

CIVIL CASE INFORMATION STATEMENT  
CIVIL CASES  
In the Circuit Court of Kanawha County, West Virginia

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**MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,**  
**A West Virginia Limited Liability Company,**

**Plaintiff,**

**v.**

**Civil Action No:**

**SMITH/PACKETT MED-COM, LLC,**  
**A Virginia Limited Liability Company, and**  
**Sole Manager-Member of Defendant, SP WV, LLC,**

**Defendant;**

**AND**

**SP WV, LLC,**  
**A Virginia Manager-Managed Limited Liability Company**  
**and "Pass Through Entity" Acting as the Sole Member**  
**of Defendant, WV IL-AL Investors, LLC,**

**Defendant;**

**AND**

**WV IL-AL INVESTORS, LLC,**  
**A Virginia Member-Managed Limited Liability Company,**

**Defendant;**

**AND**

**JARRETT CONSTRUCTION SERVICES, INC.,**  
**A West Virginia Limited Liability Company,**  
**as Construction Manager at Risk;**

**Defendant;**

**AND**

**CARTER BANK & TRUST,**  
**A Virginia Banking Corporation,**

**Defendant.**

**FILED**

2020 MAY -1 A 8:19

*la*

CIRCUIT COURT

20-C-350

*Kaufman*

\$275.02

200.00 FF

50.00 MDF

25.00 FLF

acct 579688

no sum iss

	<u>Days to Answer</u>	<u>Type of Service</u>
<u>Smith/Packett Med-Com, LLC</u>	<u>20</u>	<u>WVSOS</u>
<u>4423 Pheasant Ridge Road, Suite 300</u> Street		
<u>Roanoke, VA 24014</u> City, State, Zip		
<u>SP WV, LLC</u>	<u>20</u>	<u>WVSOS</u>
<u>4423 Pheasant Ridge Road, Suite 300</u> Street		
<u>Roanoke, VA 24014</u> City, State, Zip		
<u>WV IL-AL Investors, LLC</u>	<u>20</u>	<u>WVSOS</u>
<u>4423 Pheasant Ridge Road, Suite 300</u> Street		
<u>Roanoke, VA 24014</u> City, State, Zip		
<u>Jarrett Construction Services, Inc.</u>	<u>20</u>	<u>WVSOS</u>
<u>1605 Virginia St., E.</u> Street		
<u>Charleston, WV 25311</u> City, State, Zip		
<u>Carter Bank &amp; Trust</u>	<u>20</u>	<u>WVSOS</u>
<u>4 East Commonwealth Blvd.</u> Street		
<u>Martinsville, VA 24112-1920</u> City, State, Zip		

ORIGINAL AND 5 COPIES OF COMPLAINT FURNISHED HEREWITH.

<b>MOUNTAIN STATE PIPELINE &amp; EXCAVATING, LLC,</b> <b>A West Virginia Limited Liability Company,</b>  <div style="text-align: center;"><b>Plaintiff,</b></div> <b>v.</b>  <b>SMITH/PACKETT MED-COM, LLC,</b> <b>A Virginia Limited Liability Company, and</b> <b>Sole Manager-Member of Defendant, SP WV, LLC,</b>  <b>AND</b>  <b>SP WV, LLC,</b> <b>A Virginia Manager-Managed Limited Liability Company</b> <b>and "Pass Through Entity" Acting as the Sole Member</b>	<b>CASE NUMBER:</b>
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of Defendant, WV IL-AL Investors, LLC,  AND  WV IL-AL INVESTORS, LLC, A Virginia Member-Managed Limited Liability Company,  AND  JARRETT CONSTRUCTION SERVICES, INC., A West Virginia Limited Liability Company, as Construction Manager at Risk;  AND  CARTER BANK & TRUST, A Virginia Banking Corporation,  <p style="text-align: center;"><b>Defendants.</b></p>	
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## II. TYPE OF CASE:

TORTS		OTHER CIVIL
<input type="checkbox"/> Asbestos	<input type="checkbox"/> Adoption	<input type="checkbox"/> Appeal from Magistrate Court
<input type="checkbox"/> Professional Malpractice	<input type="checkbox"/> Contract	<input type="checkbox"/> Petition for Modification OF Magistrate Sentence
<input type="checkbox"/> Personal Injury	<input type="checkbox"/> Real Property	<input type="checkbox"/> Miscellaneous Civil
<input type="checkbox"/> Product Liability	<input type="checkbox"/> Mental Health	<input type="checkbox"/> Other
<input checked="" type="checkbox"/> Other Tort	<input type="checkbox"/> Appeal of Administrative Agency	

III. JURY DEMAND ☒ YES ☐ NO

CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR): April, 2021

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMODATIONS DUE TO A DISABILITY OR AGE? ☐ YES ☒ NO

IF YES, PLESE SPECIFY:

- ☐ Wheelchair accessible hearing room and other facilities
- ☐ Interpreter or other auxiliary aid for the hearing impaired
- ☐ Reader or other auxiliary aid for the visually impaired
- ☐ Spokesperson or other auxiliary aid for the speech impaired
- ☐ Other:

Attorney Name: Carl J. Roncaglione, Jr.

Representing:

Address: Suite 401 Boulevard Tower  
1018 Kanawha Boulevard East  
Charleston, West Virginia 25301  
(WVSB # 5723)

☒ Plaintiff ☐ Defendant

☐ Cross-Complainant ☐ Cross-Defendant

Telephone: (304) 342-3945

Dated April 30, 2020  
Signature Carl J. Roncaglione, Jr.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,  
A West Virginia Limited Liability Company,**

**Plaintiff,**

**v.**

**Civil Action No:** 20-C-3501

**SMITH/PACKETT MED-COM, LLC,  
A Virginia Limited Liability Company, and  
Sole Manager-Member of Defendant, SP WV, LLC,**

**Defendant;**

**AND**

**SP WV, LLC,  
A Virginia Manager-Managed Limited Liability Company  
and "Pass Through Entity" Acting as the Sole Member  
of Defendant, WV IL-AL Investors, LLC,**

**Defendant;**

**AND**

**WV IL-AL INVESTORS, LLC,  
A Virginia Member-Managed Limited Liability Company,**

**Defendant;**

**AND**

**JARRETT CONSTRUCTION SERVICES, INC.,  
A West Virginia Limited Liability Company,  
as Construction Manager at Risk;**

**Defendant;**

**AND**

**CARTER BANK & TRUST,  
A Virginia Banking Corporation,**

**Defendant.**

**COMPLAINT**

*Comes now* the Plaintiff, Mountain State Pipeline & Excavating, LLC, by and through its undersigned counsel, and as grounds for its Complaint against the Defendants states and avers as



follows:

### **THE PARTIES**

1. Mountain State Pipeline & Excavating, LLC (hereinafter sometimes referred to as “MSPE” and/or “Plaintiff”), is a limited liability company, organized under the laws of the State of West Virginia, with its principal place of business located at or near 109 Elm Street, Elkview, West Virginia 25071.

2. Defendant Smith/Packett Med-Com, LLC (hereinafter referred to sometimes as “Smith/Packett”, and/or “Owner” and/or “Defendant”, and/or “Smith/Packett Defendants”, and/or “Defendants”, collectively), is a Virginia limited liability company, organized under the laws of the State of Virginia, doing business in Kanawha County, West Virginia, with its principal place of business located at or near, 4423 Pheasant Ridge Road, Suite 300, Roanoke, Virginia 24014. At all times material hereto, Defendant Smith/Packett conducted business, and caused business to be conducted in, and at, *inter alia*, The Crossings at Southridge, at 500 Peyton Way, South Charleston, Kanawha County, West Virginia, (the “Project” or the “Crossings Project”) and was the sole manager-member of Defendant, SP WV, LLC, and operated, and caused to be operated, Defendants SP WV, LLC and WV IL-AL Investors, Inc..

3. Defendant SP WV, LLC (hereinafter referred to sometimes as “SP WV”, and/or “Owner” and/or “Defendant”, and/or “Smith/Packett Defendants”, and/or “Defendants”, collectively), is a Virginia member-manager managed limited liability company, formed June 26, 2017, to act on behalf of, and in furtherance of, Defendants, including Defendant Smith/Packett, as the sole member of, and for, Defendant WV IL-AL Investors, LLC acting as a “pass through entity” and “shell” company, doing business in Kanawha County, West Virginia with its principal place of business located at or near, 4423 Pheasant Ridge Road, Suite 300, Roanoke, Virginia 24014. At all times material hereto, Defendant SP WV conducted business, and caused business to be conducted on behalf of, and in furtherance of, Defendants, including Defendant Smith/Packett, in, and at, *inter alia*, The Crossings at Southridge, at

500 Peyton Way, South Charleston, Kanawha County, West Virginia, (the “Project” or the “Crossings Project”), and Defendant SP WV, acting on behalf of, for, and in furtherance of Defendants, including Defendant Smith/Packett, as the sole member of Defendant, WV IL – AL Investors, LLC.

4. Defendant WV IL-AL Investors, LLC (hereinafter referred to sometimes as “WV Investors”, and/or “Owner” and/or “Defendant”, and/or “Smith/Packett Defendants”, and/or “Defendants”, collectively), the breaching party at fault, is a Virginia member-managed limited liability company, formed on or about April 27, 2017, to act on behalf of, and for, Defendants, Smith/Packett and SP WV, as a “shell company” doing business in Kanawha County, West Virginia with its principal place of business located at or near, 4423 Pheasant Ridge Road, Suite 300, Roanoke, Virginia 24014. At all times material hereto, Defendant WV Investors, operated by Defendants Smith/Packett, and SP WV, conducted business, and caused business to be conducted in, and at, *inter alia*, The Crossings at Southridge, at 500 Peyton Way, South Charleston, Kanawha County, West Virginia, (the “Project” or the “Crossings Project”), and was operated, and caused to be operated, by Defendant Smith/Packett and SP WV.

