

IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

UPTON CONSTRUCTION CO., INC.,
a West Virginia Corporation,

Plaintiff,

v.

Civil Action No. 16-C-165
Honorable David H. Wilmoth

TOWN OF MILL CREEK WEST VIRGINIA,
a West Virginia Municipal Corporation, and
POTESTA & ASSOCIATES, INC., a West
Virginia Corporation,

Defendants.

**TOWN OF MILL CREEK WEST VIRGINIA'S ANSWER, AFFIRMATIVE
DEFENSES, COUNTERCLAIM AND CROSS-CLAIM TO PLAINTIFF'S COMPLAINT**

COMES NOW, the Town of Mill Creek, West Virginia ("Mill Creek"), by and through its counsel, the law firm of Bailey & Wyant, PLLC, John P. Fuller and Betsy L. Stewart and the law firm of Busch, Zurbuch & Thompson, PLLC, Jeffrey S. Zurbuch and Peter G. Zurbuch, and for its Answer, Affirmative Defenses, Counterclaim and Cross-Claim, asserts the following:

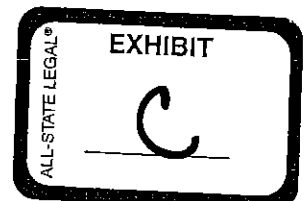
ANSWER AND AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff has failed to state a claim against this Defendant upon which relief may be granted in favor of the Plaintiff and against this Defendant, and therefore, it is proper for this Court to dismiss Plaintiff's Complaint.

SECOND AFFIRMATIVE DEFENSE

This Defendant denies each and every allegation not specifically and affirmatively admitted herein. With regard to the individual allegations contained in the Complaint, this Defendant responds as follows:



1. This Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 1 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

2. This Defendant admits the allegations contained in Paragraph 2 of Plaintiff's Complaint.

3. This Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 1 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

4. The allegations contained in Paragraph 4 of Plaintiff's Complaint call for conclusions of law to which no response is required. To the extent that any further response is required to Paragraph 4 of Plaintiff's Complaint, this Defendant denies the same and demands strict proof thereof.

5. This Defendant admits that on or about August 19, 2015, Mill Creek accepted bids for a construction project identified as "Water System Improvements Project, Town of Mill Creek, West Virginia." To the extent that any further response is required to Paragraph 5 of Plaintiff's Complaint, this Defendant asserts that the Contract speaks for itself and, to the extent any further response is required, this Defendant denies the same and demands strict proof thereof.

6. This Defendant admits that various documents were provided to various bidders with regard to the subject project. To the extent that any further response is required to Paragraph 6 of Plaintiff's Complaint, this Defendant denies the same and demand strict proof thereof.

7. This Defendant admits that Plaintiff submitted a bid for the subject project. To the extent that any further response is required to Paragraph 7 of Plaintiff's Complaint, this Defendant denies the same and demand strict proof thereof.

8. This Defendant admits that Plaintiff submitted a bid for the subject project. To the extent that any further response is required to Paragraph 8 of Plaintiff's Complaint, this Defendant denies the same and demand strict proof thereof.

9. This Defendant admits that Plaintiff was awarded the Contract. To the extent that any further response is required to Paragraph 9 of Plaintiff's Complaint, this Defendant denies the same and demand strict proof thereof.

10. This Defendant asserts that the Contract is a written document and speaks for itself. To the extent that any further response is required to Paragraph 10 of Plaintiff's Complaint, this Defendant denies the same and demand strict proof thereof.

11. This Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 11 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

12. The allegations contained in Paragraph 12 of Plaintiff's Complaint either call for conclusions of law or contain conclusions of law to which no response is required. To the extent that any further response is required to Paragraph 12 of Plaintiff's Complaint, this Defendant denies the same and demand strict proof thereof.

13. The allegations contained in Paragraph 13 of Plaintiff's Complaint either call for conclusions of law or contain conclusions of law to which no response is required. To the extent that any further response is required to Paragraph 13 of Plaintiff's Complaint, this Defendant denies the same and demand strict proof thereof.

14. The allegations contained in Paragraph 14 of Plaintiff's Complaint either call for conclusions of law or contain conclusions of law to which no response is required. To the extent

that any further response is required to Paragraph 14 of Plaintiff's Complaint, this Defendant denies the same and demand strict proof thereof.

