of the Contract for Construction." Section 15.1.1 of the AIA 201 General Conditions states in relevant part as follows:

> A claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.

Section 15.4.1 states "...any Claim subject to, but not resolved by, mediation shall be subject to arbitration...".

1. The Arbitration Provision at issue is "Broad"

As appears above, the construction contract at issues includes in the definition of "Claims" "...disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." Courts typically characterize arbitration agreements purporting to govern disputes "arising out of or related to" the underlying contract between the parties as "broad" arbitration clauses encompassing a wide range of issues. *Aiken v. World Fin. Corp.*, 373 S.C. 144, 149 n.2, 644 S.E.2d 705, 708 (2007) *citing J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988).

B. The Contract Documents Evidence a Transaction Involving Interstate Commerce

The FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (footnote omitted). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski Bright Acres Assoc.*, 346 S.C 580, 594, 553 S.E.2d 110, 117 (2001). In this present case, the contract documents "evidence transactions in commerce" on their face as one of the subcontractors performing work is a Michigan subcontractor f/k/a Michigan Pre-Stain. Michigan Pre-Stain was served in Michigan and remains a Michigan company. (See Exh. A, Proof of Service). As an additional ground for holding that the contract between the parties evidences transactions in commerce, one need only consider the nature of the project and the actual work performed in fulfillment of the contractual obligations. *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (Finding it would be virtually impossible to complete construction contracts with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina).

C. The Arbitration Provision at issue in this Case Encompasses Plaintiffs' claims against SeaQuest

"The policy of the United States and South Carolina is to favor arbitration of disputes." *Zabinski*, 346 S.C. 580, 596, 553 S.E.2d 110, 118. To decide whether an arbitration agreement covers a particular dispute, the court must determine whether the factual allegations underlying the claim fall within the scope of the agreement, ***irrespective of the label given to the cause of action.*** *Id.* (emphasis added). When interpreting arbitration agreements within the scope of the FAA, due regard must be given to the federal policy in favor of arbitration, and any ambiguity in

the scope of the arbitration clause must be resolved in favor of arbitration. *Stokes Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 714 (Ct. App. 2002). "Unless the court can say with positive assurance that arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Zabinski*, 346 S.C. 580, 597, 553 S.E.2d 110, 118. *See also Vestry & Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co.*, 356 S.C. 202, 206-07, 588 S.E.2d 136, 138 (Ct. App. 2003); *Towles United HealthCare Corp.*, 338 S.C. 29, 41-42, 524 S.E.2d 839, 846 (Ct. App. 1999) (stating a motion to compel arbitration should be denied only where the arbitration clause is not susceptible to any interpretation that would cover the asserted claim).

SeaQuest argues that because the McIntires' causes of action do not include breach of contract, they are not subject to arbitration. However, the scope of a broad arbitration provision does "not limit arbitration to the literal interpretation or performance of the contract [, but] embraces every dispute between the parties having a significant relationship to the contract." *Landers v. FDIC*, 402 S.C. 100, 109-10, 739 S.E.2d 209, 213-14 (2013) (Holding tort claims of slander and intentional infliction of emotional distress were within the scope of the arbitration clause) (internal citations omitted). Further, as the Court held in *Zabinski*, the Court must determine whether the factual allegations underlying the claim fall within the scope of the agreement, ***irrespective of the label given to the cause of action***. The McIntires have articulated claims against SeaQuest for damages caused by the faulty work performed by SeaQuest and its subcontractors. As Your Honor recognized:

> South Carolina courts have historically been inclined to expand general contract and tort principles to protect innocent homebuyers…Thus, in cases involving residential construction contracts, general contract and tort principles occasionally give way to the State's dual policies of protecting the homebuyer and making it easier for that buyer to pursue claims against the builder or seller.

Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., No. 27655, 2016 S.C. LEXIS 227, at *31-32 (Aug. 17, 2016) (Justice Toal, dissent). The claims articulated by the McIntires are in line with *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989) and its progeny, and there is no interpretation of the of the contract that would support the notion that claims for construction defects do not bear a significant relationship to a contract to build a house.

SeaQueast further argues that under *Zabinski*, the McIntires' tort claims are not subject to arbitration because they can be maintained without reference to the contract. However, as recognized by the South Carolina Supreme Court in *Landers v. FDIC*, 402 S.C. 100, 111, 739 S.E.2d 209, 214 (2013), "under the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause." *Id. citing J.J. Ryan*, 863 F.2d at 321 (finding that under the significant relationship test, broad arbitration clause does not limit arbitration to literal interpretation or performance of the contract). The type of torts that are typically held to be outside the scope of an arbitration are outrageous torts, which were unforeseeable to the reasonable consumer and legally distinct from the contractual relationship between the parties. *See Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007) (establishing, in South Carolina, the outrageous torts exception to arbitration enforcement). However, there is some question as to whether even outrageous torts can be excluded from the scope of a broad arbitration provision in light of the has United States Supreme Court opinions in *AT&T Mobility, LLC. v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) and *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468, 193 L. Ed. 2d 365 (2015). *See Parsons v. John Wieland Homes &*

Neighborhoods of the Carolinas, Inc., No. 27655, 2016 S.C. LEXIS 227, at *10 (Aug. 17, 2016) (discussing the viability of the outrageous tort exception).

Accordingly, as the Mc McIntires' claims bear a significant relationship to the contract, they are subject to arbitration.

D. Plaintiffs have not Waived their Right to Arbitration

SeaQuest argues that because the McIntires did not immediately move to compel arbitration or institute arbitration proceedings, they waived their arbitration rights. The McIntires filed suit against SeaQuest and its subcontractors on April 8, 2016. Each of the subcontractors were named in order to prevent the running of the statute of repose. It took several months to discover registered agents for the Defendants and obtain proper service over them. The last affidavit of service if dated July 20, 2016. When the bulk of the Defendants had been served, the McIntires moved to stay the litigation and compel arbitration on July 15, 2016.

The party opposing arbitration "bears the heavy burden of proving waiver." *In re Mercury Constr. Co.*, 656 F.2d 933, 939 (4th Cir. 1981). A party may waive its right to insist on arbitration if the party "so substantially utilizes the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987). But even in cases where the party seeking arbitration has invoked the "litigation machinery" to some degree, "the dispositive question is whether the party objecting to arbitration has suffered actual prejudice." *Id.* "Neither delay nor the filing of pleadings by the party seeking a stay will suffice, without more, to establish waiver of arbitration." *Id.* (citation omitted).

The McInitres' delay, if it can be called delay, was for the three-month period it took to serve the Defendants. Nothing in the record suggests that SeaQuest suffered actual prejudice

sufficient to constitute a waiver of the McIntires' right to arbitration. "It is only when . . . delay results in actual prejudice that it may amount to 'default' within the [Federal Arbitration] Act."), *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). *See also MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249-50 (4th Cir. 2001) (Where the time between the filing of the action and the arbitration request was less than six months, there was no waiver). Any delay by the McIntires in asserting their right to arbitration, therefore, is insufficient to support a finding of waiver

III. CONCLUSION

For the reasons stated above, the McIntires respectfully request that SeaQuest's (and RedBay Constructors who have filed a similar motion) motion be dismissed and the McIntires' motion to stay this litigation and compel arbitration be granted.

ANDREW K. EPTING, JR., LLC

BY: _____

Andrew K. Epting, Jr.
Michelle N. Endemann
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ake@epting-law.com; mne@epting-law.com

ATTORNEYS FOR PLAINTIFFS

On this 19th day of October, 2016
Charleston, South Carolina

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

Signed this 19 day of October 20 16
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

ANDREW and KIMBERLY MCINTIRE,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Case No.: 2016-CP-10-1833

AFFIDAVIT OF SERVICE of QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN D/B/A MICHIGAN PRESTAIN CO.

I, Angela Gross, being duly sworn, depose and say that on April 13, 2016, I sent the Summons and Complaint for the above referenced matter via US Mail, Certified-Return Receipt Requested, Restricted Delivery addressed to:

Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co., which was received and signed for on July 11, 2016 as reflected on the PS Form 3811 Return Receipt (70121640000053469130)(**EXHIBIT A**).

Angela Gross, Legal Assistant to
Andrew K. Epting, Jr., Esquire

Bindertek #CLEX

A

Michelle N. Endemann, Esquire
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401
Phone: 843-377-1871
Facsimile: 843-377-1310

Sworn to and subscribed before me
On this 19 day of Oct, 2016

Patricia D Solomon
Notary Public for South Carolina
My Commission Expires: 1/7/24

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Quality Cedar Products Inc
of Michigan d/b/a
3903 Kraft Ct. Caffee Mem
Grand Rapids, MI 49548

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Debra Riviere ☐ Agent ☑ Addressee

B. Received by (Printed Name) | C. Date of Delivery: 7-11-16

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Certified Mail® ☐ Priority Mail Express™
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ Collect on Delivery

4. Restricted Delivery? (Extra Fee) ☑ Yes

2. Article Number (Transfer from service label) 7012 1640 0000 5346 9130

PS Form 3811, July 2013 Domestic Return Receipt

PS Form 3811, July 2013 Domestic Return Receipt

7012 1640 0000 5346 9130

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com®

OFFICIAL USE

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$

Postmark Here

Sent To Quality Cedar Products Inc
Street, Apt. No.; or PO Box No.
City, State, ZIP+4

PS Form 3800, August 2006 See Reverse for Instructions

ELECTRONICALLY FILED - 2021 Feb 16 4:18 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

IN THE STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON** ANDREW and KIMBERLY MCINTIRE, Plaintiffs, v. SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC n/k/a CAROLINA WINDOW & MILLWORK – OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN d/b/a CASTEEN CUSTOM CABINETS; QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN d/b/a MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO. INC.; JERRY COMER d/b/a JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; NEW SOUTH CONSTRUCTION SUPPLY, LLC. Defendants.	**IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT** CASE NO. 2016-CP-10-1833 **JOINT MOTION FOR CLARIFICATION**

Plaintiffs Andrew and Kimberly McIntire ("Owners") and Defendant Seaquest Development Company, Inc. ("General Contractor") jointly file this motion seeking clarification as to the status of claims pending against the remaining Defendants ("Subcontractors") following remand of this case from the appellate courts.