5. Defendant Jarrett Construction Services, Inc. (hereinafter referred to sometimes as “JCS”, and/or “Contractor”, “Constructor” and/or “Construction Manager”, and/or “CM”, and/or “Construction Manager at Risk”, and/or “CMAR”, and/or Defendant, and/or “Defendants”, collectively) is a West Virginia corporation, incorporated under the laws of the State of West Virginia, having its principal place of business in the State of West Virginia, located at, or near, 1605 Virginia Street East, Charleston, West Virginia 25311. By separate, different contracts, in or about April 1, 2018, the Smith/Packett Defendants engaged Defendant JCS to act as the Smith/Packett Defendants’ Construction Manager at risk, and Constructor (not prime contractor) to the Smith/Packett Defendants for the Project.

6. The W.Va. Department of Labor issued general contractor license number WV030133 to Defendant JCS.



7. Defendant Carter Bank & Trust (“Carter Bank & Trust” and/or “CBT”), a Virginia banking corporation, organized under the laws of the State of Virginia, with its principal place of business located at or near, 4 East Commonwealth Boulevard, Martinsville, Virginia 24112-1920, is, and was, doing business in Kanawha County, West Virginia at all times material hereto, and is listed as the “Lender” in that certain deed of trust executed March 29, 2018 and recorded in the Kanawha County Clerk’s Office in Trust Deed Book 4297, at page 467, thus claiming, as a necessary party, an interest in the encumbered real property made the subject of this action, known as the Crossings Project as more fully alleged herein.

### **JURISDICTION AND VENUE**

8. Jurisdiction and venue are proper for this action in the Circuit Court of Kanawha County, with no unsatisfied conditions for MSPE to pursue and maintain this action.

### **GENERAL AND SPECIFIC ALLEGATIONS**

9. The Smith/Packett Defendants, Smith/Packett, SP WV, and WV Investors, the breaching parties, desired to construct a for profit and compensation independent living (IL) and assisted living (AL) facility, a four story, 194,800 SF independent living, assisted living, memory care facility, known as The Crossings at Southridge (the “Project” or the “Crossings Project”), and employed among others, the following design professionals to act as the Smith/Packett Defendants’ agents, servants, employees, and representatives to prepare, draft, publish and issue the Smith/Packett Defendants’ October 27, 2017 “Project Manual”. Meyers Architects, Inc./Meyer Design, Inc. as an Architect, MacIntosh Engineering as Structural Engineer, BSEG, LLC as Fire-Protection Engineer, BSEG, LLC as Plumbing Engineer, BSEG, LLC as HVAC Engineer, BSEG, LLC as Electrical Engineer, ECS MidAtlantic, LLC (“ECS”) as geotechnical engineers, Terradon Corporation (“Terradon”) as civil engineer, and Jarrett Construction Services, Inc. (“JCS”) by separate contracts as contractor/constructor, and as construction manager at risk, and The Genesee Group, also, as Construction Manager to prepare “Civil Drawings and

Specifications”, to design the Project for pre-construction and construction phases, and to prepare plans, specifications, and bidding documents for said construction project, including, *inter alia*, Terradon’s *June 15, 2017 Hydrology Study* for Smith/Packett – The Crossings at Southridge, and ECS’s June 23, 2017 Report of Subsurface Exploration and Geotechnical Analysis including soil test borings, laboratory analysis, and geotechnical recommendations for this Project, all as identified in the Smith/Packett Defendants’ October 27, 2017 “Project Manual”.

10. The Smith/Packett Defendants engaged Defendant JCS to act as both constructor, and as construction manager in the construction manager multi-prime (CM-MP) project delivery method for the Crossings Project, including, *inter alia*, to perform and render to the Smith/Packett Defendants, JCS’s professional CM services consistent with the skill, and care ordinarily provided by CMs practicing in the same or similar locality under the same or similar circumstances, including without limitation, as to evaluations, schedules, scheduling, recommendations, construction management plans, estimates, reviewing and advising as to design documents, proposed site use and improvements, constructability, sequencing, alternative design, ordering of materials, reviewing drawings, and specifications, coordinating work, providing administration of construction contracts, and administrative, management and related services, reviewing and certifying amounts due contractors, like MSPE.

11. Project materials and delivery of project materials were not part of MSPE’s site preparation Contract, but instead were purchased, and required to be purchased, by Defendants.

12. Defendants JCS is not a party to MSPE’s Contract for site preparation entered into by Smith/Packett Defendants with MSPE on, and after November 30, 2017.

13. In and around March, 2017, the Smith/Packett Defendants hired ECS Mid-Atlantic, LLC (“ECS”) as their subsurface-geotechnical engineer.



14. On or about June 23, 2017, ECS prepared its geotechnical report for the Smith/Packett Defendants, which geotechnical report was inadequate as to the Smith/Packett Defendants' chosen design on their Project site.

15. In and around June, 2017, the Smith/Packett Defendants, including by and through their design professionals and consultants relocated Building Pad A (A wing), which was relocated and moved onto the Smith/Packett Defendants designed fill slope, unbeknownst to, and through absolutely no fault or involvement of MSPE.

16. During construction, regardless, and at all times, MSPE's site work was regularly inspected and approved by the Smith/Packett Defendants, and their designated third-party testing agents, servants, and representatives, including Terradon.

17. On and before November 30, 2017, Defendants Smith/Packett, SP WV and WV Investors, by and through their design professionals, Architects, Engineers, and Construction Managers, issued and published contract plans, drawings and specifications, and issued addenda and contract and bidding documents (aka the "Project Manual") identifying the scope of work for, among other things, the site preparation portion of the Project in order to solicit bids from interested and qualified bidders to be a prime contractor for The Crossings at Southridge, for the construction of a four story, 194,800 SF independent living, assisted living, and memory care facility, known as The Crossings at Southridge, (the "Project" or the "Crossings Project"), including as to the site preparation portion of the Project, making affirmative, though false, representations, warranting in Defendants' drawings, plans, and specifications, addenda, and bidding documents ("contract documents", and/or "Project Manual") as to the adequacy, suitability, and constructability of the Smith/Packett Defendants' chosen Project design, including the Smith/Packett Defendants' contract and bidding documents, drawings, plans, and specifications for construction as suitable and constructable on the Crossings Project site, along with the Smith/Packett Defendants' chosen site, location, and existing subsurface, and site conditions, as

adequate for construction, when in fact the Smith/Packett Defendants' contract and bidding documents, drawings, plans, and specifications for construction were inadequate, not suitable, and not constructable for, and at Defendants' chosen site, breaching the Smith/Packett Defendants' warranty of adequacy on the Crossings Project site.

18. The Project also included as part of the site preparation portion of the Project, the construction, on the Bible Center Church's adjacent property, of a soccer field with "lifts" of qualifying soil MSPE excavated from the Project site on which Building Pads A, B, C, and D were located, and after MSPE's excavation, and transportation by MSPE to the neighboring property owner's adjacent property, on which the "soccer field" was located, in turn MSPE's placement and compaction of qualifying "lifts" of excavated soil to construct the soccer field, in accordance with the Project Manual on the Bible Center Church's adjacent property.

19. Plaintiff MSPE, the non-breaching party, received the Smith/Packett Defendants' drawings, plans and specification and addenda and bidding and contract documents, i.e., the "Project Manual", for the Project's site preparation, drafted and prepared by the Smith/Packett Defendants, and their agents, servants, employees, and representatives.

20. The Smith/Packett Defendants' Project Manual, including their contract, and bidding, documents contained, made the Smith/Packett Defendants' affirmative representations and warranties to MSPE, in order, and as a means by which, to solicit and induce MSPE as a prime contractor to bid the Project's site preparation Contract.

21. The foregoing undisclosed defects, deficiencies, and inadequacies plaguing and marring the Smith/Packett Defendants' Project Manual, drawings, plans, and specifications, and site require the Smith/Packett Defendants to remedy their defective and inadequate design, and to eliminate and remediate the site's defective soil, and subsurface conditions, including the site's pre-existing subsurface slip, and slip plane (rotational/circular, following subsurface bedrock), and subsurface water conditions



affecting their design, site, and construction, which the Smith/Packett Defendants failed and refused to do, and still fail and refuse, to do.

22. On or about March 2, 2020- John James, P.E., of Terradon Corporation, the Smith/Packett Defendants' civil engineering firm, informed the Smith/Packett Defendants that the Project's "slide belongs to the Owner", not to MSPE, who has been badly and needlessly injured by the negligent, deceitful and malicious acts and omissions of the Smith/Packett Defendants, Defendant JCS, and their design professionals.

23. Absent costly additional engineering and architectural design, and additional expensive construction of, *inter alia*, expensive retaining walls, helical piles and piers, and potential tie-back anchoring systems among other design remediation and additions, the Crossings Project site could not, and cannot, be developed, and completed as-bid, and as-designed, breaching the Smith/Packett Defendants' site preparation Contract with MSPE, interfering with, and preventing MSPE's work and performance, and frustrating the Project's commercial purpose unbeknownst to, and through no fault of, MSPE.

24. Despite the Project Manual's inadequate drawings, plans, and specifications, along with the site's undisclosed defects, deficiencies, and inadequacies, the Smith/Packett Defendants, by and through their agents, servants, employees, and representatives, nevertheless, prepared, drafted, and published their contract and bidding documents, aka, the "Project Manual", to solicit and procure MSPE's bid, making false misrepresentations, and warranties to MSPE for construction of the Project, concealing, and without disclosing, the foregoing.

25. As part of the Smith/Packett Defendants' Project, and their representations as to their specified design and construction, the Smith/Packett Defendants obtained National Pollution Discharge Elimination/State Storm Water Construction #1 Permit ID: WVR108909, on or about October 28, 2017, and as part thereof represented that the cubic yards of excavation (cut/fill) and waste/borrow sites totaled



125,000 cubic yards, based upon Smith/Packett Defendants' "balance on site", a balance study performed by the Smith/Packett Defendants.