15. The allegations contained in Paragraph 15 of Plaintiff's Complaint either call for conclusions of law or contain conclusions of law to which no response is required. To the extent that any further response is required to Paragraph 15 of Plaintiff's Complaint, this Defendant denies the same and demand strict proof thereof.

16. This Defendant admits that representatives of the Town of Mill Creek and representatives of Defendant Potesta & Associates, Inc. conferred regarding Plaintiff's listing of claims prior to Plaintiff filing of its Complaint. As for any remaining allegations in Paragraph 16 of Plaintiff's Complaint, such allegations either contain or call for the conclusions of law to which no response is required. To the extent that any further response is required to Paragraph 16 of Plaintiff's Complaint, this Defendant denies the same and demand strict proof thereof.

17. This Defendant denies the allegations contained in Paragraph 17 of Plaintiff's Complaint, and therefore demands strict proof thereof.

18. This Defendant denies the allegations contained in Paragraph 18 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

19. This Defendant denies the allegations contained in Paragraph 19 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

20. Having previously responded to Paragraph 1 through 19 of Plaintiff's Complaint, this Defendant reasserts and avers each and every response as if fully contained herein.

21. This Defendant denies the allegations contained in Paragraph 21 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

22. This Defendant denies the allegations contained in Paragraph 22 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

23. This Defendant denies the allegations contained in Paragraph 23 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

23. This Defendant denies the allegations contained in Paragraph 24 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

24. This Defendant denies the allegations contained in Paragraph 25 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

25. Having previously responded to Paragraph 1 through 25 of Plaintiff's Complaint, this Defendant reasserts and avers each and every response as if fully contained herein.

26. This Defendant denies the allegations contained in Paragraph 27 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

27. This Defendant denies the allegations contained in Paragraph 28 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

28. This Defendant denies the allegations contained in Paragraph 29 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

29. This Defendant denies the allegations contained in Paragraph 30 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

30. Having previously responded to Paragraph 1 through 30 of Plaintiff's Complaint, this Defendant reasserts and avers each and every response as if fully contained herein.

31. This Defendant denies the allegations contained in Paragraph 32 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

32. This Defendant denies the allegations contained in Paragraph 33 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

33. This Defendant denies the allegations contained in Paragraph 34 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

34. This Defendant denies the allegations contained in Paragraph 35 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

35. This Defendant denies the allegations contained in Paragraph 36 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

36. Having previously responded to Paragraph 1 through 36 of Plaintiff's Complaint, this Defendant reasserts and avers each and every response as if fully contained herein.

37. This Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 38 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

38. This Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 39 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

39. This Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 40 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

40. This Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 41 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

41. Having previously responded to Paragraph 1 through 41 of Plaintiff's Complaint, this Defendant reasserts and avers each and every response as if fully contained herein.

42. This Defendant denies the allegations contained in Paragraph 43 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

43. This Defendant denies the allegations contained in Paragraph 44 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

44. This Defendant denies the allegations contained in Paragraph 45 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

45. This Defendant denies the allegations contained in Paragraph 46 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

46. This Defendant denies the allegations contained in Paragraph 47 of Plaintiff's Complaint, and therefore, demands strict proof thereof.

47. This Defendant denies that the Plaintiff is entitled to any of the relief sought in the "WHEREFORE" paragraph and therefore, demands strict proof thereof.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claim for fraud is barred, in whole or in part, for failure to plead fraud with particularity as required by W. Va. R.C.P. 9 (b).

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, for failure to allege facts sufficient to demonstrate that any act or omission by the Town of Mill Creek caused any injury or damages to Plaintiff.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, for failure to allege facts sufficient to demonstrate that the Town of Mill Creek breached any duty owed to the Plaintiff.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's alleged injuries and damages were caused solely and/or exclusively by circumstances over which the Town of Mill Creek did not have control and/or responsibility and/or intervening, superseding, and/or independent causes over which the Town of Mill Creek

did not have control and/or responsibility and not in any manner whatsoever by the actions and/or inactions of the Town of Mill Creek.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of waiver.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine unclean hands.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by its failure to mitigate damages.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of assumption of risk.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, due to its contributory and/or comparative negligence.

FOURTEENTH AFFIRMATIVE DEFENSE

To the extent discovery reveals, Plaintiffs claims are barred, in whole or in part, by the statute of limitations and/or statute of repose.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiffs request for an award of attorney's fees is improper, impermissible, and inappropriate based on the allegations of the Complaint and any applicable law.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff has failed to state a cognizable claim for punitive damages.