Owners sued the General Contractor and all of its Subcontractors relating to various claimed residential construction defects. The contract between the Owners and the General

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Contractor contained an arbitration provision, and the Owners moved to stay and compel arbitration. The General Contractor moved to dismiss the case on the basis that the Notice and Opportunity to Cure Construction Dwelling Defects Act (S.C. Code § 40-59-810 *et seq.*) had not been complied with and could not be complied with, requiring dismissal of the suit. One of the subcontractors, Red Bay, filed a similar motion.

The motions were argued before Justice Toal on October 13, 2016, and a Form 4 order accompanied by a reasoned opinion was entered on May 1, 2017 (i) granting the General Contractor's motion to dismiss and, as a consequence, (ii) denying the Owners' motion to stay and compel arbitration, and (iii) declaring Red Bay's motion moot. **Exh. A**. The order was timely appealed in its entirety on May 30, 2017. **Exh. B**. On December 31, 2019, the Court of Appeals reversed and remanded the case.[1] **Exh. C**.

On remand, certain subcontractors have taken the position that their dismissal was never appealed because they were not made parties to the appeal and, therefore, they are no longer party to this action. The Owners and General Contractor take the position that (i) this Court's order dismissed the entire case on the basis that Owners' claims were barred by statute and was appealed and reversed in its entirety, and (ii) that no motion to dismiss filed or joined by any Subcontractor was decided by this Court that would entitle them to dismissal.

Owners and the General Contractor move this Court for clarification and ask the Court to rule whether the Subcontractors remain parties to this action.[2]

---

[1] Seaquest's petition for certiorari was denied by the Supreme Court December 11, 2020.

[2] The Owners and General contractor will proceed in arbitration. Because the contracts between the General Contractor and the Subcontractors contain arbitration provisions, Subcontractors will only participate in the arbitration if they consent to do so. Should the Subcontractors remain parties to this action, the Owners and General Contractor would seek a stay of all claims against the Subcontractors pending arbitration.

Respectfully submitted:

EPTING & RANNIK, LLC

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COUNSEL FOR PLAINTIFF

-AND-

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Attorneys for Defendant Seaquest Development Company, Inc.

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EXHIBIT A

FORM 4

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

FILED
2017 MAY -1 AM 11:52
JULIE J. ARMSTRONG
CLERK OF COURT

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 **CP**-10-1833

Andrew and Kimberly McIntire,

PLAINTIFF(S)

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

DEFENDANT(S)

Submitted by: Jean H. Toal	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

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

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

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

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.
Additional Information for the Clerk : Order attached Dismissing Case

INFORMATION FOR THE JUDGMENT INDEX

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

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

ELECTRONICALLY FILED - 2021 Feb 16 4:18 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

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

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

Circuit Court Judge	2758 **Judge Code**	1-17-17 **Date**

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

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

ELECTRONICALLY FILED - 2021 Feb 16 4:18 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

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

ANDREW and KIMBERLY McINTIRE,

Plaintiffs,

v.

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

Defendants.

SEAQUEST DEVELOPMENT COMPANY, INC.,

Third-Party Plaintiff,

v.

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

Third-Party Defendants.

#1

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

ORDER OF DISMISSAL

ELECTRONICALLY FILED - 2021 Feb 16 4:18 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

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

(1) Seaquest's[1] **Motion to Dismiss or Stay Proceedings** filed June 17, 2016 ("Seaquest's Motion to Dismiss");

(2) Red Bay's[2] **Motion to Dismiss or for Stay of Proceedings** filed June 23, 2016 ("Red Bay's Motion to Dismiss");

(3) The McIntires'[3] **Motion to Stay and to Compel Arbitration** filed July 27, 2016 (the "Motion to Compel Arbitration"); and

(4) The McIntires' **Motion for Protective Order as to Requests for Admissions of Seaquest Development Company** filed August 15, 2016 (the "Motion for Protective Order").

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

BACKGROUND

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

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

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

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

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

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

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

DISCUSSION

I. Seaquest's Motion to Dismiss

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

#3

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

[4] As used in the Right to Cure Act,

> "Construction defect" means a deficiency in or a deficiency arising out of the design, specifications, surveying, planning, supervision, or observation of construction or construction of residential improvements that results from any of the following:
>
> (a) defective material, products, or components used in the construction of residential improvements;
>
> (b) violation of the applicable codes in effect at the time of construction of residential improvements;
>
> (c) failure of the design of residential improvements to meet the applicable professional standards of care at the time of

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

---

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

§ 40-59-820(3).

[5] As used in the Right to Cure Act,

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

§ 40-59-820(4).

[6] As used in the Right to Cure Act,

#4

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

§ 40-59-820(2).

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

[8] As used in the Right to Cure Act,

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

§ 40-59-820(1) (emphasis added).

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

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

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

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

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

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

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

#6

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

II. The Motion to Compel Arbitration

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

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

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

#7

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

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

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

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

#6

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

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

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

Additionally, the McIntires are contractually barred from demanding arbitration. The McIntires are attempting to invoke provisions in their contract[10] with Seaquest to compel arbitration. Specifically, they claim that Section 4.6 of that contract requires arbitration.

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

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

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

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

#10

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

would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7." The applicable statute of limitations for the claims brought by the McIntires is three years as set forth in S.C. Code Ann. § 15-3-510, *et seq.* Paragraph 13.7.1.3 states, "As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued . . . ." Accordingly, the McIntires' demand for arbitration had to have been made sometime prior to 2012.[11] The statute of limitations to demand arbitration, as calculated by the contract and by the arbitration clause contained therein, has run.

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



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

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CONCLUSION

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

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

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

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

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

AND IT IS SO ORDERED.

Jean Hoefer Toal
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina

Jan. 17, 2017

#12

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EXHIBIT B

ELECTRONICALLY FILED - 2021 Feb 16 4:18 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Jean Hoefer Toal, Circuit Court Judge

RECEIVED
JUN 02 2017
SC Court of Appeals

Case No.: 2016-CP-10-1833

ANDREW MCINTIRE AND KIMBERLY MCINTIRE,.....Plaintiffs/ Appellants,

v.

SEAQUEST DEVELOPMENT COMPANY, INC. .....Defendant/Respondents.

RECEIVED
JUN 07 2017
By

v.

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

---

NOTICE OF APPEAL

Plaintiffs Andrew and Kimberly McIntire appeal the order of the Honorable Jean Hoefer Toal, dated January 17, 2017 (Exhibit A). Appellants received written notice of entry of Judge Toal's order on May 2, 2017. Appellants are in receipt of the transcript of record.

May 30, 2017

ANDREW K. EPTING, JR., LLC

By _____
Andrew K. Epting, Jr.
Jaan G. Rannik
46A State Street, Charleston, SC 29401
Phone: 843-377-1871; Fax: 843-377-1310
ake@epting-law.com
jgr@epting-law.com

Attorneys For Appellants

Counsel of Record for Respondents:
Edward D. Buckley, Jr., Esquire
Jason A. Daigle, Esquire

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EXHIBIT A

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-10-1833

FILED
2017 MAY -1 AM 11:52
JULIE J. ARMSTRONG
CLERK OF COURT

RECEIVED
JUN 02 2017
SC Court of Appeals

Andrew and Kimberly McIntire,

PLAINTIFF(S)

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

DEFENDANT(S)

Submitted by: Jean H. Toal	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

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

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk : Order attached Dismissing Case with Prejudice

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge	2758 **Judge Code**	1-17-17 **Date**

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

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

ELECTRONICALLY FILED - 2021 Feb 16 4:18 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

ANDREW and KIMBERLY McINTIRE,

Plaintiffs,

v.

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

Defendants.

SEAQUEST DEVELOPMENT COMPANY, INC.,

Third-Party Plaintiff,

v.

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

Third-Party Defendants.

#1

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

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

ORDER OF DISMISSAL

RECEIVED
JUN 02 2017
SC Court of Appeals

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ELECTRONICALLY FILED - 2021 Feb 16 4:18 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

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

(1) Seaquest's[1] **Motion to Dismiss or Stay Proceedings** filed June 17, 2016 ("Seaquest's Motion to Dismiss");

(2) Red Bay's[2] **Motion to Dismiss or for Stay of Proceedings** filed June 23, 2016 ("Red Bay's Motion to Dismiss");

(3) The McIntires'[3] **Motion to Stay and to Compel Arbitration** filed July 27, 2016 (the "Motion to Compel Arbitration"); and

(4) The McIntires' **Motion for Protective Order as to Requests for Admissions of Seaquest Development Company** filed August 15, 2016 (the "Motion for Protective Order").

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

BACKGROUND

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

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

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

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

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

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

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

DISCUSSION

I. Seaquest's Motion to Dismiss

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

#3

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

[4] As used in the Right to Cure Act,

> "Construction defect" means a deficiency in or a deficiency arising out of the design, specifications, surveying, planning, supervision, or observation of construction or construction of residential improvements that results from any of the following:
>
> (a) defective material, products, or components used in the construction of residential improvements;
>
> (b) violation of the applicable codes in effect at the time of construction of residential improvements;
>
> (c) failure of the design of residential improvements to meet the applicable professional standards of care at the time of

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

---

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

§ 40-59-820(3).

[5] As used in the Right to Cure Act,

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

§ 40-59-820(4).

[6] As used in the Right to Cure Act,

#4

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

§ 40-59-820(2).

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

[8] As used in the Right to Cure Act,

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

§ 40-59-820(1) (emphasis added).

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

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

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

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

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

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

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

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

II. The Motion to Compel Arbitration

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

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

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

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

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

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

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

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

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

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

Additionally, the McIntires are contractually barred from demanding arbitration. The McIntires are attempting to invoke provisions in their contract[10] with Seaquest to compel arbitration. Specifically, they claim that Section 4.6 of that contract requires arbitration.