26. On or about November 20, 2017, the Smith/Packett Defendants published and issued their Project Manual to MSPE containing, among other things, the Smith/Packett Defendants' Table of Contents, with an "Invitation to Bid", and Document 002113 "Invitation to Bidders", contract Specifications Divisions 00-01, 02-14, 21-23, 25-28, and 31-33 including, among others, Specification Division 31 – Earthwork (prepared by civil engineer), Section 311000 - Site Clearing, Section 312000 - Earth Moving, and 313116 - Termite Control, and amended specification Division 00 – Procurement and Contracting Requirements, Document 004373, a Proposed Schedule of Values Form for the Project's site preparation work, to induce MSPE to submit a bid as a prime contractor.

27. On or before November 30, 2017, and at all times thereafter, the Smith/Packett Defendants' drawings, plans, and specifications, and bidding and contract documents, the Project Manual, prepared by the Smith/Packett Defendants' design professional agents, servants, employees, and representatives supplied, and provided to MSPE, also included, without limitation, Smith/Packett Defendants' Specification Division 00 – Section 011000 - Summary, Part 1-General, § 1.1 Related Documents, including the Smith/Packett Defendants' drawings and general provisions of the Contract, including General and Supplementary Conditions, and other Division 01 Specifications Sections, identifying the Owners' retained design professionals who prepared designated portions of the Contract Documents referenced on the Smith/Packett Defendants' "Cover Sheet on Drawings" (hereinafter sometimes referred to as "Civil Drawings and Specifications"), including the Civil Drawings Sheet Index identifying the following drawings for bidding and construction purposes on the Project:

- a) Sheet C0.00 Cover Sheet
- b) Sheet C1.00 Subdivision Plat
- c) Sheet C1.01 Existing Survey
- d) Sheet C2.00 Layout Plan

- e) Sheet C3.00 Grading Plan
- f) Sheet C3.01 Grading Plan
- g) Sheet C4.00 Drainage and Utility Plan
- h) Sheet C4.01 Sanitary Profile
- i) Sheet C4.02 Storm Profile
- j) Sheet C5.00 Erosion and Sediment Control Plan
- k) Sheet C5.01 Erosion and Sediment Control Plan
- l) Sheet C6.00 Miscellaneous Details
- m) Sheet C7.00 Miscellaneous Details
- n) Sheet C8.00 Landscape Plan
- o) Sheet C9.00 Roadway Plan and Off-Site Utilities
- p) Sheet C 10.00 Roadway Profile
- q) Sheet C11.00 Roadway Sections
- r) Sheet C11.01 Roadway Sections
- s) Sheet C11.02 Roadway Section
- t) Sheet SE-1 Site Lighting Plan
- u) Sheet SE-2 Roadway Lighting Plan

28. Unbeknownst to MSPE, the Smith/Packett Defendants' Project Manual, including the Civil Drawings and Specifications, were inadequate, and not suitable for construction, failing to disclose, concealing, misrepresenting, and suppressing the Project's design defects and inadequacies to be suitable, and constructible for construction on the Smith/Packett Defendants' chosen site, including the site's various design, site, surface, and subsurface issues, defects, deficiencies, and inadequacies.

29. In response to the Smith/Packett Defendants' solicitation, Project Manual's Division 00 "Procurement and Contracting Requirements", Document 001116 "Invitation to Bid", and Document 002113 "Invitation to Bidders", on November 30, 2017, MSPE submitted its bid in the amount of \$1,499,931.000, with MSPE's identified schedule of values as a breakdown of MSPE's bid amount, to the Smith/Packett Defendants and its agent(s) for completing construction of the Project's site preparation, as specified by the Owners, Smith/Packett Defendants.



30. Following MSPE's November 30, 2017 bid submission, the Smith/Packett Defendants accepted, and caused to be accepted, MSPE's submitted bid, entering into a contract (the "Contract") with MSPE for the site preparation of the Crossings Project.

31. The Smith/Packett Defendants, in turn, authorized, and notified MSPE to begin performing the Contract, mobilizing MSPE's equipment, manpower, and forces to the Project site, and in and around March and April, 2018, MSPE mobilized to the Project site, and began site preparation construction and related activities of MSPE's scope of work as-bid, with the Smith/Packett Defendants continuing to make various additional modifications, changes, and updates to MSPE's scope of work, even as late as April 30, 2018, and throughout construction as more fully alleged herein.

32. When preparing its bid for the Smith/Packett Defendants' site preparation construction contract, (the "Contract") MSPE relied upon, among other things, its own proven planned methods, techniques, sequences and procedures of construction in conformity with, and as represented by, the Smith/Packett Defendants' Project Manual when ascertaining the cost MSPE would incur in performing the site preparation contract in response to Smith/Packett Defendants' representations, and warranties for the designed site preparation portion of the construction, all as specified by the Smith/Packett Defendants' Project Manual, and incorporated bidding, and contract documents, including the Smith/Packett Defendants' foregoing Civil Drawings and Specifications, and drawings identified on the Smith/Packett Defendants' Civil Drawings Sheet Index

33. MSPE also relied upon the contract plans, specifications, and bidding documents prepared, drafted, and published by the Smith/Packett Defendants, and their representations made therein, including the Smith/Packett Defendants' as-bid information supplied to MSPE, representing to MSPE precisely what was to be constructed in order for MSPE to prepare, and submit MSPE's bid, and to construct the Project site.



34. Despite MSPE's performance of its obligations under the Contract, Defendants Smith/Packett, SP WV, and WV Investors - the breaching parties - failed and refused to pay MSPE the following principal amounts of for undisputed work completed without excuse or justification pursuant to the parties' Contract the following amounts: a) \$205,396.41 for contract, extra work, and lost profit; b) \$157,726.75 for unpaid oral modifications and change order work performed at Defendants' instructions; c) \$771,794.30 for Owner delay, and extended performance after 9/15/2019, caused by Defendants' unexcused delays, active interference with, and prevention of, MSPE's work.

35. During MSPE's performance of work under the Contract, the Smith/Packett Defendants, by and through their agents, servants, representatives, and design professionals, actively interfered with, delayed and prevented MSPE from using its planned manner and method of performance due to breaches of duties, including in contract, by Defendants Smith/Packett, SP WV, and Investors, including requiring MSPE to perform extra and additional work outside and beyond the Contract to, unilaterally, increase MSPE's cost of performance, to force MSPE to perform extra and additional work outside and beyond the terms of the Contract based upon Defendants' oral modifications, and to suit and accommodate Defendant JCS, and the Smith/Packett Defendants, who failed to perform, and who breached the Owners' obligations under the Contract as follows:

- a) By deviating from the original plans, specifications, bidding documents;
- b) By providing defective, incomplete, partially complete and misleading plans and specifications;
- c) By failing to pay Plaintiff all amounts owed including retainage and lost profit of \$205,396.41;
- d) By making changes and additions to the plans and specifications;
- e) By requiring work in accordance with an incorrect interpretation of the plans and specifications;
- f) By delaying or failing to make decisions on clarifying the plans and specifications;
- g) By failing to issue drawing, plans, specifications, and bidding documents for the Project, adequate for constructability, and suitable for the construction of the Project, including as to

undisclosed Project site defects related to poor soil quality, drainage problems, subsurface defects, and subsurface water concentrations and infiltrations preventing, and interfering with Plaintiff's planned methods, manners, techniques, and sequences of construction;

h) By failing to identify subsurface defects, inadequate soil qualities, and subsurface slip/slide planes on the Owner's site in advance of bidding and construction, including subsurface slip/slide planes on the Owner's site, undisclosed in the Owner's site investigation and Project design for site preparation purposes including a (pre-existing) subsurface slip/slide reactivated on Defendants' Project site on or about January 8, 2019, also constituting a supervening event preventing and excusing MSPE's performance, making construction commercially impracticable through no fault of MSPE, with such unannounced, undisclosed subsurface slip/slide, defect, and deficiency being an obvious nonoccurrence on which MSPE's Contract with the Smith/Packett Defendants was made;

i) By frustrating, suspending, interfering with, extending, changing, and preventing MSPE's performance, including rendering MSPE's performance commercially impracticable, excusing MSPE's performance;

j) By soliciting MSPE's bid, and entering into a Contract for the Project's site preparation Contract with MSPE based upon faulty, unreliable, inaccurate, and inadequate information (site's subsurface defects) negligently supplied, and provided by the Smith/Packett Defendants to MSPE for MSPE's reliance upon, and guidance and usage in preparing its bid when in fact the Smith/Packett Defendants' chosen design and site was inadequate, contained defects, including a subsurface slip, inadequate subsurface and soil, subsurface water, and a pre-existing slide plane, now reactivated, along with other inadequacies, defects and deficiencies the Smith/Packett Defendants withheld and concealed;

k) By failing to cooperate, coordinate and schedule the various portions of the Project's work, including contractors, prime contractors, subcontractors, and suppliers, thus interfering with MSPE's



as-planned site preparation Contract, performance, manner, method, means, techniques, and sequence of construction;

l) By providing ambiguous, unclear, inconsistent, competing, deficient, and contradictory bidding and contract documents, terms, times, and dates, for, *inter alia*, the work, contract completion, including substantial completion, preventing and frustrating MSPE's performance, making it commercially impracticable if not impossible, and by requiring, and instituting Owner-caused, and Defendant JCS-caused, changes, and modifications. including arbitrary Owner-caused, and Defendants JCS-caused, time extensions arbitrarily extending, and interfering with, MSPE's completion time, risk and scope of work undertaken, and other milestones substantially impairing MSPE's performance, and effectively holding MSPE hostage to Defendants' arbitrary changes, while however refusing to extend MSPE's time for completion, to pay MSPE's additional delay costs, and to remediate the Project site's defects - to coerce MSPE's continuation of construction under duress, entitling MSPE to relief including judicially declared termination of the site preparation Contract;

m) By arbitrarily and maliciously, as to substantial completion of MSPE's Project site preparation work, withholding signatures, failing to perform inspections, and failing to prepare and review comprehensive lists of items as to whether MSPE's Project site preparation work or designated portion is substantially complete where Defendants have occupied, and used MSPE's Project site preparation work for its intended use, since on or before September 15, 2019;

n) By breaching the Contract's time is of the essence provision;

o) By causing, requiring, and coercing MSPE to incur, and perform out of sequence, unplanned, and delayed construction activities, including unannounced changes and modifications by Defendants, causing further hardship, delay, interference, and increased costs for MSPE;