SEVENTEENTH AFFIRMATIVE DEFENSE

Due to the lack of clear standards, the imposition of punitive damages against the Town of Mill Creek would be unconstitutionally vague and/or overbroad.

EIGHTEENTH AFFIRMATIVE DEFENSE

None of the alleged acts or omissions of the Town of Mill Creek were malicious, willful, wanton, reckless, grossly negligent and/or intentional; therefore, any award of punitive damages is barred.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiff's claim for punitive damages is in contravention of the Town of Mill Creek's rights under the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution, the Excessive Fines Clause of the Eighth Amendment of the United States Constitution, and similar provisions in the Constitution of West Virginia and/or the common law and public policies of West Virginia.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the terms, conditions, and limitations contained in the contract between Plaintiff and the Town of Mill Creek, West Virginia.

TWENTY-FIRST AFFIRMATIVE DEFENSE

The Town of Mill Creek reserves the right to assert additional affirmative defenses as further investigation and discovery may warrant.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Any and all damages incurred by the Plaintiff were the direct and proximate result of the actions or omissions of the Plaintiff or a person or entity other than this Defendant and are in no way attributable to any wrongdoing on the part of this Defendant.

TWENTY-THIRD AFFIRMATIVE DEFENSE

This Defendant asserts all immunities and defenses available to it, including, but not limited to, those afforded under the Governmental Torts Claims and Insurance Reform Act, W.Va. Code § 29-12A-1, et seq.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

This Defendant raises each and every affirmative defense or matter constituting an avoidance under Rules 8, 9 and 12 of the West Virginia Rules of Civil Procedure, to the extent that the same may appear applicable, as well as any and all other defenses which may be revealed as appropriate during discovery.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

This Defendant reserves the right to file additional affirmative defenses, counterclaims, crossclaims, and/or third party claims if a sufficient or factual basis therefore is developed through continuing investigation and discovery.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

At all times material herein, this Defendant, acted in an objectively, reasonable manner and did not violate any legal rights of the Plaintiff of which this Defendant knew or in the exercise of reasonable diligence should have known.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

This Defendant is entitled to qualified immunity.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

This Defendant cannot be held liable under respondeat superior or vicarious liability.

TWENTY-NINTH AFFIRMATIVE DEFENSE

The Town of Mill Creek as a political subdivision is immune from liability for Plaintiff's

state law claims pursuant to Governmental Tort Claims and Insurance Reform Act, *West Virginia Code*, §§ 29-12A-4 and 29-12A-5.

THIRTIETH AFFIRMATIVE DEFENSE

Defendant Town of Mill Creek asserts that it cannot be held vicariously liable for any intentional or unlawful conduct engaged in by any agent thereof.

THIRTY-FIRST AFFIRMATIVE DEFENSE

This Defendant denies that its actions deprived Plaintiff of any right, privilege, or immunity secured by the United States Constitution and laws or the Constitution of the State of West Virginia.

THIRTY-SECOND AFFIRMATIVE DEFENSE

This Defendant did not engage in any intentional wrongdoing, any departure from any prescribed or known standard of action, nor in any willful, wanton, malicious, reckless or egregious conduct; consequently, there is no factual basis to support Plaintiff's claim for damages against this Defendant.

THIRTY-THIRD AFFIRMATIVE DEFENSE

Plaintiff is barred from recovering punitive damages against the Defendants pursuant to *West Virginia Code* § 29-12A-7(a), which prohibits an award of punitive or exemplary damages against such political subdivision.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

Although these Defendants deny that they are liable for Plaintiff's state law claims, Plaintiff's non-economic damages, if any, are limited by *West Virginia Code*, § 29-12A-7(b).

THIRTY-FIFTH AFFIRMATIVE DEFENSE

Time was of the essence in the contract, and Plaintiff failed to timely comply with the deadlines for completion of its work as Plaintiff abandoned the contract and/or ceased work before completion, due to no fault of this Defendant, and without sufficient grounds or excuse. Therefore, Plaintiff forfeits all right to contract damages. Alternatively, this Defendant has been damaged thereby and is entitled to a set-off against any monies allegedly owed Plaintiff.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

This Defendant states that at all times relevant hereto, this Defendant acted in good faith and in accordance with clearly established law.