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

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

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

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

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

would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7." The applicable statute of limitations for the claims brought by the McIntires is three years as set forth in S.C. Code Ann. § 15-3-510, *et seq*. Paragraph 13.7.1.3 states, "As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued . . . ." Accordingly, the McIntires' demand for arbitration had to have been made sometime prior to 2012.[11] The statute of limitations to demand arbitration, as calculated by the contract and by the arbitration clause contained therein, has run.

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

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

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CONCLUSION

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

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

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

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

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

AND IT IS SO ORDERED.

Jean Hoefer Toal
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina

Jan. 17, 2017

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Jean Hoefer Toal, Circuit Court Judge

RECEIVED
JUN 02 2017
SC Court of Appeals

Case No.: 2016-CP-10-1833

ANDREW MCINTIRE AND KIMBERLY MCINTIRE,.....Plaintiffs/ Appellants,

v.

SEAQUEST DEVELOPMENT COMPANY, INC. .....Defendant/Respondents.

v.

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

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PROOF OF SERVICE

I certify that I have served the Appellants' Notice of Appeal by depositing a copy in the United States Mail, Postage prepaid, on May 30, 2017, addressed to Respondent's attorneys of record as follows:

Edward D. Buckley, Jr., Esquire
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By _____
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EXHIBIT C

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(D)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Andrew and Kimberly McIntire, Appellants,

v.

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

Of which Seaquest Development Company, Inc. is the Respondent.

Appellate Case No. 2017-001270

Appeal From Charleston County
Jean Hoefer Toal, Circuit Court Judge

Opinion No. 2019-UP-413
Heard November 5, 2019 – Filed December 31, 2019

REVERSED AND REMANDED

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Andrew K. Epting, Jr., Jaan Gunnar Rannik, and Michelle N. Endemann, all of Andrew K. Epting, Jr., LLC, of Charleston, for Appellant.

Edward D. Buckley, Jr., Stephen Lynwood Brown, Jason Alan Daigle, and Russell Grainger Hines, all of Young Clement Rivers, LLP, of Charleston, for Respondent.

PER CURIAM: In this residential construction defect case, Andrew and Kimberly McIntire (the McIntires) appeal from the trial court's denial of their motion to compel arbitration with general contractor Seaquest Development Company, Inc. (Seaquest). The McIntires argue the trial court erred in (1) not ordering the dispute to arbitration when the parties' contract contained a valid arbitration clause; (2) addressing issues of statute of limitations, right to cure, and waiver when the court's sole jurisdiction was to decide the question of arbitrability; and (3) dismissing the case for failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act ("Right to Cure Act").[1] We reverse and remand the case for arbitration.

FACTS

The McIntires entered into a written contract with Seaquest for the construction of a home in Mount Pleasant in August 2007. A certificate of occupancy was issued in September 2008. On April 8, 2016, the McIntires filed an action against Seaquest, alleging defects in the home's construction and asserting causes of action for negligence and gross negligence, breach of warranty of habitability, negligent misrepresentation and constructive fraud, and breach of warranty of good and workmanlike work. Prior to bringing the action, the McIntires had discovered a number of alleged construction defects in their home and hired experts and began repairs without notifying Seaquest. The repairs were substantially completed before the lawsuit was filed or were completed soon thereafter.

On June 17, 2016, Seaquest filed a motion to dismiss or stay proceedings, arguing the McIntires failed to comply with the Right to Cure Act. On July 27, 2016, the McIntires filed a motion to stay and compel arbitration. The McIntires also filed a

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[1] S.C. Code Ann. § 40-59-810, *et seq*. (2011).

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motion on August 15, 2016, seeking an order staying their responses to Seaquest's requests for admission until the court ruled on Seaquest's motion. After a hearing on October 13, 2016, the trial court granted Seaquest's motion to dismiss and denied the McIntires' motion to compel arbitration. This appeal follows.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the trial court's factual findings, this court will not overrule those findings. *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

LAW/ANALYSIS

I. Arbitration

The McIntires argue the trial court erred in not ordering the dispute to arbitration when the parties' contract contained a valid arbitration clause. We agree.

"The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties." *Hous. Auth. of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003). "Arbitration is available only when the parties involved contractually agree to arbitrate." *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a) (2005) ("On application of a party showing an agreement described in § 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied."). "There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

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The written contract between the McIntires and Seaquest provides at the top of the contract:

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

The contract further provides, "AIA Document A201 – 1997 General Conditions of the Contract for construction is adopted in this document by reference." AIA Document A201, section 4.6 states that "[a]ny Claim arising out of or related to the Contract . . . shall . . . be subject to arbitration."

The right to enforce an arbitration clause may be waived. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). In *Rhodes*, this court stated three factors our courts consider to determine if a party waived its right to compel arbitration:

> (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others.

Id.

"[T]o establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "To establish prejudice, the non-moving party must show something more than 'mere inconvenience.'" *Rhodes*, 374 S.C. at 127, 647 S.E.2d at 251 (quoting *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76-77 (Ct. App. 2003)). "To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took 'advantage of the judicial system by engaging

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in discovery.'" *Id*. (quoting *Evans*, 352 S.C. at 548, 575 S.E.2d at 76). "'[A] substantial length of time' varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration." *Id.* at 126, 647 S.E.2d at 251. "Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts." *Id*. at 127, 647 S.E.2d at 252.

The trial court found the McIntires had "engaged in extensive discovery in that they retained forensic and construction liability and repair experts to investigate, document, and repair the alleged defects at their house." The repairs to the McIntires' home were substantially completed prior to the filing of the motion to compel arbitration, which the court found resulted in material prejudice to Seaquest because it precluded "Seaquest from investigating, inspecting, and/or challenging the McIntires' claims." The trial court also found a "substantial amount of time transpired between the time the McIntires engaged their experts and the time they moved to compel arbitration."

The McIntires argue the trial court erred in finding they waived their arbitration right because hiring a contractor to inspect and repair issues with their residence does not amount to engaging in discovery. The McIntires also argue the trial court erred in focusing on the amount of time between when the McIntires engaged their experts and the filing of the motion to compel arbitration, instead of on the amount of time between the filing of the suit and the filing of the motion as set forth in *Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251.

Based on our review, we find the evidence in the record does not support the trial court's finding that the McIntires participated in discovery, much less "extensive discovery," or retained "forensic and construction liability and repair experts." Also, the McIntires moved to compel arbitration on July 27, 2016, two days after they received notice the last defendant had been served with their complaint.[2] The complaint was filed on April 8, 2016. Thus, we find a "substantial length of time" did not occur between the commencement of the action and the commencement of the motion to compel arbitration. Accordingly, we reverse on this issue and remand the case for arbitration.

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[2] The McIntires' counsel told the court it took a while to serve all the defendants because many of the defendant companies were out of business.

II. Jurisdiction and Right to Cure Act

The McIntires argue the trial court erred in addressing the issues of statute of limitations, Right to Cure Act, and waiver when the court's sole jurisdiction was to decide the question of arbitrability. The McIntires also argue the trial court erred in dismissing the case for failure to comply with the Right to Cure Act.

Because we already determined the trial court erred in finding the McIntires waived their arbitration right and remand for arbitration, we need not address these issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

CONCLUSION

Accordingly, the decision of the trial court is

REVERSED and REMANDED.

SHORT, THOMAS, and GEATHERS, JJ., concur.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2016-CP-10-01833
ANDREW and KIMBERLY MCINTIRE,	)	
	)	
Plaintiffs,	)	
	)	**MEMORANDUM IN OPPOSITION TO PLAINTIFFS' AND SEAQUEST DEVELOPMENT COMPANY, INC.'S JOINT MOTION FOR CLARIFICATION**
vs.	)	
	)	
SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC n/k/a CAROLINA WINDOW & MILLWORK-OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN d/b/a MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO., INC.; JERRY COMER d/b/a JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; and NEW SOUTH CONSTRUCTION SUPPLY, LLC,	)	
	)	
Defendants.	)	
_____	)	

TO: JAAN G. RANNIK, ESQUIRE, ATTORNEY FOR PLAINTIFFS; AND JASON A. DAIGLE, ESQURE, ATTORNEY FOR DEFENDANT SEAQUEST DEVELOPMENT COMPANY, INC.:

Defendant Red Bay Constructors Corp.; Defendant Benzenburg Custom Cabinets, Inc.; Defendant Jonathan Marshall Construction; Defendant Southcoast Exteriors, Inc.; Defendant Coastal Plumbing & Gas, LLC; Defendant Foam Insulation Co., Inc.; Defendant Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Defendant Lowcountry Fireplaces, Inc.; Defendant Carolina Pest

Solutions, Inc.; Defendant New South Construction Supply, LLC (collectively, "Subcontractor Defendants"), by and through their undersigned attorneys, hereby submit the following memorandum of law in opposition to Plaintiffs' and Defendant Seaquest Development Company, Inc.'s ("Seaquest") motion for clarification. For the following reasons, the joint motion for clarification should be denied.

Summary of Argument

Chief Justice Toal's order dated January 17, 2017 and filed May 1, 2017 (the "Order") dismissed the entire case and all claims asserted therein, including those claims asserted by Plaintiffs and Seaquest against the Subcontractor Defendants. Neither Plaintiffs nor Seaquest timely sought reconsideration or clarification of the Order and did not appeal the Order dismissing the claims against the Subcontractor Defendants. Therefore, the Order dismissing their claims against the Subcontractor Defendants became a final judgment and the law of the case. Accordingly, neither Plaintiffs nor Seaquest is entitled to relitigate these extinct claims and the motion for clarification should be denied.

Factual Background & Procedural History

Plaintiffs commenced this construction defect action against the general contractor, Seaquest, and fourteen other subcontractors on or about April 8, 2016. Plaintiffs' complaint contained causes of action directly against the Subcontractor Defendants for (1) negligence/gross negligence, (2) negligent misrepresentation, (3) constructive fraud, and (4) breach of the implied warranty of workmanship. Seaquest answered and asserted cross-claims against the Subcontractor Defendants for (1) equitable indemnity, (2) contribution, (3) breach of contract, (4) negligence, and (5) breach of express and implied warranties. Seaquest also asserted a third-party complaint

against various other parties. The Subcontractor Defendants each separately filed an answer denying all liability and raising various affirmative defenses.

