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[www.kaycasto.com](http://www.kaycasto.com)

E-Mail: [vwilson@kaycasto.com](mailto:vwilson@kaycasto.com)  
After hours ext. 114

August 31, 2020

Honorable Edythe Nash Gaiser  
Clerk of The Supreme Court of  
Appeals of West Virginia  
Room E-317  
Capitol Building  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305

RE: Acme Enterprises, Inc. v. M C. Development Company, Inc.  
Civil Action No. 20-C-84 CBL

Dear Ms. Gaiser:

Enclosed for filing in the above-referenced matter, please find a Motion to Refer Case to the business Court Division

If you have any questions whatsoever about the filing of *Motion to Refer Case to the Business Court Division*, please do not hesitate to call me at (304) 391-8814 or email me at [vwilson@kaycasto.com](mailto:vwilson@kaycasto.com).

Sincerely,

Victoria L. Wilson

VLW/afb

Enclosures

Cc: Per Certificate of Service

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ACME ENTERPRISES, INC.,  
a Michigan corporation,

*Plaintiff,*

vs.

M C DEVELOPMENT COMPANY, INC.,  
a Kentucky corporation,

*Defendant.*

Cabell County Circuit Court

Civil Action No. 20-C-84

TO: THE HONORABLE CHIEF JUSTICE

MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, the Plaintiff/Counterclaim-Defendant, Acme Enterprises, Inc. ("Acme"), by counsel, respectfully requests the above-styled case be referred to the Business Court Division.

There are no known related actions.

This action involves: (Please check all that apply):

- |  |  |
|--|--|
| <input checked="" type="checkbox"/> Breach of Contract;  | <input type="checkbox"/> Professional Liability Claims in Connection with the Rendering of Professional Services to a Commercial Entity; |
| <input type="checkbox"/> Sale or Purchase of Commercial Entity;  | <input type="checkbox"/> Anti-trust Actions between Commercial Entities;   |
| <input type="checkbox"/> Sale or Purchase of Commercial Real Estate;                                     | <input type="checkbox"/> Injunctive and Declaratory Relief Between Commercial Entities;  |
| <input type="checkbox"/> Sale or Purchase of Commercial Products Covered by the Uniform Commercial Code; | <input type="checkbox"/> Liability of Shareholders, Directors, Officers, Partners, etc.;   |
| <input type="checkbox"/> Terms of a Commercial Lease;  | <input type="checkbox"/> Mergers, Consolidations, Sale of Assets, Issuance of Debt, Equity and Like Interest;                            |
| <input checked="" type="checkbox"/> Commercial Non-consumer debts;                                       | <input type="checkbox"/> Shareholders Derivative Claims;   |
| <input type="checkbox"/> Internal Affairs of a Commercial Entity;  | <input type="checkbox"/> Commercial Bank Transactions;   |
| <input type="checkbox"/> Trade Secrets and Trademark Infringement;                                       | <input type="checkbox"/> Franchisees/Franchisors;  |
| <input type="checkbox"/> Non-compete Agreements;   | <input type="checkbox"/> Internet, Electronic Commerce and Biotechnology   |
| <input type="checkbox"/> Intellectual Property, Securities, Technology Disputes;                         |  |
| <input type="checkbox"/> Commercial Torts;   |  |
| <input type="checkbox"/> Insurance Coverage Disputes in Commercial Insurance Policies;                   |  |

☒ Disputes involving Commercial Entities; or \_\_\_\_\_

☐ Other (Describe) \_\_\_\_\_

In support of this motion, this matter contains issues significant to businesses, and presents novel and/or complex commercial or technological issues for which specialized treatment will be helpful, as more fully described herein.

Acme is a Michigan corporation with its principal place of business in Roseville, Michigan. In addition to its other work, Acme builds Taco Bell Restaurants throughout the country and averages between five and seven new Taco Bell construction projects each year. Acme contracted with M C Development Co., Inc. ("MCDC") to build a new Taco Bell restaurant on Kinetic Drive in Huntington, West Virginia. The contract was for \$1,171,633.00. Unfortunately, the project did not proceed as planned. There were numerous delays in the project due to failure of the Owners to answer questions and address problems in a timely fashion. Acme started construction of the project in September 2018 and turned the project over to the Owners in October 2019.