WHEREFORE, Defendant Mill Creek requests that Plaintiff's Complaint against it be dismissed, with prejudice, and that Mill Creek be awarded its costs and attorney's fees incurred in the defense of this action.

THIS DEFENDANT DEMANDS A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

COUNTERCLAIM

The Town of Mill Creek ("Mill Creek"), by counsel, pursuant to Rule 13(a) of the West Virginia Rules of Civil Procedure, states as follows for its Counterclaim against Plaintiff Upton Construction Co., Inc., a.k.a., Upton Construction Company, Inc.:

1. Mill Creek incorporates the allegations contained in Plaintiff's Complaint for reference purposes only and restates and re-alleges all affirmative defenses, responses, and allegations set forth in its foregoing Answer to Plaintiff's Complaint as if said pleading was set forth verbatim here.

2. Mill Creek incorporates the affirmative defenses, responses, and allegations set forth in the Answer previously filed herein by Defendant Potesta & Associates, Inc. ("Potesta"), as well as the Exhibits A and B filed therewith, for reference purposes only.

3. On or about November 12, 2015, Mill Creek entered into a written agreement ("Agreement") with Plaintiff for Plaintiff to provide labor, services, materials and all work required to construct and complete Mill Creek's water system improvements project consistent with the Agreement and the other Contract Documents specified therein. The project is an underground water utility project that primarily called for the replacement of various water mains, valves, and pipes in addition to installation of a new water storage tank for Mill Creek's water system. A true copy of the Agreement, without the other Contract Documents attachments, is attached hereto as Exhibit A.

4. Article 8 of the Agreement identified the Contract Documents that comprise the entire agreement (hereinafter sometimes referred to as "contract") between Mill Creek as owner and Plaintiff as contractor. The Contract Documents included the Bid and Bid Schedule, Agreement, Performance Bond, Payment Bond, General Conditions, Supplementary Conditions, Specifications Special Conditions, Technical Specifications, and Drawings, among other items.

5. The project was designed by Potesta, which has served as engineer for the project. Postesta prepared the Contract Documents, handled bidding for the project, administered and observed construction of the project, and acted as Mill Creek's representative on the construction project.

6. On or about August 19, 2015, Mill Creek accepted bids for the project. After bids were received, Potesta reviewed the bids for accuracy and completeness and tabulated the bids. It made a recommendation to Mill Creek regarding the bids received and selection of a contractor

to complete the work. A Notice of Award was issued to Plaintiff on or about September 21, 2015, notifying Plaintiff that its bid for the project had been accepted. An Acceptance of Notice was signed by Plaintiff on or about September 30, 2015.

7. On or about November 12, 2015, in addition to Mill Creek entering into the Agreement with Plaintiff, a Notice to Proceed was issued to Plaintiff for it to commence work in accordance with the Agreement on or before November 22, 2015. The Notice to Proceed also noted that one winter shutdown would be allowed per winter, which would suspend the contract, that work was to begin by April 1 of each year, and that all work shall be completed no later than October 31, 2017. A request for winter shutdown was issued by Plaintiff on or about November 30, 2015.

8. On or about April 4, 2016, Plaintiff commenced work on major construction activities for the project.

9. Pursuant to its contract with Mill Creek, Plaintiff was to complete all work as specified and indicated in the Contract Documents.

10. On or about July 14, 2016, as a result of various disputes between Plaintiff and Potesta concerning the manner and quality of Plaintiff's work, the design and administration of the project by Potesta, the location of underground facilities, conditions on the site, and progress of the work, Plaintiff suspended its work on the project without permission or justification.

11. Plaintiff failed to comply with the dispute, claim resolution, change order, and other provisions provided for in the Contract Documents.

12. On or about October 17, 2016, Plaintiff sent a letter to Potesta asserting that it was terminating its contract with Mill Creek for cause based upon claimed breaches of contract on the part of Mill Creek and Potesta. No valid cause existed for Plaintiff to terminate the contract. As

such, Plaintiff ceased work and abandoned the contract without justification and thereby breached its contract with Mill Creek.

13. Pursuant to the contract, Plaintiff assumed responsibility for conditions (surface, subsurface and underground facilities) at or contiguous to the site or otherwise that might affect its work. Despite this, Plaintiff incorrectly asserted that unexpected conditions, particularly involving underground facilities, provided a basis for it to terminate its contract with Mill Creek.