In conjunction with Seaquest's answer, it also filed a contemporaneous motion to dismiss or, alternatively, to stay proceedings on the basis that Plaintiffs failed to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, codified at S.C. Code Ann. § 40–59–810, et seq. (the "Right to Cure Act"). This motion was heard by Chief Justice Toal on October 13, 2016 In the Order dated January 17, 2017 and filed May 1, 2017, Chief Justice Toal stated that "this case is DISMISSED in its entirety" and that "this case shall be and hereby is DISMISSED." See Order at 2 & 12. The Form 4 filed with Order also stated that the Order ended the case and was "dismissing this action." See Form 4 at 1. The Plaintiffs and Seaquest concede in the joint motion for clarification that Chief Justice Toal's Order did dismiss the entire case. See Pls.' & Seaquest's Joint Mot. for Clarification at 2.

No party filed a motion to alter or amend or otherwise sought clarification of the Order. Plaintiffs ultimately filed a notice of appeal from the Order naming Seaquest as the only respondent and chose not to join any other party to the appeal. Seaquest did not cross-appeal the Order dismissing its claims against the Subcontractor Defendants. The Subcontractor Defendants did not participate in the appeal in any manner, and no issue framed by Plaintiff or Seaquest addressed the dismissal of the claims against the Subcontractor Defendants. Rather, the only issues framed and argued related to the arbitrability of the issues surrounding the application of the Right to Cure Act and the proper application of those provisions where Plaintiffs had already made repairs prior to bringing suit.[1] No issues decided by the Court of Appeals addressed dismissal of the claims against

[1] It should be noted that the Subcontractor Defendants are not subject to arbitration as the contracts between Seaquest and the respective Subcontractor Defendants do not contain arbitration provisions. As such, arguments related to arbitrability are and were at all times inconsequential to the Subcontractor Defendants.

the Subcontractor Defendants. The Court did not list the Subcontractor Defendants on the docket, provide the notices or letters, or in any other way treat the Subcontractor Defendants as Respondents.

On December 31, 2019, the Court of Appeals issued a per curiam opinion reversing the Order and remanding the case back to the trial court to require arbitration between Plaintiffs and Seaquest. The opinion does not reference the Subcontractor Defendants at all. In the opinion, the Court of Appeals held that "a substantial length of time did not occur between the commencement of the action and the commencement of the motion to compel arbitration," and, therefore, Plaintiffs had not "waived their arbitration right." See Dec. 31, 2019 Court of Appeals Order, attached as "Exhibit C" to Pls.' & Seaquest's Joint Mot. for Clarification, at 5. With respect to the application of the Right to Cure Act, the Court of Appeals held that "[b]ecause we have already determined the trial court erred in finding [Plaintiffs] waived their arbitration right and remand for arbitration, we need not address these issues." Id. at 6. The remittitur from the Court of Appeals was filed on December 17, 2020. On or about February 16, 2021, Plaintiffs and Seaquest filed the instant joint motion for clarification and seeking the Court "to rule whether the Subcontractors remain parties to this action." See Pls.' & Seaquest's Joint Mot. for Clarification at 2.

For the reasons set forth below, this court should determine that the Order dismissing the claims against the Subcontractor Defendants was an unappealed order and, therefore, became the law of the case and foreclosed Plaintiffs' and Seaquest's ability to relitigate these claims.

Law & Argument

I. The ruling dismissing all claims against the Subcontractor Defendants was not appealed by any party and, therefore, has become the law of the case.

"[A]n unappealed ruling, right or wrong, is the law of the case." Atl. Coast Builders & Contractors, LLC v. Lewis, 730 S.E.2d 282, 285 (S.C. 2012).; see also Rumpf v. Mass. Mut. Life

Ins. Co., 593 S.E.2d 183, 189 (S.C. Ct. App. 2004) ("Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed."); see also Shirley's Iron Works, Inc. v. City of Union, 743 S.E.2d 778, 785 (S.C. 2013) ("Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case."). "Under the law of the case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." Judy v. Martin, 674 S.E.2d 151, 153 (S.C. 2009).

Again, Justice Toal undoubtedly and unambiguously dismissed the case in its entirety. The propriety of her decision is not at issue; our law is clear that an unappealed decision, "right or wrong," is the law of the case. See Atl. Coast, 730 S.E.2d at 285. Neither Plaintiffs nor Seaquest appealed the dismissal of the claims against the Subcontractor Defendants—none of the Subcontractor Defendants was included as a respondent to the appeal;[2] neither Plaintiffs nor

[2] Rule 202(a), SCACR, provides that "[t]he party appealing shall be known as the appellant and the adverse party as the respondent." See also Rule 203(c), SCACR ("A respondent may institute a cross-appeal by serving a notice of appeal on all adverse parties . . . ."). Looking to the Court of Appeals' order reversing and remanding the Order, the caption speaks for itself:

> Andrew and Kimberly McIntire, Appellants,
> v.
> Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co., Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Custom Supply, LLC, Defendants,
> ***Of which Seaquest Development Company, Inc. is the Respondent.***

See Dec. 31, 2019 Court of Appeals Order, attached as "Exhibit C" to Pls.' & Seaquest's Joint Mot. for Clarification, at 1. (emphasis added).

Seaquest served a notice of appeal upon the Subcontractor Defendants;[3] the Subcontractor Defendants did not participate in the appeal in any manner whatsoever;[4] and the only issues framed and argued on appeal by Plaintiffs and Seaquest related to the claims by and/or between them and not the claims related to the Subcontractor Defendants. No appeal was taken with respect to the dismissal of the Subcontractor Defendants and, accordingly, the Order dismissing such claims became a final order. See C.I.T. Corp. v. Corley, 13 S.E.2d 440, 441–42 (S.C. 1941) (the trial court's order that a third party should not be made a party to the action became law of the case after no appeal from the order was taken and the trial court was thereafter "wholly without power or jurisdiction to revoke, vacate, overrule or reverse the same.").

It has been suggested that the reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had ever been rendered. See Brown v. Brown, 331 S.E.2d 793, 793–94 (S.C. Ct. App. 1985) ("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no such judgment had been rendered."); see also Moore v. N. Am. Van Lines, 462 S.E.2d 275. While it is true that reversal of a *judgment* on appeal has the effect of vacating that *judgment*, the important distinction is that there were portions of the Order that were never appealed (i.e., the order dismissing the

[3] See Rule 203(a), SCACR ("A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules. Service and filing are defined by Rule 262. See Rule 203(b), SCACR (A notice of appeal shall be served on all respondents within (30) days after receipt of written notice of entry of the order or judgment.); see also Rule 262(b), SCACR ("Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court."). The Notice of Appeal states the plaintiffs received the Order on May 2, 2017. The Notice of Appeal had to be served on all Respondents by June 1, 2017. No such service was ever effected by Plaintiffs or Seaquest and the deadline can never be extended. See Notice of Appeal and Proof of Service.

[4] No briefs were ever served or filed by the subcontractor defendants. See Rule 208(a), SCACR ("Within thirty (30) days after receiving the transcript or, if no transcript is ordered, within thirty (30) days after serving the notice of appeal, appellant shall serve one copy of his brief on all parties to the appeal . . . ."); see also Rule 209(a), SCACR ("At the same time a party serves his initial brief(s) under Rule 208 . . . he shall also serve on all parties to the appeal a Designation of Matter to be Included in the Record on Appeal . . . ."); see also Rule 211(a), SCACR ("Within twenty (20) days after the service of the Record on Appeal, each party shall serve a copy of his final brief(s) on every other party to the appeal . . . .")

claims against the subcontractor defendants). See Rumpf, 593 S.E.2d at 189 ("Any unappealed ***portion*** of the trial court's judgment is the law of the case, and must therefore be affirmed.") (emphasis added). As such, the Order dismissing the claims against the Subcontractor Defendants (i.e., a portion of the judgment) could not possibly have been vacated by the Court of Appeals because it was unappealed and never before the Court of Appeals. See Gold Kist, Inc. v. Citizens and Southern Nat. Bank of S.C., 333 S.E.2d 67, 70 (S.C. Ct. App. 1985) (holding that issues not argued on appeal are deemed abandoned and are not to be considered by the appellate court).

For example, in ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 489 S.E.2d 470 (S.C. 1997), the Supreme Court considered an appeal following a grant of summary judgment in favor of the defendant on claims for professional negligence and negligent misrepresentation. The plaintiff appealed the ruling on the negligent misrepresentation claim only and did not appeal the dismissal of the professional negligence claim. The Supreme Court, in reversing the Court of Appeals' decision with respect to the professional negligence claim, stated that

> There was no appeal of the master's ruling that the [plaintiff] was not the [defendant's] client. This unappealed ruling is the law of the case . . . and should not have been considered by the Court of Appeals. Since it is the law of the case that the [plaintiff] was not the [defendant's] client, we reverse the Court of Appeals' ruling that the [defendant] had a duty to disclose.

Id., 489 S.E.2 at 472 (citing In re Morrison, 468 S.E.2d 651 (S.C. 1996)).

The cases cited by Judge Young in his email correspondence dated February 19, 2021 (Brown and Moore) are distinguishable from the instant case and, further, the proposition that these two cases "leaves any claims against the subcontractors alive" is, respectfully, contrary to well-established law. Moore was a worker's compensation matter and Brown was a family court matter involving an alimony dispute. What these two cases have in common is that they both were cases where a single issue was before the trial court between a single plaintiff and single defendant.

A single issue was decided, was appealed, and was thereafter reversed. The proposition that the reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had ever been rendered is absolutely correct as applied to these two cases where there were no unappealed issues in the case. However, to apply this principle to a case where there were unappealed issues, such as the case sub judice, is directly contrary to well-established law which states that an unappealed portion of a judgment, whether right or wrong, is the law of the case. See Atl. Coast, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case."; see also Rumpf, 593 S.E.2d at 189 ("Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed."); see also Shirley's Iron Works, 743 S.E.2d at 785 ("Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case.").