- p) By causing, and allowing Defendant JCS to act as both contractor/constructor, and as CM at risk, breaching duties owed to MSPE, and creating an insurmountable, and tortious conflict of interest in which Defendant JCS acted tortuously to, in reality, avoid paying and absorbing construction costs in excess of, among other things, maximum prices required as to JCS, who improperly required MSPE to perform work causing the cost of MSPE's work to increase and extend, and to interfere with, prevent, prejudice, and delay MSPE's performance, while at the same time, favoring JCS's duties, and responsibilities as CM and as constructor, maliciously disadvantaging and injuring MSPE, with no intent or attempt by Defendant JCS to supervise, manage, and coordinate the construction, frustrated, delayed, changed, and prevented through no fault of MSPE;
- q) By relocating the Smith/Packett Defendants' buildings, and related structures (A wing) to, and beyond (16.4') the crest of slopes and sloping areas, surfaces, and related subsurface on the Project site - unbeknownst to MSPE - on and before November, 2017, at which site location(s) no, or inadequate subsurface testing was performed by Defendants to determine the adequacy, if any, for suitability and constructability including for Building Pad A;
- r) By changing, and increasing the cubic yards of soil and material to be excavated, cut, filled, handled, double handled, transported, and wasted, beyond MSPE's 115,000 CY as bid;
- s) By requiring the installation of, among other things, subsurface underdrains for the Project to proceed because of inadequate design, and unforeseen, inadequate, defective, and deficient subsurface water, soil, subsurface conditions including soil, and site defects, inadequacies, and deficiencies, known by, and which should have been known by, Defendants in advance, to try to make the Crossings Project site constructible, suitable, and adequate, after entering into a Contract with MSPE;
- t) By failing to cooperate, coordinate and schedule construction to be performed, by failing to properly administer the Contract, and by improperly administering the Contract causing, and

resulting in, and breaching the Contract with MSPE, and resulting in increased construction costs for MSPE, construction inefficiencies, out of sequence performance, unscheduled work and unannounced changes, delays, interference, modifications, prevention of performance, and impracticability of performance breaching the Contract, and excusing MSPE;

u) By making sudden, unexpected oral modifications to the Contract by and through the Smith/Packett Defendants' agents, servants, employees, design professionals, and representatives, including unannounced and unscheduled oral modifications to the Project Manual, including the drawings, plans, specifications, and bidding and contract documents, outside, and beyond MSPE's as-bid scope of work, and by changing MSPE's Contract for site preparation, preventing and delaying MSPE's performance, and extending MSPE's performance time requiring MSPE to perform extra and additional work, *outside* and *beyond* the Contract, totaling \$274,861.71 with respect to which the Smith/Packett Defendants already paid MSPE \$117,134.96 (less 10% retainage), for extra additional work already performed – without written change orders, leaving \$157,726.75 still owed to MSPE for undisputed extra, and additional work performed based upon oral modifications, instructions and directions by the Smith/Packett Defendants and their agent(s) for:

- i) Mud Removal for \$219.80
- ii) Addt'l Conduit Gas Co. for \$534.00
- iii) Mud Removal North Drive Area for \$0.58
- iv) Addt'l Elec Conduit Trench – Transformer to Bldg for \$765.00
- v) Mud Removal Jan-May for \$3,213.00
- vi) Crushed Concrete for \$5,227.50
- vii) Reimbursement for 5.14.18 Mattingly Engineers Invoice for \$1,000.00
- viii) Erroneous Deduct on 3.15.19 – (Core & Main PO Adj. – (\$3,548.10)) for \$1607.96



- ix) Additional Downspouts for \$5,508.00
- x) Plumber's Roof Drain Connections for \$2,800.00
- xi) An additional year of pollution insurance for \$5,168.69;
- xii) Revised grading for soccer field for \$9,500.00
- xiii) Additional testing requirements (proof rolling) to place slope fill for \$50,071.80;
- xiv) Test excavation slip bldg. A subsurface investigation (8/26/2019 Inv. 1) for \$3,672.00
- xv) Storm Clean-Up for \$11,769.78 of which Smith/Packett Defendants paid \$7,675.00, leaving a balance due of \$4,094.78;
- xvi) Develop Defendants' Surplus Waste Area of \$21,462.84;
- xvii) Construct and Reclaim Alternate Ingress/Egress/Haul Road of \$37,648.20;
- xviii) Place Additional Slope Matting > 12,000 SY/not shown of \$5,232.60; and
- xix) By deliberately and negligently delaying, interfering with, and changing MSPE's performance requiring work to be performed after September 15, 2019, constituting extra and additional work after 9/15/2019, for which no pricing, or costs were solicited from MSPE, or made a part of any agreement with MSPE, and which should have been performed before September 15, 2019, but through no fault or involvement of MSPE were changed, prevented, interfered with, and delayed, in the present amount of \$771,794.30.

36. As a result of the foregoing, Defendants, Smith/Packett, SP WV, and WV Investors, along with Defendant JCS as construction manager at risk, in bad faith, improperly, unjustly, and maliciously withheld, and still withhold, payment owed to MSPE in the amounts of a) \$205,396.41 for contract work, extra work, and lost profits; b) \$157,726.75 for oral modifications and change order work performed at Defendants' instructions; and c) \$771,794.30 for Owner-caused delay, and extended performance, caused by Defendants' unexcused delays, active interference with, and prevention of MSPE's work, without excuse or justification.



37. Immediately after MSPE's 11/30/2017 \$1,499,931.00 bid, acceptance, and the Smith/Packett Defendants' entry into the as-bid site preparation Contract with MSPE, the Smith/Packett Defendants and Defendant JCS began changing, and modifying MSPE's Contract, and related scope of work.

38. As of September 15, 2019, the Smith/Packett Defendants increased MSPE's revised contract by \$274,861.71 in additional, extra work with no written change orders issued in advance for MSPE's extra work performed, resulting in MSPE's revised contract sum (9/15/2019) of \$1,711,357.29.

39. With modifications by Defendants, MSPE completed the as-built soccer field in the Project's site preparation Contract, located on the Bible Center Church's real property, on or before August 26, 2019.

40. On or before September 15, 2019, MSPE's Project site preparation work was complete, and substantially complete for the stage in the progress of the work for MPSE's site preparation contract, and the designated portion thereof that is, and was, substantially complete in accordance with the applicable contract documents so the Owner could either occupy, or utilize the work of MSPE for its intended use, including construction and services for MSPE's site preparation work required by the applicable contract documents, whether completed or partially completed, including all other labor, materials, equipment and services provided or to be provided by the prime contractor to fulfill such obligations, which may constitute the whole or a part of the Project.

41. During performance, on or about September 18, 2018, subsurface water on the Project regularly infiltrated into, and on 9/18/2018 impacted the surface, and underlying subsurface of Smith/Packett Defendant's Building Pad A, including the five (5') "undercut" of compacted soil five feet (5') below Building Pad A's 980' finished floor elevation ("FFE"), bringing the Project to a "standstill".

42. As a result of the 9/18/2018 surface and subsurface water infiltration into the Building Pad A and 5' undercut, MSPE was required to perform extra and additional work by oral modification, to re-excavate the, prior, entire Building Pad A compacted fill, and to transport the useless water-soaked soil to the soccer field, and to expensively "double-handle" said water-soaked soil, for placement in the

soccer field, and to locate, cut and fill new qualifying soil, to replace, and re-compact, in Building Pad A (its fill then having been re-excavated), thereby wasting the prior Building Pad A fill, then water-soaked with subsurface water and unusable, requiring further additional engineering, design and installation of expensive, extra and additional “underdrains” by additional oral modifications, delaying, and interfering with construction for over 30 days, through no fault of MSPE.

43. Because of the Smith/Packett Defendants’ addition of expensive “underdrains”, added to MSPE’s site preparation Contract during construction in October, 2018, to dewater Building Pad A and its 5’ soil undercut, construction was stopped, at a “standstill”, preventing, interfering with, and delaying MSPE’s performance.

44. The Smith/Packett Defendants also failed and refused to fix, correct, and repair their defective design, site, and pre-existing subsurface slip/slide, and related design and site defects, and inadequacies from the beginning of the Project, and particularly on, and after January 8, 2019 when the Project’s pre-existing, undisclosed subsurface slip/slide reactivated causing a slump mass wasting, through no fault, responsibility, or involvement of MSPE

45. Ever since, the Smith/Packett Defendants, the breaching parties, have failed and refused to remediate the Project’s inadequate design, and the Project site’s defects, including the 1/8/2019 slump mass wasting, breaching the Contract entered into with MSPE, further preventing and excusing MSPE’s performance, through no fault of MSPE.

46. The Smith/Packett Defendants’ defective and inadequate design, and pre-existing, undisclosed subsurface slip plane/slide (slump mass wasting), relocation of Building Pad A, and concealed subsurface defects constitute an undisclosed, supervening event breaching the Contract entered into with MSPE, the nonoccurrence of which MSPE’s Contract for the Project’s site preparation was made, through no fault and responsibility of MSPE - the non-breaching party.

### **COUNT 1 – BREACH OF CONTRACT**



47. Plaintiff MSPE restates, realleges, and incorporates the allegations set forth above, as if the same were set forth verbatim herein.