14. Relevant portions of the Contract Documents were previously filed by Potesta as attachments to its Answer and Affirmative Defenses in this action, identifying particular provisions within the Contract Documents that Potesta asserted Plaintiff specifically failed to comply with. See Potesta's Answer and Affirmative Defenses, Twenty-First Affirmative Defense and corresponding Exhibits A and B.

15. Prior to and/or since Plaintiff's purported termination of the contract in October 2016, Plaintiff breached its construction contract with Mill Creek, including, without limitation, in the following respects:

- a. Failure to remedy defective and/or incomplete work on the project;
- b. Failure to adequately progress and complete the project;
- c. Disregard for the authority of Potesta as engineer and failure to comply with Potesta's valid directives;
- d. Failure to abide by the claims, dispute resolution, change order, and other provisions of the Contract Documents;
- e. Failure to abide by or perform its work consistent with its representations, warranties, and other obligations in the Contract Documents, including, without limitation, those in its Bid, under Article 7 of the Agreement, and under Paragraphs 4.02 – 4.04 of the

General Conditions and Supplementary Conditions with respect to technical data, site conditions, underground facilities, and other subsurface and surface conditions;

- f. Abandonment of the construction project;
- g. Failure to comply with specific Contract Document provisions as identified by Potesta in the Twenty-First Affirmative Defense in its Answer and the corresponding Exhibits A and B; and
- h. Otherwise failed to comply with its obligations under the contract.

16. As a result of the breach of contract by Plaintiff, Mill Creek has been damaged, including, but are not limited to, the following:

- a. Incurred and likely will incur in the future additional costs for completion of the project;
- b. Delay in completion of the project and loss of use of the subject premises and facilities until the project is completed;
- c. Costs to repair, replace or complete defective and/or incomplete work of Plaintiff;
- d. Additional costs associated with project financing; and
- e. Other damages to be determined.

17. In addition, time was of the essence in the contract, and Mill Creek is entitled to liquidated damages for the delay in completion of the project caused by Plaintiff.

WHEREFORE, Mill Creek as counterclaimant demands judgment against Plaintiff Upton Construction Co., Inc. (a.k.a. Upton Construction Company, Inc.) for all the damages to which it is entitled, and its costs and attorney's fees incurred in this action.

TRIAL BY JURY IS DEMANDED ON ALL ISSUES SO TRIABLE.

CROSS-CLAIM

The Town of Mill Creek ("Mill Creek"), by counsel, pursuant to Rule 13(g) of the West Virginia Rules of Civil Procedure, states as follows for its Cross-Claim against Defendant Potesta & Associates, Inc. ("Potesta"):

1. Mill Creek incorporates the allegations contained in Plaintiff's Complaint for reference purposes only and restates and re-alleges all affirmative defenses, responses, and allegations set forth in its foregoing Answer to Plaintiff's Complaint as if said pleading was set forth verbatim here. Mill Creek also incorporates its foregoing Counterclaim against Plaintiff for reference purposes only.

2. Plaintiff filed its Complaint against the Defendants alleging that such Defendants are jointly and severally liable to Plaintiff for damages it claimed to have suffered.

3. Mill Creek denies that it is at fault under any theory of liability which proximately caused or contributed to Plaintiff's alleged damages. As such, Mill Creek denies that it is liable to Plaintiff in any respect.

4. Mill Creek entered into an agreement with Potesta for Potesta to provide professional engineering services in connection with Mill Creek's water system improvements project.

5. The damages, if any, that Plaintiff allegedly suffered may be the direct and proximate result of the acts and/or omissions of Defendant Potesta and were not the result of the acts and/or omissions of Mill Creek.

6. While denying any liability to Plaintiff for claims or damages alleged in its Complaint, Mill Creek asserts that Potesta is or may be liable to Mill Creek for all or part of the claims asserted in this action by Plaintiff against Mill Creek.

7. In the event that Mill Creek is found liable to Plaintiff, which liability is specifically denied, then in such event the liability of Mill Creek is passive and secondary to the liability of Potesta, whose liability would be active and/or primary and, as a result thereof, Mill Creek is entitled to indemnification by Potesta for all sums, if any, which may be adjudged against Mill Creek in favor of Plaintiff.