Finally, the suggestion in the joint motion for clarification that the Subcontractor Defendants are not entitled to dismissal because the Subcontractor Defendants did not seek dismissal does not prevent the application of the law of the case doctrine. The Order, as Plaintiffs and Seaquest recognize, clearly dismissed all Subcontractor Defendants from the case. That the dismissal may not have been requested is of no consequence. "A [Rule 59(e)] motion must be made when the trial court either grants relief not requested or rules on an issue not raised [below].") Fryer v. South Carolina Law Enforcement Div., 631 S.E.2d 918, 920 (S.C. Ct. App. 2006). No Rule 59(e) motion was filed, and the dismissal of the Subcontractor Defendants became the law of the case regardless of whether such relief was sought or not. See id. (finding that defendant failed to preserve for appellate review argument that the trial court erred in granting mandamus to the

plaintiff even though the plaintiff had not requested such relief because the defendant did not file a post-trial motion on the issue).

Plaintiffs and Seaquest failed to appeal the Order dismissing their respective claims against the Subcontractor Defendants. As such, this unappealed ruling has become the law of the case and Plaintiffs and Seaquest are barred from relitigating these extinct claims.

II. This Court has no authority or jurisdiction to reinstate the Subcontractor Defendants as parties to the case after the Subcontractor Defendants were previously dismissed with prejudice and no appeal was taken from such ruling.

Put simply, there is no procedural mechanism which affords Plaintiffs and Seaquest the right to request clarification of an order almost four years after it was issued. Rule 59(e) of the South Carolina Rules of Civil Procedure is the mechanism for a party to ask the court to issue a ruling on issues raised but not ruled upon, state findings of fact or conclusions of law underpinning the order, address possible misapprehension of an earlier argument, or revisit a previously raised argument. See, e.g., Elam v. S.C. Dep't of Transp., 602 S.E.2d 772, 777 (S.C. 2004). Pursuant to Rule 59(e), SCRCP, "[a] motion to alter or amend a judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Id.

Here, Plaintiffs and Seaquest jointly seek clarification of the Order to determine whether the Subcontractor Defendants remain as parties to this action. The Order undoubtedly dismissed the entire case, including those claims asserted by Plaintiffs and Seaquest against the Subcontractor Defendants. To the extent Plaintiffs or Seaquest believed Justice Toal misapprehended arguments of counsel or mistakenly dismissed certain claims, then the parties were required to file a Rule 59(e) motion within ten days of written notice of entry of the judgment. Plaintiffs and Seaquest did not meet the ten-day deadline provided by Rule 59(e) and, therefore, the joint "motion for clarification" is improper. See Leviner v. Sonoco Prods. Co., 530 S.E.2d 127 (S.C. 2000) (holding

where neither party filed a Rule 59(e) motion within the ten day time period asking for clarification of the circuit court's order, the circuit court lost jurisdiction to enter any further orders on the matter); see also In re Beard, 597 S.E.2d 835, 838 (S.C. Ct. App. 2004) ("The established case law is that a trial judge loses jurisdiction over a case when the time to file [Rule 59(e) motions] has elapsed.").

To the extent Plaintiffs and/or Seaquest argue that the joint motion for clarification is being made pursuant to Rule 60(a), SCRCP, this argument also fails. Rule 60(a) of the South Carolina Rules of Civil Procedure provides, in pertinent part, as follows:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Id. "Generally, a clerical error is defined as a mistake in writing or copying." Dion v. Ravenel, Eiserhardt Assocs., 449 S.E.2d 251, 253 (S.C. Ct. App. 1994) (citing *Black's Law Dictionary* 252 (6th ed. 1990)). "As applied to judgments and decrees, it is a mistake or omission by a clerk, counsel, judge or printer which is not the result of exercise of judicial function." Id. "While a court may correct mistakes or clerical errors in its own process to make it conform to the record, ***it cannot change the scope of the judgment***." Id. at 253–54 (emphasis added); see also Brown v. Brown, 709 S.E.2d 679, 683 (S.C. Ct. App. 2011) (holding that the trial judge's modification of an award "did not amount to correction of a clerical error such as misspelling, a misplaced decimal, or a miscalculation" but rather recharacterized the award and imposed additional terms upon the parties that did not exist at the time the order was entered). "Except to correct such clerical errors, a trial judge loses jurisdiction to modify an order at the end of the term during which it is issued." Michel v. Michel, 345 S.E.2d 730, 732 (S.C. Ct. App. 1986). "Therefore, the order is no longer

subject to any modification which involves the exercise of judgment or discretion on the merits of the action." Id.

Here, Justice Toal undoubtedly and unambiguously dismissed the entire case. This intent is clear from the multitude of references to same in the Order and accompanying Form 4 order. See Order at 2 ("this case is DISMISSED in its entirety"); see also id. at 12 ("this case shall be and hereby is DISMISSED."); see also Form 4 at 1 (stating that the Order ended the case and was "dismissing this action"). A request for a further order stating that the Subcontractor Defendants remain as defendants in the within action not only purports to seek clarification of an unambiguous directive by Justice Toal, but its very essence asks the court to change the scope of the judgment from a dismissal of all claims to a dismissal of only some claims. Our case law is clear that Rule 60(a), SCRCP, is an improper vehicle for such a modification. Rather, to the extent such a modification was, in fact, warranted, it should have been requested through a Rule 59(e) order within ten days after written notice of the entry of judgment. Unfortunately for Plaintiffs and Seaquest, their disguised Rule 59(e) motion was made almost four years too late.

Plaintiffs and Seaquest are therefore prohibited from seeking clarification of the Order pursuant to either Rule 59(e) or Rule 60(a)[5]. Furthermore, this Court lost jurisdiction following the appeal to presently rule that the Subcontractor Defendants remain parties to the suit notwithstanding their prior dismissal. "After the remittitur is sent down from an appellate court, the trial court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court ruling." Ackerman v, McMillan, 477 S.E.2d 267, 268 (S.C. Ct. App. 1996). "[A]

[5] Plaintiffs and Seaquest are also prohibited from seeking any relief under Rule 60(b)(1), SCRCP for "mistake, inadvertence, surprise, or excusable neglect" because a motion under Rule 60(b)(1) must be made "not more than one year after the judgment, order or proceeding was entered or taken." In addition, a party cannot seek relief under Rule 60(b) where it could have pursued the issue on appeal. Relief from a judgment is not a substitute for an appeal. Tench v. South Carolina Dep't of Educ., 553 S.E.2d 451, 453 (S.C. 2001). Plaintiffs and/or Seaquest could have filed a Rule 59(e) motion and then subsequently appealed the dismissal of the Subcontractor Defendants but chose not to do so. Rule 60 cannot now be used as a backdoor to challenge the dismissal of these defendants.

trial court has no authority to exceed the mandate of the appellate court on remand. . . . . The mandate of the appellate court is jurisdictional. . . . The trial court has a duty to follow the appellate court's directions." Prince v. Beaufort Mem'l Hosp., 709 S.E.2d 122, 125 (S.C. Ct. App. 2011) (internal citations omitted).

Therefore, "[w]hen [the appellate court] remand[s] a case, the trial court has only the jurisdiction and authority mandated by th[e] court." Id. The Court of Appeals only remanded this case to require arbitration between Plaintiffs and Seaquest. It gave no other instructions in its opinion and did not alter any unappealed rulings, specifically the unchallenged dismissal of the Subcontractor Defendants. This Court no longer has any jurisdiction to alter, revisit, or revoke the rulings in Chief Justice Toal's Order which were unappealed and constitute the law of the case.

Accordingly, for the foregoing reasons, the Subcontractor Defendants respectfully request the court deny Plaintiffs and Seaquest's joint motion for clarification as untimely and improper.

Conclusion

WHEREFORE, for the foregoing reasons, the Subcontractor Defendants respectfully request the Court deny Plaintiffs' and Seaquest Development Company, Inc.'s joint motion for clarification.

Dated this 4th day of March, 2021.

Respectfully submitted,

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Andrew and Kimberly McIntire,	)	CASE NO. 2016-CP-10-1833
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork - Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC,	)	**SEALTIGHT OF SOUTH CAROLINA, LLC'S MEMORANDUM IN OPPOSITION TO JOINT MOTION FOR CLARIFICATION**
	)	
Defendants.	)	
	)	

Dismissed third-party defendant Sealtight of South Carolina, LLC ("Sealtight") hereby joins in the arguments contained in the Memorandum in Opposition to Plaintiffs' and Seaquest Development Company, Inc.'s Joint Motion for Clarification, filed March 3, 2021, by the other dismissed subcontractors to this matter. For all the reasons stated in the Memorandum in Opposition, the Joint Motion for Clarification should be denied. Like the dismissed subcontractors, Sealtight was a subcontractor on the underlying project and was dismissed on May 1, 2017. The dismissal of the subcontractors is the law of the case, as it was not appealed. Unlike the other subcontractors, however, Sealtight was a third-party defendant and was completely removed from the caption of this case when Sealtight's dismissal was not appealed.

The Joint Motion for Clarification did not include Sealtight in the caption. Accordingly, Sealtight joins in the Memorandum in Opposition. For the reasons stated, Sealtight is not a party to the action and requests that the Judge direct the Clerk of Court to identify Sealtight as an inactive party on the docket.

Respectfully submitted,

CHANDLER & DUDGEON LLC

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March 4, 2021

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO. 2016-CP-10-1833
ANDREW and KIMBERLY McINTIRE, Plaintiffs, v. SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC n/k/a CAROLINA WINDOW & MILLWORK – OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN d/b/a CASTEEN CUSTOM CABINETS; QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN d/b/a MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO. INC.; JERRY COMER d/b/a JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; NEW SOUTH CONSTRUCTION SUPPLY, LLC, Defendants.	**PLAINTIFFS AND SEAQUEST DEVELOPMENT COMPANY, INC.'S JOINT MEMORANDUM IN SUPPORT OF MOTION FOR CLARIFICATION**
SEAQUEST DEVELOPMENT COMPANY, INC., Third-Party Plaintiff, v. ARCHITECTURAL PRODUCTS OF CHARLESTON, LLC; SEALTIGHT OF SOUTH CAROLINA, LLC, Third-Party Defendants.	