48. By reason of the foregoing, the Smith/Packett Defendants breached the Contract with MSPE for the Project' site preparation, breached other duties owed to MSPE, and breached the warranty of adequacy for constructability, and suitability for construction of the Smith/Packett Defendants' design set forth in their Project Manual, drawings, plans, and specifications, and for their chosen Project, site, and related design, concealed and misrepresented by the Smith/Packett Defendants at all times material hereto.

49. As a direct and proximate result of the breach of contract and deviations by Defendants, changing MSPE's manner and method of performance, and active interference with, prevention, and delays in, MSPE's work and performance by the Smith/Packett Defendants, including by and through Smith/Packett's agents, servants, employees, design professionals, and representatives, MSPE has been damaged by being prevented from performing, frustrating MSPE's performance, and by being required to perform extra and additional work and by delay, which caused increased payroll costs, increased equipment costs, increased material costs, increased overhead costs, increased mobilization costs, increased home office and administrative costs, a loss of profit, and a loss of interest upon amounts due and upon late payments, headache, annoyance, and inconvenience, for which MSPE demands judgment against Defendants as more fully set forth below.

### **COUNT 2 - BREACH OF WARRANTY**

50. Plaintiff MSPE restates, realleges, and incorporates the allegations set forth above, as if the same were set forth verbatim herein.

51. By reason of the foregoing, the Smith/Packett Defendants breached the warranty of adequacy of their Project Manual, Civil Drawings and Specifications for the Project, for which MSPE demands judgment against Defendants as more fully set forth below.

### **COUNT 3 - FRAUD, DECEIT, INDUCEMENT, AND MISREPRESENTATION**

52. Plaintiff MSPE restates, realleges, and incorporates the allegations set forth above, as if the same were set forth verbatim herein.

53. To construct the Project, on and before November 30, 2017, and at all times thereafter to the present, the Smith/Packett Defendants employed among others, the foregoing design professional as their agents, servants, employees, and representatives to prepare portions of the Project Manual, and contract and bidding documents, including the Civil Drawings and Specifications, along with *inter alia*, Terradon's June 15, 2017 Hydrology Study for Smith/Packett – The Crossings at Southridge, and ECS's June 23, 2017 Report of Subsurface Exploration and Geotechnical Analysis including soil test borings, laboratory analysis, and geotechnical recommendations.

54. On or before November 30, 2017, and at all times thereafter Smith/Packett Defendants' earlier referenced Project Manual, and Civil Drawings and Specifications, included, *inter alia*, a Grading Plan made a part of the Project Manual, prepared by Terradon, for the Smith/Packett Defendants.

55. Smith/Packett Defendants' Grading Plan, among other Civil Drawings and Specifications, specifically represented to MSPE, and detailed, identified, and showed on November 30, 2017 the respective Project contour elevation lines, structures, and locations as part the Smith/Packett Defendants' representations and existing Project design, including the required excavation, cut, and fill, undercuts, and related placement of topsoil by MSPE in the Smith/Packett Defendants' Project design, for the designed elevations, and contours, prepared by the Smith/Packett Defendants' civil engineer, Terradon Corporation, including the exact locations, and elevations of Smith/Packett Defendants' building pads A, B, C, and D identified on the Grading Plan.

56. The Smith/Packett Defendants' Project Manual and Grading Plan, specifically represented that site preparation for the Smith/Packett Defendants' designed building pads was to be performed to



finished floor elevation (FFE) of 980' above sea level, with a 5' undercut for utilities installation, off of which central, finished floor elevation other Project elevations related and integrated.

57. In connection therewith, Smith/Packett Defendants' Grading Plan, and other Civil Drawings and Specifications further represented the precise contoured elevations for the Smith/Packett Defendants' chosen site, and the entire Project to the specified, designated contoured elevations for each location on the various Civil Drawings, and Grading Plan, comprising the Project, as represented on November 30, 2017.

58. Unbeknownst to MSPE, the Smith/Packett Defendants relocated, and moved, in a southwesterly direction – before November 30, 2017 and before soliciting MSPE's bid and entering into a contract with MSPE – closer to the Project's embankment slope, which relocation site of Building Pad A on the Project, however, contained an undisclosed pre-existing slip/plane, unsuitable soil, unsuitable subsurface bedrock, and subsurface water conditions on the Project's slope crest, and on which relocated position for Building A, the Smith/Packett Defendants conducted no, and insufficient subsurface testing as to the building footprint for Building A, prior to entering into the Contract with MSPE, without disclosing the same.

59. While the Smith/Packett Defendants' Project Manual including their Grading Plan represented the precise contoured excavation lines, locations, and corresponding elevations as to the contoured surfaces, excavations, and locations, with existing, underlying subsurface identified on which the Project would be, and was located as competent, suitable, and constructible for the designed construction of the Project the Smith/Packett Defendants, however, concealed from, and misrepresented to MSPE in the Smith/Packett Defendants' chosen site, civil drawings, Grading Plan, and Project Manual, the Project site's pre-existing, defective, and inadequate underlying subsurface structure and conditions, which, instead, contained unsuitable soil, unsuitable subsurface bedrock, and subsurface water conditions including a pre-existing, defective, deficient, and weakened subsurface (a "slip plane") neither

competent, nor suitable, and not constructible, for Building Pad A's location, all of which was misrepresented, concealed and undisclosed by Defendants.

60. On November 30, 2017, and at all times material hereto, the Smith/Packett Defendants' Project Manual and Civil Drawings and Specifications misrepresented to MSPE the Project site, and design for bidding and construction purposes, concealing and suppressing, unbeknownst to MSPE, the Smith/Packett Defendants' undisclosed site defects, deficiencies, and inadequacies, including the Smith/Packett Defendants' undisclosed, inadequate soil, and subsurface conditions, and pre-existing subsurface slip-plane, along with subsurface water conditions, plaguing the Project site's subsurface.

61. With superior knowledge as to all of the foregoing, the Smith/Packett Defendants knew, and had reason to know of the Project's inadequate design, and site defects and deficiencies, and of the unsuitability of the Project design, and site for constructability, but deceitfully and maliciously concealed, withheld, misrepresented to MSPE, and suppressed the foregoing design, information and facts, including the site's undisclosed pre-existing slip-plane, and their undisclosed relocation of Building A to an unsuitable location along the Project's southwesterly slope with no, or little, subsurface investigation at that location, and subsurface water conditions, when soliciting MSPE to submit a bid, to otherwise cause, and induce, MSPE, to submit a bid, and subsequently, to enter into a Contract for the site preparation portion of the Project.

62. In exchange and return for MSPE's bid, work, and performance on the Project, the Smith/Packett Defendants represented to MSPE the Smith/Packett Defendants was constructible, and that they would pay MSPE, which was false.

63. In and around January 8, 2019, the Smith/Packett Defendants' Project site's surface, and subsurface water conditions persisted, and continued, and eventually the Project site's undisclosed, pre-existing slip reactivated with a resulting subsurface slump mass wasting (sometimes called a subsurface "slip", or "slide"), through no fault, or responsibility of MSPE.



64. The Project site's surface, and subsurface water conditions, and reactivated, pre-existing slip, and the slump mass wasting, remain un-remediated by the Smith/Packett Defendants, and prevented, blocked, and interfered with a portion of the Project's completion.

65. The Smith/Packett Defendants' hired, and authorized their civil engineer, Terradon, to perform quality assurance, and quality control ("QA/QC") testing of MSPE's site preparation work, and to monitor, supervise, and observe MSPE's site preparation performed work on the Project, which Terradon did.

66. MSPE's site preparation work performed on the Project met, and exceeded the Project's contract requirements, in conformity with the Project's applicable contract documents, plans, drawings, and specifications.

67. Terradon, acting as the Smith/Packett Defendants' QA/QC testing agency, monitored, documented, supervised, observed, and approved – in writing - MSPE's site preparation work performed on the Project.

68. The Smith/Packett Defendants' representations made to MSPE on, and before April 30, 2018, and at all times thereafter, in their Project Manual including their Grading Plan for the Project to induce MSPE to submit a bid, and subsequently to enter into a Contract, for the Project's site preparation, including to further induce MSPE to continue performing by additional representations made by the Smith/Packett Defendants to MSPE during performance that the Smith/Packett Defendants would pay MSPE, for MSPE's continued performance, including extra and additional work during construction, in exchange and return for which the Smith/Packett Defendants would pay MSPE, which were, however, false.

69. The Smith/Packett Defendants knew, and had reason to know, their representations and misrepresentations made to MSPE about the Crossings Project design, site, constructability, and suitability on and before April 30, 2018, and at all times thereafter, were false with no intent to perform,

and the Smith/Packett Defendants, without knowledge of the true facts, recklessly misrepresented them with no intent to perform, and were made by mistake with no intent to perform, but with the intention that MSPE should rely upon them, which MSPE did.

70. MSPE believed the representations made by the Smith/Packett Defendants, and in detrimental, and justifiable reliance upon them, submitted MSPE's bid without knowledge of the true facts, entering into the Contract for the site preparation portion of the Contract with the Smith/Packett Defendants for the Project, commencing construction, and completing in excess of ninety eight percent (98.54%) of MSPE's contract work including extra and additional work by oral modification through July 15, 2019, and completing, on or before September 15, 2019, one hundred percent (100%) of MSPE's contract, not otherwise prevented, interfered with, and delayed, by the Smith/Packett Defendants and Defendant JCS, which included even more, extra and additional work by additional oral modifications made by the Smith/Packett Defendants, JCS, and their agents, servants, and representatives, for which MSPE has not been paid..