8. Alternatively, if it is determined that Mill Creek participated in any conduct which would render it liable to Plaintiff, which participation and conduct is specifically denied, then in such event, the liability of Mill Creek would be such as to entitle Mill Creek to contribution from Potesta toward any sums that may be adjudged against it in favor of Plaintiff.

9. Mill Creek further alleges that Defendant Potesta is or may be required to provide this Defendant implied and/or contractual indemnification, and all costs incurred in the defense of this action, including attorney's fees and costs as well as the cost of bringing the instant crossclaim and Mill Creek's Counterclaim.

10. In addition, while continuing to assert it is entitled to recover from Plaintiff under the Counterclaim herein, Mill Creek asserts that Potesta is, or may be, liable to Mill Creek for such damages as it has sustained to the extent any resulted from negligence, breach of contract, or other failure to exercise ordinary care on Potesta's part in connection with the subject project.

WHEREFORE, Mill Creek, while denying any liability to Plaintiff, demands judgment against Potesta for indemnification and/or contribution with respect to any and all such sums which may be adjudged against it in favor of Plaintiff, including, without limitation, any judgment, costs, and attorney's fees, and it otherwise demands judgment for damages against Potesta as noted herein.

TRIAL BY JURY IS DEMANDED ON ALL ISSUES SO TRIABLE.

TOWN OF MILL CREEK
WEST VIRGINIA,

By Counsel,

John P. Fuller / by J.P.Z. w/ permission

John P. Fuller (WV Bar #9116)

Betsy L. Stewart (WV Bar #12042)

BAILEY & WYANT, PLLC

500 Virginia Street, East, Suite 600

Post Office Box 3710

Charleston, West Virginia 25337-3710

(304) 345-4222

Jeffrey S. Zurbuch

Jeffrey S. Zurbuch (WV Bar #7384)

Peter G. Zurbuch (WV Bar #5765)

Busch Zurbuch & Thompson, PLLC

P.O. Box 1819

Elkins, West Virginia 26241-1819

(304) 636-3560

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF RANDOLPH, TO-WIT:

I, William Brock, Mayor of The Town of Mill Creek, West Virginia, hereby swear and affirm that I am a duly authorized representative of Defendant, the Town of Mill Creek, West Virginia, and that the facts and allegations contained in the foregoing Answer, Affirmative Defenses, Counterclaim and Cross-Claim are true and correct based upon my knowledge, information and belief.

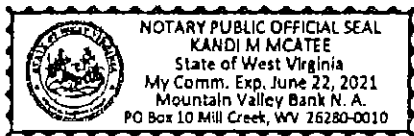
Date: March 20, 2017.

Town of Mill Creek, West Virginia

By: William Brock
William Brock, Mayor

Taken, sworn to and subscribed before me this 20TH day of March, 2017, by WILLIAM BROCK, Mayor of The Town of Mill Creek, West Virginia.

My commission expires JUNE 22, 2021



Kandi M Mcatee
NOTARY PUBLIC

IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

UPTON CONSTRUCTION CO., INC.,
a West Virginia Corporation,

Plaintiff,

v.

Civil Action No. 16-C-165
Honorable David H. Wilmoth

TOWN OF MILL CREEK WEST VIRGINIA,
a West Virginia Municipal Corporation, and
POTESTA & ASSOCIATES, INC., a West
Virginia Corporation,


Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing "Town of Mill Creek West Virginia's Answer, Affirmative Defenses, Counterclaim and Cross-Claim to Plaintiff's Complaint" was served upon the following counsel for parties by U.S. Mail on this day, Monday, March 20, 2017:

Charles M. Johnstone, II
Johnstone & Gabhart, LLP P.O.
Box 313
1125 Virginia Street East
Charleston, WV 25321-0313 *Counsel*
for Upton Construction Company, Inc.

Phillip R. Earnest
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
One Oxford Centre, 38th Floor
Pittsburgh, PA 15219 *Counsel*
for Potesta & Associates, Inc.


Jeffrey S. Zurbuch (WV Bar #7384)

Peter G. Zurbuch (WV Bar #5765)

Busch Zurbuch & Thompson, PLLC

P.O. Box 1819

Elkins, West Virginia 26241-1819

(304) 636-3560

John P. Fuller (WV Bar #9116)

Betsy L. Stewart (WV Bar #12042)

BAILEY & WYANT, PLLC

500 Virginia Street, East, Suite 600

Post Office Box 3710

Charleston, West Virginia 25337-3710

(304) 345-4222