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Plaintiffs Andrew and Kimberly McIntire ("Owners") and Defendant Seaquest Development Company, Inc. ("General Contractor") jointly file this Memorandum in Support of General Contractor and Owner's Joint Motion for Clarification.

FACTUAL BACKGROUND

Owners sued the General Contractor and all of its Subcontractors ("Subcontractors") relating to various claimed residential construction defects. The contract between the Owners and the General Contractor contained an arbitration provision, and the Owners moved to stay and compel arbitration. The General Contractor moved to dismiss the case on the basis that the Notice and Opportunity to Cure Construction Dwelling Defects Act (S.C. Code § 40-59-810 et seq.) had not been complied with and could not be complied with, requiring dismissal of the suit. Only one of the subcontractors, Red Bay, filed a similar motion.

The motions were argued before Justice Toal on October 13, 2016, and a Form 4 order accompanied by a reasoned opinion was entered on May 1, 2017 (i) granting the General Contractor's motion to dismiss and, as a consequence, (ii) denying the Owners' motion to stay and compel arbitration, and (iii) declaring Red Bay's motion moot. Exhibit A. The order was timely appealed in its entirety on May 30, 2017. Exhibit B. On December 31, 2019, the Court of Appeals reversed and remanded the case. Exhibit C.

On remand, certain subcontractors have taken the position that General Contractor's motion granted them a dismissal of both Plaintiffs' claims and General Contractor's cross-claims despite no such motion being made by them or on their behalf. Those certain subcontractors posit that their dismissal was never appealed because they were not made parties to the appeal and, therefore, that they are no longer party to this action. On February 16, 2021, Owner and General Contractor filed a Joint Motion for Clarification taking the position that (i) this Court's order

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which dismissed the entire case on the basis that Owners' claims were barred by statute and was appealed and reversed in its entirety, and (ii) that no motion to dismiss Plaintiffs' claims or General Contractor's cross-claims filed or joined by any Subcontractor was decided by this Court that would entitle them to dismissal. Exhibit D. On March 4, Subcontractors filed Memorandums in opposition to Owner and General Contractor's Joint Motion. Exhibit E; Exhibit F.

ARGUMENT

Judge Young, in reviewing the research provided by Justice Toal, noted in his email correspondence dated February 19, 2021 that the Owner's claims against Subcontractors are very much still alive. Exhibit G. This is because "[r]eversal of judgment on appeal has effect of vacating judgment and leaving case standing as if no judgment had been rendered. *Moore v. North American Van Lines*, 319 S.C. 446, 462 S.E.2d 275 (S.C. 1995); *Brown v. Brown*, 286 S.C. 56, 331 S.E.2d 793 (S.C. Ct. App. 1985)("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had been rendered."); *see also* 16 S.C. Jur. Appeal and Error § 142 ("Reversal of a judgment as to one defendant may mandate reversal as to a co-defendant"). Furthermore, Rule 241(a), SCACR, states "[a]s a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court."

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Application of the above authorities to the matter at hand is simple. Justice Toal granted General Contractor's Motion to Dismiss, denied Owner's Motion to Compel Arbitration, and dismissed the *case* in its entirety.[1] Exhibit A at 12. This was the judgment appealed and reversed by the Court of Appeals. Exhibit C at 3;7. Since the judgment dismissing the case in its entirety was reversed, the case in its entirety is left standing as if no judgement was rendered. *See Moore*, 319 S.C. at 446; *Brown*, 286 S.C. at 56. Accordingly, Subcontractors are still parties to this action.

CONCLUSION

WHEREFORE, Owner and General Contractor respectfully request that this Court affirm that Subcontractors remain parties to this action upon remand.

Respectfully Submitted,

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-AND-

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[1] Subcontractors make the false equivalency of framing Justice Toal's Order as one specifically dismissing claims against the Subcontractors. The Order makes no specific mention of dismissing claims but, rather, dismisses *the case* in its entirety.

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EXHIBIT A

ELECTRONICALLY FILED - 2021 Mar 12 4:27 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Jean Hoefer Toal, Circuit Court Judge

Case No.: 2016-CP-10-1833

FILED
2017 MAY 31 PM 1:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY

ANDREW MCINTIRE AND KIMBERLY MCINTIRE,.....Plaintiffs/ Appellants,

v.

SEAQUEST DEVELOPMENT COMPANY, INC. .....Defendant/Respondents.

v.

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

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NOTICE OF APPEAL

Plaintiffs Andrew and Kimberly McIntire appeal the order of the Honorable Jean Hoefer Toal, dated January 17, 2017 (Exhibit A). Appellants received written notice of entry of Judge Toal's order on May 2, 2017. Appellants are in receipt of the transcript of record.

May 30, 2017

ANDREW K. EPTING, JR., LLC

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Counsel of Record for Respondents:
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ELECTRONICALLY FILED - 2021 Mar 12 4:27 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

EXHIBIT B

ELECTRONICALLY FILED - 2021 Mar 12 4:27 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

Andrew and Kimberly McIntire..... Appellants,

v.

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

Of which Seaquest Development Company, Inc. .....Respondent.

FINAL BRIEF OF APPELLANTS

ANDREW K. EPTING, JR., LLC
Andrew K. Epting, Jr., Esquire
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ATTORNEYS FOR APPELLANTS

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S.E.2d 245, 247 (2007) ("In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court.").

II. The Court's Function Is Solely to Determine Arbitrability

When a party moves to stay litigation and compel arbitration under the Federal Arbitration Act ("FAA"), the only question before the court is whether the parties' contractual agreement renders the dispute arbitrable. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85 (2002). "Procedural" questions, including "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met," are for the arbitrator to decide in the first instance, not the court. *Id.* at 85.

The contract between the Parties is governed by the FAA and requires arbitration of disputes; the dispute is arbitrable. This Court should vacate the trial court's order and direct the parties to engage in arbitration.

A. The Parties' Contract Requires Arbitration of Disputes

There is no dispute that the Parties have a valid contract or that the contract contains a notice that states: "**WARNING: THIS AGREEMENT SUBJECT TO BINDING ARBITRATION IN THE STATE OF SOUTH CAROLINA, CITY OF CHARLESTON, UNDER THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (CODE SEC. 15-48-10, ET SEQ.)**." (Contract – AIA Document A101-1997, dated August 22, 2007, signed by Andrew McIntire and Craig Hines, **R. pp. 158-79**). The notice is in bold, underlined text, displayed prominently on the first page of the contract as required by S.C. Code Ann. § 15-48-10.

Additionally, the contract is a standard form AIA Document A101-1997 that incorporates A201-1997, section 4.6 of which requires that "[a]ny claim arising out of or related to the

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another part of the dwelling while trying repair the original defect, and the homeowner may not discover the new damage for years. Would the homeowner then be forced again to give the contractor an opportunity to repair the new damage?

The trial court's decision implies that contractors have an inviolable right to physically repair any defects in their work (and presumably to also remediate consequential damage stemming from the defective work), and the homeowner has no right to hire a different, more competent contractor repair the defective work. Such an interpretation is inconsistent with public policy.

CONCLUSION

The trial Court went far beyond its authority to determine arbitrability, decided matters reserved for the arbitrator, and—most surprisingly—also decided issues of waiver, statute of limitations, and notice under the Right to Cure Act without any supporting documentation. Not one exhibit was introduced. The record was devoid of support for finding that the statute of limitations had run, that no notice had been sent of a right to cure, or that the McIntires engaged in discovery.

For the reasons stated, this Court should reverse the judgment of the circuit court and order the parties to arbitrate the dispute.

Respectfully submitted,

January 8, 2018

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EXHIBIT C

ELECTRONICALLY FILED - 2021 Mar 12 4:27 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(D)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Andrew and Kimberly McIntire, Appellants,

v.

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

Of which Seaquest Development Company, Inc. is the Respondent.

Appellate Case No. 2017-001270

Appeal From Charleston County
Jean Hoefer Toal, Circuit Court Judge

Opinion No. 2019-UP-413
Heard November 5, 2019 – Filed December 31, 2019

REVERSED AND REMANDED

ELECTRONICALLY FILED - 2021 Mar 12 4:27 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

Andrew K. Epting, Jr., Jaan Gunnar Rannik, and Michelle N. Endemann, all of Andrew K. Epting, Jr., LLC, of Charleston, for Appellant.

Edward D. Buckley, Jr., Stephen Lynwood Brown, Jason Alan Daigle, and Russell Grainger Hines, all of Young Clement Rivers, LLP, of Charleston, for Respondent.

PER CURIAM: In this residential construction defect case, Andrew and Kimberly McIntire (the McIntires) appeal from the trial court's denial of their motion to compel arbitration with general contractor Seaquest Development Company, Inc. (Seaquest). The McIntires argue the trial court erred in (1) not ordering the dispute to arbitration when the parties' contract contained a valid arbitration clause; (2) addressing issues of statute of limitations, right to cure, and waiver when the court's sole jurisdiction was to decide the question of arbitrability; and (3) dismissing the case for failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act ("Right to Cure Act").[1] We reverse and remand the case for arbitration.

FACTS

The McIntires entered into a written contract with Seaquest for the construction of a home in Mount Pleasant in August 2007. A certificate of occupancy was issued in September 2008. On April 8, 2016, the McIntires filed an action against Seaquest, alleging defects in the home's construction and asserting causes of action for negligence and gross negligence, breach of warranty of habitability, negligent misrepresentation and constructive fraud, and breach of warranty of good and workmanlike work. Prior to bringing the action, the McIntires had discovered a number of alleged construction defects in their home and hired experts and began repairs without notifying Seaquest. The repairs were substantially completed before the lawsuit was filed or were completed soon thereafter.

On June 17, 2016, Seaquest filed a motion to dismiss or stay proceedings, arguing the McIntires failed to comply with the Right to Cure Act. On July 27, 2016, the McIntires filed a motion to stay and compel arbitration. The McIntires also filed a

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[1] S.C. Code Ann. § 40-59-810, *et seq*. (2011).