71. The Smith/Packett Defendants, however and without excuse or justification, failed to coordinate, and cooperate in the scheduling of as-bid work, have scheduled MSPE's as-built Project work out-of-sequence with unannounced changes from the as-bid work, and failed and refused to pay MSPE, maliciously and perniciously withholding payment and compensation to MSPE to unconscionably gouge, to tortuously interfere with, and to injure MSPE, unjustly, and unfairly enriching the Smith/Packett Defendants, and Defendant JCSI.

72. As a result of the Smith/Packett Defendants' foregoing false misrepresentations of material fact made to MSPE, and the Smith/Packett Defendants' fraud, deceit, concealments, and suppressions, the Smith/Packett Defendants have maliciously failed and refused to pay MSPE all amounts owing and due for MSPE's Project site preparation work performed, not otherwise interfered with, prevented and



delayed by the Smith/Packett Defendants, currently totaling \$1,134,917.47, for which MSPE demands judgment as set forth below.

**COUNT 4 – JARRETT CONSTRUCTION - PROFESSIONAL NEGLIGENCE AS  
CONSTRUCTION MANAGER, AT RISK**

73. Plaintiff MSPE restates, realleges, and incorporates the allegations set forth above, as if the same were set forth verbatim herein.

74. Defendant JCS entered into separate agreements with the Smith/Packett Defendants, including as a CM at risk for JCS's professional services as Construction Manager, at risk, and as a contractor for JCS's construction services with regard to the Crossings Project.

75. By reason of the foregoing, Defendant JCS's negligence, breach of other duties owed, and wrongdoings caused and created an unconscionable, tortious, and untenable conflict of interest, and self-dealing as to Defendant JCS, acting as CM at risk and other capacities including as constructor, blurring any distinction and acting negligently and tortuously as both CM at risk and as constructor, relative to MSPE and the administration of MSPSE's Project as-bid site preparation Contract, during construction.

76. In connection with the foregoing, Defendant JCS in the rendering of its professional CM, at risk, services, was negligent, negligently supplied information to MSPE, and acted negligently and maliciously in bad faith, and by unconscionable self-dealing conflict of interest, injuring MSPE, to maliciously benefit JCS as CM at risk to shift, improperly, increased costs of construction to MSPE for JCS to avoid paying costs in excess of any "guaranteed maximum price" (GMP) applicable to JCS, including to increase any fee based compensation to JCS to, thereby, deny and delay payment to MSPE, inconsistent with claims for additional and increased contract time and money made by JCS in literally the same time frame on the same Project involving the same and similar underlying causes and reasons impacting MSPE, caused by Defendant JCS's negligence as CM during construction, interfering with MSPE's work, and in turn, delaying, and interfering with MSPE, to impermissibly transfer, and cause to transfer risk and increased costs of construction to MSPE, injuring MSPE.

77. Defendants JCS owed a duty to MSPE to use the ordinary and reasonable skill and care of a professional CM, at risk, in the execution of JCS's duties as a professional CM, at risk and in connection with JCS's involvement in, *inter alia*, the administration of MSPE's as-bid Project site preparation Contract, including free of conflicts of interest, and self-dealing by JCS.

78. Defendants JCS also had a duty to use the ordinary and reasonable skill and care of a professional CM, at risk, in administering, supervising, and managing construction of, and under, MSPE's Contract with the Defendant-Owners, including in interpreting and applying the applicable as-bid contract and bidding documents, the Project Manual, and Civil Drawings and Specifications, and in recommending as-built changes in the contract price and time for MSPE's site preparation Contract, without, and free from, Defendant JCS's negligence, interference, and impermissible conflicts of interest while acting as CM at risk.

79. Defendant, JCS, was negligent in the discharge of JCS's duties as professional CM at risk, and in its administration of MSPE's Project site preparation Contract(s), in supervising and managing the Contract(s), in interpreting the Contract(s), in scheduling and coordinating the Project work, and in recommending changes in contract price, and time.

80. Plaintiff MSPE in performing its Contract relied, and had no choice but to rely, upon Defendant JCS's involvement and ability as CM, at risk, in the execution, implementation and administration of MSPE's Contract with the Smith/Packett Defendants, including Defendant JCS's claimed ability as a professional CM at risk, free of conflicts of interest and self-dealing for JCS, in JCS's administering, interpreting, managing, and supervising construction, as well as in interpreting and applying as CM the various applicable contract document(s), if any, comprising MSPE's Project site preparation Contract, and in recommending changes in the contract price, and time, especially for Defendant JCS-caused, and Smith/Packett- caused changes, disruptions, and delays to benefit and accommodate Defendant JCS, but



in turn having a negative economic impact on MSPE's Contract, and performance, which Defendants knew, and had reason to know, but maliciously did anyway.

81. As a direct, proximate and foreseeable cause of Defendant JCS's negligence and breaches of duties as the Project's CM, at risk, Plaintiff MSPE has been damaged by being required to perform additional work and delay, by increased costs of performance due to JCS's negligence, by out-of-sequence, unscheduled, and uncoordinated work caused by JCS's negligence, and by disruptions, and changes in MSPE's manner, method, time, and price of performance caused by JCS and its negligence, which caused increased time of performance, increased payroll costs, increased equipment costs, increased overhead costs, increased mobilization costs, increased home office and administrative costs, a loss of profit and a loss of interest upon amounts due, for which MSPE demands judgment against Defendant JCS as set forth below.

#### **COUNT 5 – TORTIOUS INTERFERENCE – JARRETT CONSTRUCTION SERVICES**

82. Plaintiff MSPE restates, realleges, and incorporates the allegations set forth above, as if the same were set forth verbatim herein.

83. By reason of the foregoing, Defendant JCS, who is not a party to MSPE's site preparation Contract for the Crossings Project with the Smith/Packett Defendants tortuously interfered with MSPE's contractual rights, titles, benefits, relations, expectations, and interests, including without limitation, MSPE's site preparation as-bid Contract for the Crossings Project, and MSPE's work, performance, and payment of MSPE thereunder.

84. Defendant, JCS, as CM at risk, tortuously interfered with MSPE's site preparation Contract for the Crossings Project by, among other things, JCS's conflict of interest and self-dealing as CM at risk and as constructor on the Crossings Project, and as such by maliciously interfering in bad faith with, and in, MSPE's execution (performance) of the as-bid Contract for site preparation and applicable terms and conditions of MSPE's as-bid Contract, and by maliciously interfering in bad faith with MSPE's

execution of that Contract, to, improperly, promote and advance JCS's interests, including to improperly transfer risk and costs of performance to MSPE, and for JCS to avoid absorbing costs of construction in excess of certain guaranteed maximum pricing, such that if exceeded, JCS was obligated to bear such costs in excess of the GMP, while though, however, improperly and tortuously forcing, and interfering with MSPE's site preparation contract, to cause MSPE to absorb and to incur increased contract costs, and extended time of performance, due to Owner-caused, and JCS-caused changes, delays, disruptions, defects, deficiencies, and delays, through no fault and involvement of MSPE.

85. While initially MSPE's completion date was October, 2018, after oral modifications, MSPE's completion date was changed to September 15, 2019, which was, upon information and belief, before JCS's completion of on or about December 16, 2019, thereby causing and creating delay and interference by JCS, and the Smith/Packett Defendants with MSPE's as-bid Contract.

86. JCS, as CM at risk was not substantially complete on 9/15/2019, or on 12/16/2019, and is still not substantially complete, which impermissibly interfered with, and prevented MSPE's performance, and which continues to do so.

87. MSPE's pay applications and invoices for payment, including payment owed and due to MSPE, are, however, being maliciously and improperly withheld in bad faith, including by reason of Defendant JCS's malicious improper interference as CM at risk with MSPE's contractual rights, titles, interests, and business expectations.

88. Defendant JCS, as CM at risk, maliciously caused and required MSPE to perform out of sequence, unscheduled work, with unannounced changes and modifications, and Owner-, and JCS-caused delay to injure MSPE, along with disruptions, and interference with MSPE's work, resulting in, and causing MSPE to needlessly incur increased costs, and time of performance for the purpose of injuring MSPE, and to, however, benefit Defendant JCS.



89. As a direct, and proximate cause of Defendant JCS's tortious interference, negligence, and breaches of other duties owed in tort, Plaintiff MSPE has been damaged by being required to perform additional work and delay, by being forced to absorb increased costs of performance, by out-of-sequence work, and by malicious disruptions, and changes in MSPE's manner, method, time, and price of performance, which caused increased payroll costs, increased equipment costs, increased overhead costs, increased mobilization costs, increased home office and administrative costs, a loss of profit and a loss of interest upon amounts due, for which MSPE demands judgment against Defendant JCS as set forth below.

**COUNT 6 – ORAL MODIFICATION, IMPLIED IN FACT CONTRACT**

90. Plaintiff MSPE restates, realleges, and incorporates the allegations set forth above, as if the same were set forth verbatim herein.

91. By reason of the foregoing, the Smith/Packett Defendants entered into enforceable oral contract(s), implied in fact contract(s) with MSPE, including without limitation, by way of multiple oral modification(s) made by the Smith/Packett Defendants, by and through their agents, servants, employees and representatives, including for work performed, including extra and additional work beyond, and outside the scope of any other contract between MSPE and the Smith/Packett Defendants, entitling MSPE to recover the current amounts owed, totaling currently : \$1,134,917.47, *notice and demand for payment of which has been given.*

92. By way of multiple oral modifications made by the Smith/Packett Defendants and their agents, servants, employees, and representatives including Defendant JCS – 18 times - with no written change order waiving any such consideration if ever applicable, the Smith/Packett Defendants entered into an implied contract(s) with MSPE, and orally changed, and modified what if any, prior Contract, based upon 18, prior, oral modifications, subtotaling \$117,134.96, less 10% retainage, as follows:

## ORAL MODIFICATIONS FOR EXTRA WORK/IMPLIED IN FACT CONTRACT

<u>WORK PERFORMED</u>	<u>INVOICE</u>	<u>AMT PAID</u>	<u>AMT OWED</u>
Undercut Building B Elevator Driller Clean-up	\$3,916.80	\$3,525.12	\$391.68
Reimburse for 5.14.18 Matting Engineers Invoice	\$1,000.00	\$0.00	\$1,000.00
Building Pad Underdrain Phase 1	\$7,500.00	\$6,750.00	\$750.00
Fill Repair & Crushed Concrete	\$11,339.34	\$10,205.41	\$1,133.93
Add'l Electrical Conduit	\$488.00	\$439.20	\$48.80
Mud Removal	\$25,000.00	\$22,302.18	\$2,697.82
Mud Removal Feb	\$6,250.00	\$5,624.48	\$625.52
Add'l Elect Conduit Trench Transformer to Building	\$765.00	\$0.00	\$765.00
Rock Excavation Secondary Conduit Trench	\$3,639.36	\$3,275.42	\$363.94
Add'l Electrical Conduit Gasline 100 LF	\$1,350.00	\$734.40	\$615.60
Mud Removal	\$950.00	\$855.00	\$95.00
Excavate Below 5' Building B	\$310.00	\$279.00	\$31.00
Replace Silt Fence Toe of Slope	\$90.00	\$81.00	\$9.00
Undercut Mech Room 18" for Conduit	\$1,590.00	\$1,431.00	\$159.00
Add'l Underdrain & Bldg Pad A Wet Material Haul Off	\$2,380.00	\$2,142.00	\$238.00
Remove Mud & Replace Fill with 8" Particle Size Matter	\$22,220.70	\$19,998.63	\$2,222.07
Additional Zurn Downspout Adapters	\$2,800.00	\$0.00	\$2,800.00
Additional Roof Drain Connections 7ea	\$5,508.00	\$0.00	\$5,508.00
Mud Removal Jan/May	\$3,213.00	\$0.00	\$3,213.00
Crushed Concrete	\$5,227.50	\$0.00	\$5,227.50
Additional Mud Removal	\$1,250.00	\$1,125.00	\$125.00
Soccer Field Material Drying & Compacting	\$20,000.00	\$18,000.00	\$2,000.00
Reimbursement of Erroneous 3/15/19 Deduct (\$3,548.10 - \$1,940.14)	\$3,548.10	\$1,940.14	\$1,607.96
Additional Year Pollution Insurance (exp. 4/20)	\$5,168.69	\$0.00	\$5,168.69
Storm Clean Up 512 CCD 5	\$11,769.78	\$7,675.00	\$4,094.78
Add'l Testing Requirements (Proof Rolling)	\$50,071.80	\$0.00	\$50,071.80
Revised Grading for Soccer Field	\$9,500.00	\$0.00	\$9,500.00
Test Pit Behind Bldg. A Sub-surface Investigation	\$3,672.00	\$0.00	\$3,672.00
Surplus Waste Area Development	\$21,462.84	\$0.00	\$21,462.84
Alternate Haul Road Development & Reclaim	\$37,648.20	\$0.00	\$37,648.20
Add'l Slope Matting > 12,000 sy/not shown	\$5,232.60	\$0.00	\$5,232.60
<b>TOTALS</b>	<b>\$274,861.71</b>	<b>\$106,382.98</b>	<b>\$168,478.73</b>

93. The Smith/Packett Defendants, however, erroneously and maliciously deducted, \$3,548.10 for additional materials in excess of the Project's site preparation materials as-bid, to unfairly, and deceitfully force MSPE to, improperly, absorb the foregoing \$3,548.10 for additional material costs. Additionally, the Smith/Packett Defendants, via Defendant JCS, maliciously applied to themselves a \$1,940.14 credit, rather than to MSPE, who returned a portion of the unused additional materials (Core & Main), to further injure MSPE, and to improperly transfer increased costs of construction to, MSPE.



94. By reason of the foregoing, the Smith/Packett Defendants orally modified contract(s) entered into with MSPE, breached implied in fact contract(s) entered into with MSPE requiring MSPE to perform extra and additional work outside, and beyond the terms and conditions of what, if any, other contract(s) entered into with MSPE, as-bid, and as-built.

95. As a direct, and proximate cause of the Smith/Packett Defendants' oral modifications, breach of implied in fact contract(s), Plaintiff MSPE has been damaged by being required to perform additional work and delay, by out-of-sequence work, and by disruptions, and changes in MSPE's manner, method, time, and price of performance, which caused increased payroll costs, increased equipment costs, increased overhead costs, increased mobilization costs, increased home office and administrative costs, a loss of profit and a loss of interest upon amounts due as set forth herein, and for which MSPE demands judgment against Defendant JCS as set forth below.

**COUNT 7 – QUANTUM MERUIT, BREACH OF IMPLIED IN LAW (QUASI) CONTRACT,  
UNJUST ENRICHMENT**

96. Plaintiffs restate, reallege and incorporate each allegation stated above as if the same were set forth verbatim herein.

97. By reason of the foregoing, MSPE, therefore, is also entitled to recover all amounts owed from, and by, the Smith/Packett Defendants for an *implied in law* contract, a *quasi*-contract, to prevent unfairness, and unjust enrichment by, and of the Smith/Packett Defendants for the current amounts they owe to MSPE.

98. By reason of the foregoing, Plaintiff MSPE alleges an implied contract was formed with Defendants, entitling Plaintiffs to relief for Defendants' breach of an implied in law contract, and for Defendants' unjust enrichment thereunder, for which Plaintiff MSPE demands judgment against Defendants as set forth below.

**COUNT 8 – DECLARATORY JUDGMENT RELIEF**

99. Plaintiff MSPE restates, realleges, and incorporates the allegations set forth above, as if the same were set forth verbatim herein. Plaintiff restates, realleges and incorporates each allegation stated above as if the same were set forth verbatim herein.

100. Pursuant to *W.Va. Code § 55-13-1, et seq.*, the West Virginia Uniform Declaratory Judgment Act, Plaintiff MSPE seeks all declaratory relief to which MSPE is entitled and which is available against all Defendants, including, without limitation, a declaration of the parties' rights, status, and other legal relations arising out, and related to the subject matter of this case and controversy, including without limitation, *inter alia*, a judicial declaration that the Smith/Packett Defendants breached the MSPE site preparation Contract, that MSPE's mechanic's lien in the amount of \$44,180.00 is valid and perfected with priority as alleged herein, that the Smith/Packett Defendants changed and orally modified MSPE's site preparation Contract, that the Smith/Packett Defendants' Project Manual and civil drawings, plans, and specifications were inadequate and breached the warranty of adequacy, that Defendant JCS was negligent and tortuously interfered with MSPE's contractual and MSPE's rights, titles, interests, and business and contractual expectations, and that Defendants breached other duties owed to MSPE, for which MSPE demands judgment against Defendants, as set forth below.

#### **COUNT 9 – JOINT VENTURE, CIVIL CONSPIRACY LIABILITY**

101. Plaintiff MSPE restates, realleges, and incorporates the allegations set forth above, as if the same were set forth verbatim herein.

102. The Smith/Packett Defendants, and Defendant JCS conspired, and acting concurrently and conjointly, aiding and abetting each other as both coconspirators, agents, principals and partners, interchangeably for each other together at all material times and dates hereto in a conspiracy, in a general partnership, joint enterprise and venture activity for profit to wit: authorizing, entering into, and causing, among others, the Smith/Packett Defendants to enter into Contract(s) with MSPE, and with Defendant JCS as Defendants' CM at risk, for the reasons and purposes set forth herein, using and



operating the business entities, Defendants SP WV, LLC and WV Investors, LLC as a front, as shell companies, as a “pass through entity” and as a *sham* alter ego entity, as a joint venture, and as an implied partnership, for liability purposes, all together, and agreed to perform the duties alleged herein in connection with the construction and related construction and professional CM services to be rendered as part of the Crossings Project, and in connection therewith making false misrepresentations to MSPE as more fully alleged herein, when in fact the Smith/Packett Defendants and Defendant JCS, collectively, had no intent to perform, and have failed and refused to pay MSPE for all amounts owing and due currently subtotaling, \$1,134,917.47, without excuse or justification, for which these Defendants should be punished.

103. The Smith/Packett Defendant caused, allowed, and permitted Defendants SP WV and WV Investors, purportedly Virginia limited liability companies, to be formed and operated, as an alter ego, and “pass through entity” acting in West Virginia, when in reality said business entities are a *sham*, not in compliance with, *inter alia*, the common law of the State of West Virginia and the provisions of *W. Va. Code §31B-1-101, et seq., and W. Va. Code §47-1-1, et seq.*, all in furtherance of an implied partnership, and the joint enterprise activity being conducted by Defendants at and upon the above referenced construction Project in Kanawha County, West Virginia.

104. The Smith/Packett Defendants, aided, abetted by each other, and who conspired and combined among themselves, and with Defendant JCS, did so to unjustly enrich themselves at Plaintiff MSPE’s expense, and to further advance, and effectuate their fraudulent and deceitful conduct as more specifically alleged herein, in a civil conspiracy to injure and damage Plaintiff MSPE for Defendants’ unjust enrichment and illicit benefit, without excuse and justification, and with no intent to perform.

105. As a result of the false misrepresentations, inducements, representations, commingling activities, acts, inactions, joint venture activities, and conspiracy of the Smith/Packett Defendants and Defendant JCS, acting together, concurrently, and as agents, principals, and partners for each other,

interchangeably in a joint enterprise for profit and for which an implied partnership should be imposed and subject to liability as such, Plaintiff MSPE furnished, provided, and performed all of their obligations under and in connection with the aforementioned Project site preparation Contract(s), for which no conditions precedent remain unsatisfied to maintain this action.