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motion on August 15, 2016, seeking an order staying their responses to Seaquest's requests for admission until the court ruled on Seaquest's motion. After a hearing on October 13, 2016, the trial court granted Seaquest's motion to dismiss and denied the McIntires' motion to compel arbitration. This appeal follows.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the trial court's factual findings, this court will not overrule those findings. *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

LAW/ANALYSIS

I. Arbitration

The McIntires argue the trial court erred in not ordering the dispute to arbitration when the parties' contract contained a valid arbitration clause. We agree.

"The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties." *Hous. Auth. of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003). "Arbitration is available only when the parties involved contractually agree to arbitrate." *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a) (2005) ("On application of a party showing an agreement described in § 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied."). "There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

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The written contract between the McIntires and Seaquest provides at the top of the contract:

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

The contract further provides, "AIA Document A201 – 1997 General Conditions of the Contract for construction is adopted in this document by reference." AIA Document A201, section 4.6 states that "[a]ny Claim arising out of or related to the Contract . . . shall . . . be subject to arbitration."

The right to enforce an arbitration clause may be waived. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). In *Rhodes*, this court stated three factors our courts consider to determine if a party waived its right to compel arbitration:

> (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others.

Id.

"[T]o establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "To establish prejudice, the non-moving party must show something more than 'mere inconvenience.'" *Rhodes*, 374 S.C. at 127, 647 S.E.2d at 251 (quoting *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76-77 (Ct. App. 2003)). "To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took 'advantage of the judicial system by engaging

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in discovery.'" *Id*. (quoting *Evans*, 352 S.C. at 548, 575 S.E.2d at 76). "'[A] substantial length of time' varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration." *Id.* at 126, 647 S.E.2d at 251. "Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts." *Id*. at 127, 647 S.E.2d at 252.

The trial court found the McIntires had "engaged in extensive discovery in that they retained forensic and construction liability and repair experts to investigate, document, and repair the alleged defects at their house." The repairs to the McIntires' home were substantially completed prior to the filing of the motion to compel arbitration, which the court found resulted in material prejudice to Seaquest because it precluded "Seaquest from investigating, inspecting, and/or challenging the McIntires' claims." The trial court also found a "substantial amount of time transpired between the time the McIntires engaged their experts and the time they moved to compel arbitration."

The McIntires argue the trial court erred in finding they waived their arbitration right because hiring a contractor to inspect and repair issues with their residence does not amount to engaging in discovery. The McIntires also argue the trial court erred in focusing on the amount of time between when the McIntires engaged their experts and the filing of the motion to compel arbitration, instead of on the amount of time between the filing of the suit and the filing of the motion as set forth in *Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251.

Based on our review, we find the evidence in the record does not support the trial court's finding that the McIntires participated in discovery, much less "extensive discovery," or retained "forensic and construction liability and repair experts." Also, the McIntires moved to compel arbitration on July 27, 2016, two days after they received notice the last defendant had been served with their complaint.[2] The complaint was filed on April 8, 2016. Thus, we find a "substantial length of time" did not occur between the commencement of the action and the commencement of the motion to compel arbitration. Accordingly, we reverse on this issue and remand the case for arbitration.

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[2] The McIntires' counsel told the court it took a while to serve all the defendants because many of the defendant companies were out of business.

II. Jurisdiction and Right to Cure Act

The McIntires argue the trial court erred in addressing the issues of statute of limitations, Right to Cure Act, and waiver when the court's sole jurisdiction was to decide the question of arbitrability. The McIntires also argue the trial court erred in dismissing the case for failure to comply with the Right to Cure Act.

Because we already determined the trial court erred in finding the McIntires waived their arbitration right and remand for arbitration, we need not address these issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

CONCLUSION

Accordingly, the decision of the trial court is

REVERSED and REMANDED.

SHORT, THOMAS, and GEATHERS, JJ., concur.

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EXHIBIT D

ELECTRONICALLY FILED - 2021 Mar 12 4:27 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

Jaan Rannik

From: Angela Gross
Sent: Friday, June 2, 2017 11:55
To: Daigle, Jason
Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: McIntire v. Seaquest, et al. - 2016-CP-10-1833
Attachments: 2017 05 31 - Notice of Appeal - Lower Ct..pdf; 2017 05 31 - Proof of Service - Lower Ct..pdf; 2017 05 30 - Ltr to Ct App filing Notice of Appeal.pdf; 2017 05 30 - Ltr to Lower Ct filing Notice of Appeal.pdf; 2017 06 02 - Proof of Service - Defendants.pdf

Counsel,

Attached please find a copy of Appellants' Notice of Appeal in the above-referenced matter. A hard copy was mailed via regular U.S. Mail to counsel for Respondents only on May 30, 2017. Please let me know if require a copy via regular U.S. Mail. Thank you.

Angela

Angela Gross
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EXHIBIT E

ELECTRONICALLY FILED - 2021 Mar 12 4:27 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Jean Hoefer Toal, Circuit Court Judge

Case No.: 2016-CP-10-1833

ANDREW MCINTIRE AND KIMBERLY MCINTIRE,.....Plaintiffs/ Appellants,

v.

SEAQUEST DEVELOPMENT COMPANY, INC. .....Defendant/Respondents.

v.

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

---

PROOF OF SERVICE

I certify that I have served the Appellants' Notice of Appeal on counsel of record for Defendants via email on June 2, 2017.

ANDREW K. EPTING, JR., LLC

By _____
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Attorneys For Appellants

ELECTRONICALLY FILED - 2021 Mar 12 4:27 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

IN THE STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON** ANDREW and KIMBERLY MCINTIRE, Plaintiffs, v. SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC n/k/a CAROLINA WINDOW & MILLWORK – OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN d/b/a CASTEEN CUSTOM CABINETS; QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN d/b/a MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO. INC.; JERRY COMER d/b/a JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; NEW SOUTH CONSTRUCTION SUPPLY, LLC. Defendants.	**IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT** CASE NO. 2016-CP-10-1833 **JOINT REPLY MEMORANDUM IN SUPPORT MOTION FOR CLARIFICATION**

Plaintiff Andrew and Kimberly McIntire and Defendant Seaquest file this brief reply to the March 3 and March 4, 2021 memoranda filed by the subcontractor defendants to this action.

I. REPLY

The question of course is whether the subcontractors were dismissed from the action and whether the claims against them persist.

A. Appeal of the Order Stayed Its Effect

At the risk of being repetitive, the order dismissing this action was appealed, automatically staying the effect of that order pursuant to Rule 241(a), S.C.R.A.P. The dismissal of the action and of any parties was thus stayed pending the outcome of the appeal.

B. Seaquest Was the Proper Respondent

The order appealed from was decided on the basis of the motion filed by Defendant Seaquest. The subcontractors did not join in that motion. The one subcontractor motion that *was* filed (asserting the same grounds as asserted in Seaquest's motion) was denied as moot by virtue of the Court's ruling on Seaquest's motion and dismissal of the action. The motion was never reached. Accordingly, the proper Respondent to the appeal was Seaquest. That the subcontractors were not each Respondents was proper, efficient, and no basis for a contention that the claims against the subcontractors were extinguished.

C. Appeal Was of Entire Order

Moreover, the order was appealed in its entirety. The Notice of Appeal states "Plaintiffs Andrew and Kimberly McIntire appeal the order of the Honorable Jean Hoefer Toal, dated January 17, 2017." **Exh. A**. Plaintiff's appellate brief stated "[t]his Court should vacate the trial court's order and direct the parties to engage in arbitration" and "reverse the judgment of the circuit court . . . ." **Exh. B** at 4, 13. Therefore, the portion of the order which dismisses the case entire case was necessarily appealed. The subcontractors' contention that only a portion of the order was appealed is incorrect. The Court of Appeals ordered that "the decision of the trial court is reversed and remanded." **Exh. C** at 6. This decision by the Court of Appeals had the effect of reversing the properly appealed order which dismissed the entire case.

D. Subcontractors Were Served With Notice of Appeal

Finally, the subcontractors contend that they were not served with the appeal. March 3, 2021 Memo at 5–6. This is inaccurate; they were timely served on June 2, 2017 as reflected by the email and certificate of service attached as **Exhibits D** & **E** to this reply.

II. CONCLUSION

Because the order in question was appealed in its entirety and reversed in its entirety, the effect was to vacate the judgment and leave "the case standing as if no judgment had been rendered." *Moore v. North American Van Lines*, 319 S.C. 446, 462 S.E.2d 275 (1995) (citing *Brown v. Brown,* 286 S.C. 56, 331 S.E.2d 793 (Ct. App. 1985)).[1] Accordingly, the claims against the subcontractors remain and are subject to being stayed pending arbitration between Plaintiffs and Seaquest.

Respectfully submitted:

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COUNSEL FOR PLAINTIFF

-AND-

[1] The subcontractors contend this motion is an improper, untimely Rule 59(e) motion to reconsider. It is nothing of the kind. Because there is no judgment, it having been vacated, there is no judgment to reconsider. This motion is simply a motion for clarification of the status of certain parties filed at this Court's direction in keeping with Rule 7(b)(1), S.C.R.C.P.

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ATTORNEY FOR DEFENDANT SEAQUEST DEVELOPMENT COMPANY, INC.

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Jean Hoefer Toal, Circuit Court Judge

Case No.: 2016-CP-10-1833

FILED
2017 MAY 31 PM 1:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY

ANDREW MCINTIRE AND KIMBERLY MCINTIRE,.....Plaintiffs/ Appellants,

v.

SEAQUEST DEVELOPMENT COMPANY, INC. .....Defendant/Respondents.

v.

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

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NOTICE OF APPEAL

Plaintiffs Andrew and Kimberly McIntire appeal the order of the Honorable Jean Hoefer Toal, dated January 17, 2017 (Exhibit A). Appellants received written notice of entry of Judge Toal's order on May 2, 2017. Appellants are in receipt of the transcript of record.

May 30, 2017

ANDREW K. EPTING, JR., LLC

By _____
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Attorneys For Appellants

Counsel of Record for Respondents:
Edward D. Buckley, Jr., Esquire
Jason A. Daigle, Esquire

EXHIBIT B

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

Andrew and Kimberly McIntire..... Appellants,

v.

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

Of which Seaquest Development Company, Inc. .....Respondent.

FINAL BRIEF OF APPELLANTS

ANDREW K. EPTING, JR., LLC
Andrew K. Epting, Jr., Esquire
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ATTORNEYS FOR APPELLANTS

S.E.2d 245, 247 (2007) ("In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court.").

II. The Court's Function Is Solely to Determine Arbitrability

When a party moves to stay litigation and compel arbitration under the Federal Arbitration Act ("FAA"), the only question before the court is whether the parties' contractual agreement renders the dispute arbitrable. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85 (2002). "Procedural" questions, including "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met," are for the arbitrator to decide in the first instance, not the court. *Id.* at 85.

The contract between the Parties is governed by the FAA and requires arbitration of disputes; the dispute is arbitrable. This Court should vacate the trial court's order and direct the parties to engage in arbitration.

A. The Parties' Contract Requires Arbitration of Disputes

There is no dispute that the Parties have a valid contract or that the contract contains a notice that states: "**WARNING: THIS AGREEMENT SUBJECT TO BINDING ARBITRATION IN THE STATE OF SOUTH CAROLINA, CITY OF CHARLESTON, UNDER THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (CODE SEC. 15-48-10, ET SEQ.)**." (Contract – AIA Document A101-1997, dated August 22, 2007, signed by Andrew McIntire and Craig Hines, **R. pp. 158-79**). The notice is in bold, underlined text, displayed prominently on the first page of the contract as required by S.C. Code Ann. § 15-48-10.

Additionally, the contract is a standard form AIA Document A101-1997 that incorporates A201-1997, section 4.6 of which requires that "[a]ny claim arising out of or related to the

another part of the dwelling while trying repair the original defect, and the homeowner may not discover the new damage for years. Would the homeowner then be forced again to give the contractor an opportunity to repair the new damage?

The trial court's decision implies that contractors have an inviolable right to physically repair any defects in their work (and presumably to also remediate consequential damage stemming from the defective work), and the homeowner has no right to hire a different, more competent contractor repair the defective work. Such an interpretation is inconsistent with public policy.

CONCLUSION

The trial Court went far beyond its authority to determine arbitrability, decided matters reserved for the arbitrator, and—most surprisingly—also decided issues of waiver, statute of limitations, and notice under the Right to Cure Act without any supporting documentation. Not one exhibit was introduced. The record was devoid of support for finding that the statute of limitations had run, that no notice had been sent of a right to cure, or that the McIntires engaged in discovery.

For the reasons stated, this Court should reverse the judgment of the circuit court and order the parties to arbitrate the dispute.

Respectfully submitted,

January 8, 2018

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P: (843) 377-1871
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ATTORNEYS FOR APPELLANTS

EXHIBIT C

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(D)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Andrew and Kimberly McIntire, Appellants,

v.

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

Of which Seaquest Development Company, Inc. is the Respondent.

Appellate Case No. 2017-001270

Appeal From Charleston County
Jean Hoefer Toal, Circuit Court Judge

Opinion No. 2019-UP-413
Heard November 5, 2019 – Filed December 31, 2019

REVERSED AND REMANDED

Andrew K. Epting, Jr., Jaan Gunnar Rannik, and Michelle N. Endemann, all of Andrew K. Epting, Jr., LLC, of Charleston, for Appellant.

Edward D. Buckley, Jr., Stephen Lynwood Brown, Jason Alan Daigle, and Russell Grainger Hines, all of Young Clement Rivers, LLP, of Charleston, for Respondent.

PER CURIAM: In this residential construction defect case, Andrew and Kimberly McIntire (the McIntires) appeal from the trial court's denial of their motion to compel arbitration with general contractor Seaquest Development Company, Inc. (Seaquest). The McIntires argue the trial court erred in (1) not ordering the dispute to arbitration when the parties' contract contained a valid arbitration clause; (2) addressing issues of statute of limitations, right to cure, and waiver when the court's sole jurisdiction was to decide the question of arbitrability; and (3) dismissing the case for failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act ("Right to Cure Act").[1] We reverse and remand the case for arbitration.

FACTS

The McIntires entered into a written contract with Seaquest for the construction of a home in Mount Pleasant in August 2007. A certificate of occupancy was issued in September 2008. On April 8, 2016, the McIntires filed an action against Seaquest, alleging defects in the home's construction and asserting causes of action for negligence and gross negligence, breach of warranty of habitability, negligent misrepresentation and constructive fraud, and breach of warranty of good and workmanlike work. Prior to bringing the action, the McIntires had discovered a number of alleged construction defects in their home and hired experts and began repairs without notifying Seaquest. The repairs were substantially completed before the lawsuit was filed or were completed soon thereafter.

On June 17, 2016, Seaquest filed a motion to dismiss or stay proceedings, arguing the McIntires failed to comply with the Right to Cure Act. On July 27, 2016, the McIntires filed a motion to stay and compel arbitration. The McIntires also filed a

[1] S.C. Code Ann. § 40-59-810, *et seq*. (2011).

motion on August 15, 2016, seeking an order staying their responses to Seaquest's requests for admission until the court ruled on Seaquest's motion. After a hearing on October 13, 2016, the trial court granted Seaquest's motion to dismiss and denied the McIntires' motion to compel arbitration. This appeal follows.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the trial court's factual findings, this court will not overrule those findings. *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

LAW/ANALYSIS

I. Arbitration

The McIntires argue the trial court erred in not ordering the dispute to arbitration when the parties' contract contained a valid arbitration clause. We agree.

"The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties." *Hous. Auth. of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003). "Arbitration is available only when the parties involved contractually agree to arbitrate." *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a) (2005) ("On application of a party showing an agreement described in § 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied."). "There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

The written contract between the McIntires and Seaquest provides at the top of the contract:

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

The contract further provides, "AIA Document A201 – 1997 General Conditions of the Contract for construction is adopted in this document by reference." AIA Document A201, section 4.6 states that "[a]ny Claim arising out of or related to the Contract . . . shall . . . be subject to arbitration."

The right to enforce an arbitration clause may be waived. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). In *Rhodes*, this court stated three factors our courts consider to determine if a party waived its right to compel arbitration:

> (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others.

Id.

"[T]o establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "To establish prejudice, the non-moving party must show something more than 'mere inconvenience.'" *Rhodes*, 374 S.C. at 127, 647 S.E.2d at 251 (quoting *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76-77 (Ct. App. 2003)). "To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took 'advantage of the judicial system by engaging

in discovery.'" *Id*. (quoting *Evans*, 352 S.C. at 548, 575 S.E.2d at 76). "'[A] substantial length of time' varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration." *Id.* at 126, 647 S.E.2d at 251. "Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts." *Id*. at 127, 647 S.E.2d at 252.

The trial court found the McIntires had "engaged in extensive discovery in that they retained forensic and construction liability and repair experts to investigate, document, and repair the alleged defects at their house." The repairs to the McIntires' home were substantially completed prior to the filing of the motion to compel arbitration, which the court found resulted in material prejudice to Seaquest because it precluded "Seaquest from investigating, inspecting, and/or challenging the McIntires' claims." The trial court also found a "substantial amount of time transpired between the time the McIntires engaged their experts and the time they moved to compel arbitration."

The McIntires argue the trial court erred in finding they waived their arbitration right because hiring a contractor to inspect and repair issues with their residence does not amount to engaging in discovery. The McIntires also argue the trial court erred in focusing on the amount of time between when the McIntires engaged their experts and the filing of the motion to compel arbitration, instead of on the amount of time between the filing of the suit and the filing of the motion as set forth in *Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251.

Based on our review, we find the evidence in the record does not support the trial court's finding that the McIntires participated in discovery, much less "extensive discovery," or retained "forensic and construction liability and repair experts." Also, the McIntires moved to compel arbitration on July 27, 2016, two days after they received notice the last defendant had been served with their complaint.[2] The complaint was filed on April 8, 2016. Thus, we find a "substantial length of time" did not occur between the commencement of the action and the commencement of the motion to compel arbitration. Accordingly, we reverse on this issue and remand the case for arbitration.

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[2] The McIntires' counsel told the court it took a while to serve all the defendants because many of the defendant companies were out of business.

II. Jurisdiction and Right to Cure Act

The McIntires argue the trial court erred in addressing the issues of statute of limitations, Right to Cure Act, and waiver when the court's sole jurisdiction was to decide the question of arbitrability. The McIntires also argue the trial court erred in dismissing the case for failure to comply with the Right to Cure Act.

Because we already determined the trial court erred in finding the McIntires waived their arbitration right and remand for arbitration, we need not address these issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

CONCLUSION

Accordingly, the decision of the trial court is

REVERSED and REMANDED.

SHORT, THOMAS, and GEATHERS, JJ., concur.

EXHIBIT D

Jaan Rannik

From: Angela Gross
Sent: Friday, June 2, 2017 11:55
To: Daigle, Jason
Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: McIntire v. Seaquest, et al. - 2016-CP-10-1833
Attachments: 2017 05 31 - Notice of Appeal - Lower Ct..pdf; 2017 05 31 - Proof of Service - Lower Ct..pdf; 2017 05 30 - Ltr to Ct App filing Notice of Appeal.pdf; 2017 05 30 - Ltr to Lower Ct filing Notice of Appeal.pdf; 2017 06 02 - Proof of Service - Defendants.pdf

Counsel,

Attached please find a copy of Appellants' Notice of Appeal in the above-referenced matter. A hard copy was mailed via regular U.S. Mail to counsel for Respondents only on May 30, 2017. Please let me know if require a copy via regular U.S. Mail. Thank you.

Angela

Angela Gross
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EXHIBIT E

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Jean Hoefer Toal, Circuit Court Judge

Case No.: 2016-CP-10-1833

ANDREW MCINTIRE AND KIMBERLY MCINTIRE,.....Plaintiffs/ Appellants,

v.

SEAQUEST DEVELOPMENT COMPANY, INC. .....Defendant/Respondents.

v.

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

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PROOF OF SERVICE

I certify that I have served the Appellants' Notice of Appeal on counsel of record for Defendants via email on June 2, 2017.

ANDREW K. EPTING, JR., LLC

By _____
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