106. Additionally, the Smith/Packett Defendants, Smith/Packett, WV SP and WV Investors, and Defendant JCS, should be treated not only as an implied partnership and as a joint enterprise, sharing in profits and losses, sufficient to disregard what if any limited liability corporate form claimed, but also to pierce the respective sham-company veils, rendering the Smith/Packett Defendant, and perhaps others, liable for the debts and liabilities of the sham entities, “pass through” shell companies, to wit: Defendants SP WV, and WV Investors, for which MSPE demands judgment, against Defendants, as set forth below.

#### **COUNT 10 MECHANIC’S LIEN ENFORCEMENT, SMITH/PACKETT AND CARTER BANK & TRUST**

107. Plaintiff restates, realleges and incorporates each allegation stated above as if the same were set forth verbatim herein.

108. Pursuant to MSPE’s site preparation Contract entered into between the Smith/Packett Defendants and MSPE as more fully set forth herein, Plaintiff MSPE sold, transferred, furnished, delivered and provided all equipment and all of the labor and/or materials to perform under the site preparation Contract, as modified by Defendants, incorporating the improvements and construction at the Smith/Packett Defendants’ real property located at or near 500 Peyton Way, South Charleston, Kanawha County, West Virginia, in exchange and return, for which the Smith/Packett Defendants promised to pay Plaintiff MSPE for said equipment, labor, and/or materials furnished, and supplied by MSPE, and for the completed installation thereof of the improvements on the Smith/Packett Defendants’ real property known as the Crossings Project

109. Despite MSPE’s demands for prompt payment, the Smith/Packett Defendants breached the site preparation Contract as modified with Plaintiff, MSPE by failing and refusing to pay over to MSPE all amounts owing and due for all equipment, labor, and/or materials furnished, and supplied, and for all work



performed pursuant to the site preparation Contract, as modified, with the Smith/Packett Defendants to construct, and build the Crossings Project, and the attendant site preparation portion of the Project, on the property of the Smith/Packett Defendants, as more fully alleged herein.

110. Defendants owe Mountain State Pipeline & Excavating, LLC the principal amount of \$44,180.00, made the subject of MSPE's lien, for contract and extra work and labor performed after 9/15/2019, plus interest accruing thereon on said principal lien amount balance for labor, at the lawful rate on the outstanding balance from March 2, 2020, until paid in full.

111. When MSPE was not paid the lien amount totaling (\$44,180.00) duly owed to it under its site preparation Contract with the Smith/Packett Defendants for all labor amounts after September 15, 2019, pursuant to *W. VA. Code, § 38-2-1, et. seq.*, Mountain State Pipeline & Excavating, LLC timely notified all applicable parties and filed its Notice of Mechanic's Lien for work performed and materials supplied with the County Clerk of Kanawha County, West Virginia, on April 24, 2020 in the principal amount of Forty Four Thousand One Hundred Eighty Dollars (\$44,180.00) which notice is recorded in said Clerk's Office, Mechanics Lien Book 64, Book at Page 767.

112. Pursuant to *W. Va. Code, § 38-2-1, et seq.*, the purpose of this Complaint is, among other things, to enforce MSPE's valid and perfected Mechanic's Lien on the real property of the Smith/Packett Defendants, with priority over all such other encumbrances, liens, and deeds of trust of record, and Defendants' interest(s) therein, which interest, if any, in said property is reflected in that certain deed of record executed March 19, 2018, and recorded in the Kanawha County Clerk's Office in Deed Book 2997, at page 30, and what if any interest is reflected in that certain deed of trust executed March 29, 2018 and recorded in the Kanawha County Clerk's Office in Trust Deed Book 4297, at page 467, for which plaintiff Mountain State Pipeline & Excavating, LLC demands judgment against Defendants, including Defendant Carter Bank & Trust, as a necessary party and its interest in the real property made the subject of this civil action, with priority as to MSPE's perfected mechanic's lien over, and as to all other encumbrances, as more fully set forth below.

#### **COUNT 11 PUNITIVE DAMAGES AND ATTORNEYS' FEES AND COSTS**

113. Plaintiff restates, realleges and incorporates each allegation stated above as if the same were set forth verbatim herein.

114. By reason of the foregoing, Plaintiff alleges Defendants' respective breaches of duty, malicious conduct, acts, omissions, and failures to act, and representations, inducements, and false misrepresentations made to Plaintiff, were grossly, willfully, and wantonly negligent, and maliciously made, beyond all civility, decency and norms, so as to warrant punitive damages, and an award of Plaintiff's reasonable attorneys' fees and costs incurred herein, including statutorily, and to act as a deterrent to others so inclined, for which Plaintiff demands judgment against Defendants as set forth below.

**Ad Damnum - Prayer for Relief**

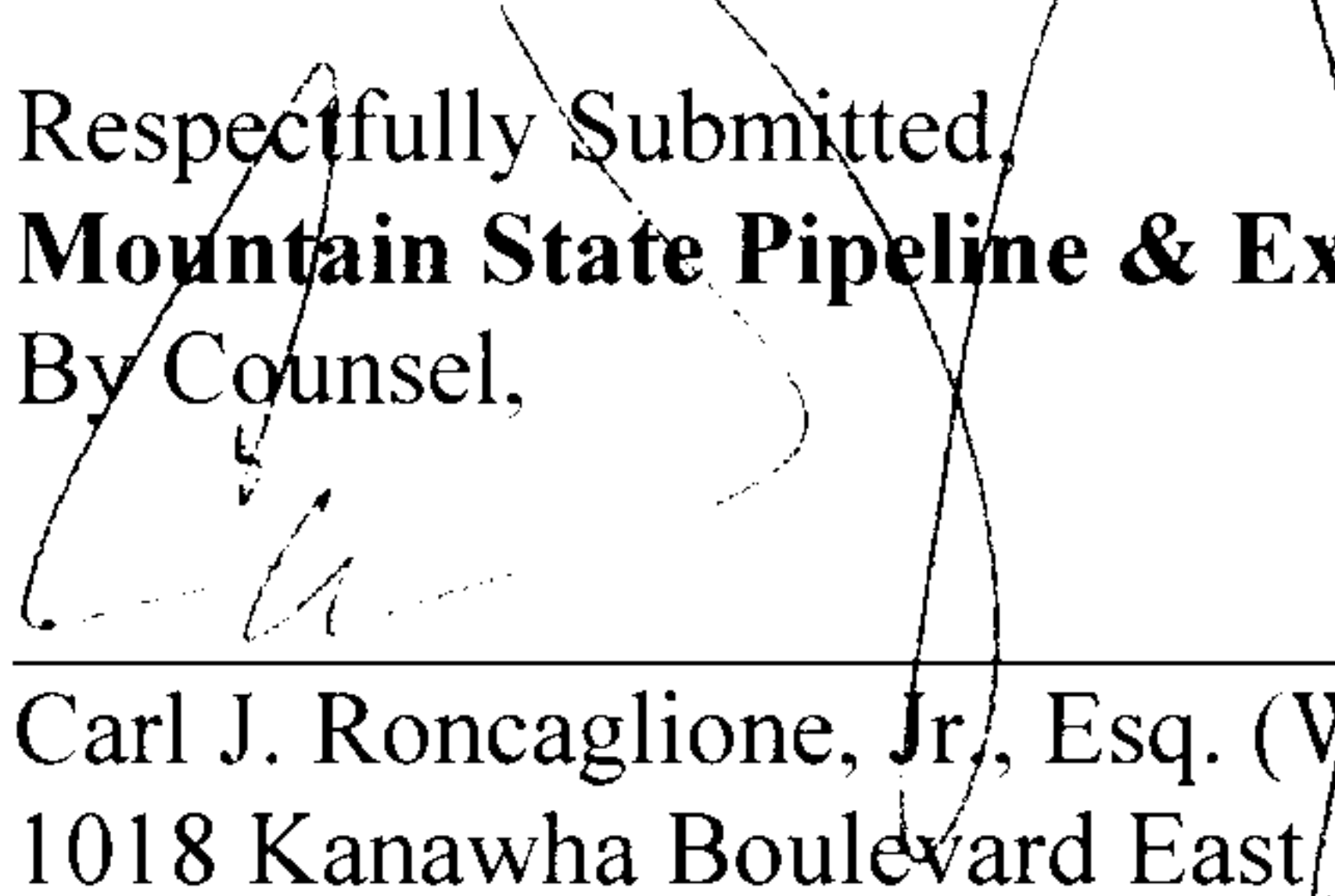
**WHEREFORE**, Plaintiff, Mountain State Pipeline & Excavating, LLC demands judgment against Defendants in an amount not less than *One Million One Hundred Thirty Four Thousand Nine Hundred Seventeen Dollars and Forty-Seven Cents (\$1,134,917.47)*, or an amount which will fully and fairly compensate Plaintiff MSPE for all amounts Plaintiff expended and that Plaintiff has been damaged, and as a result of Defendants' breach of contract, breach of warranty, negligence, fraud, deceit, misrepresentation, implied contract, civil conspiracy to unjustly enrich themselves, and for Defendants' breach of other duties owed, including holding Defendant Smith/Packett, individually, liable for the debts and obligations of Defendants WV SP and WV Investors, LLC, whose company veils should be pierced and otherwise disregarded, along with imposing an implied partnership on Defendants for purposes of liability. Plaintiffs also seek a declaratory judgment from this Court of the parties' rights, plus an award of attorneys' fees under, *inter alia*, **W.Va. Code, § 55-13-1, et seq.** Plaintiffs also demand judgment against Defendants, jointly and severally, and for an unspecified amount of punitive damages to be determined by a jury, to punish and deter Defendants for their tortuous conduct, along with all others so inclined for all amounts recoverable therefrom, plus an award



of Plaintiff MSPE's costs, and reasonable attorney fees incurred in prosecuting this Complaint, along with prejudgment interest on all liquidated sums, post-judgment interest, and an award of any and all other relief this Court deems just and appropriate.

**PLAINTIFF DEMANDS A TRIAL BY JURY.**

Respectfully Submitted,  
**Mountain State Pipeline & Excavating, LLC**  
By Counsel,



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