After numerous attempts to resolve unpaid invoices and change orders with MCDC, Acme filed a Notice of Mechanic's lien with the Clerk of the County Commission of Cabell County on February 4, 2020 against MCDC. The Mechanic's lien is of record in Book 22, at Page 588, in the amount of \$374,509.30. Thereafter on March 12, 2020, Acme filed a Complaint to enforce the mechanic's lien in the Circuit Court of Cabell County. MCDC answered the Complaint and filed counterclaims against Acme on July 20, 2020. MCDC's Counterclaim alleges multiple legal claims including Breach of Contract, Breach of Duty of Good Faith and Fair Dealing, Slander of Title, and Liquidated Damages. MCDC seeks attorney fees, compensatory damages, punitive damages, pre and post judgment interest, and any other legal or equitable relief the court deems appropriate.

Trial Court Rule 29.04(a)(1) requires that cases transferred to the business court involve “matters of significance to the transactions, operations, or governance between business entities.” This matter involves a significant business transaction between two business entities. Acme and MCDC contracted for the construction of a new Taco Bell restaurant at a cost of over \$1 million. Due to disagreements surrounding the terms of the construction contract and the obligations of each party thereunder, Acme and MCDC are each seeking payment and/or damages exceeding \$300,000.00. Further, this matter will require analysis of the contract between Acme and MCDC, including certain franchise requirements that are in place for construction of new Taco Bell restaurants. Additionally, the court will need to consider building design plans, construction practices, and numerous change orders that are in dispute between Acme and MCDC. As a result, this matter would benefit greatly from assignment to the Business Court.

In further support of this Motion, please find attached hereto an accurate copy of the operative Complaint, MCDC’s Answer and Counterclaim, and Acme’s Answer to the Counterclaim and the docket sheet. The Complaint has copies of the contract and mechanic’s lien attached as exhibits and as such they are not attached separately to this filing.

In regard to expedited review, the Movant:

- ☒ DOES NOT request an expedited review under W.Va. Trial Court Rule 29.06(a)(4), and gives notice that all affected parties may file a memorandum stating their position, in accordance with W.Va. Trial Court Rule 29.
- ☐ hereby REQUESTS that the Chief Justice grant this Motion to Refer without responses, pursuant to W.Va. Trial Court Rule 29.06(a)(4), and contends that the following constitutes good cause to do so:

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**WHEREFORE**, the undersigned hereby MOVES, pursuant to W.Va. Trial Court Rule 29, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted this 31<sup>st</sup> day of August, 2020.

**ACME ENTERPRISES, INC.**  
**Plaintiff/Counterclaim Defendant,**  
**By Counsel**



---

Tracey A. Rohrbaugh (WV Bar #6662)  
Kay Casto & Chaney PLLC  
400 Foxcroft Ave., Suite 100  
Martinsburg, WV 25401  
Phone: (304) 901-7502  
Email: [trohrbaugh@kaycasto.com](mailto:trohrbaugh@kaycasto.com)

and

Victoria L. Wilson (WV Bar #10607)  
Kay Casto & Chaney PLLC  
707 Virginia Street, East  
Suite 1500  
Charleston, WV 25301  
Phone: (304) 345-8900  
Email: [vwilson@kaycasto.com](mailto:vwilson@kaycasto.com)

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**ACME ENTERPRISES, INC.,**  
a Michigan corporation,

*Plaintiff,*

vs.

**M C DEVELOPMENT COMPANY, INC.,**  
a Kentucky corporation,

*Defendant.*

Cabell County Circuit Court  
Civil Action No. 20-C-84

**TO: THE HONORABLE CHIEF JUSTICE**

**CERTIFICATE OF SERVICE**

I, Victoria L. Wilson, do hereby certify that on this 31<sup>st</sup> day of August 2020, I have served the foregoing “Motion to Refer Case to Business Court Division,” with attachments by first-class United States mail, postage prepaid, addressed as follows:

Richard J. Bolen, Esq.  
Janet S. Holbrook, Esq.  
J. David Bolen, Esq.  
Melissa Dodd Veltri, Esq.  
Dinsmore & Shohl LLP  
611 Third Avenue  
Huntington, WV 25701  
*Counsel for M C Development Company, Inc.*

Cabell County Circuit Clerk  
Jeffrey E. Hood, Clerk  
750 Fifth Avenue  
Huntington, WV 25701

Judge Christopher D. Chiles  
Cabell County Courthouse  
750 Fifth Avenue  
Huntington, WV 25701

Business Court Division Central Office,  
Berkeley County Judicial Center,  
380 West South Street, Suite 2100  
Martinsburg, WV 25401

A handwritten signature in dark ink, appearing to read 'Victoria L. Wilson', written over a horizontal line.

Victoria L. Wilson (WVSB #10607)

09/01/2020  
10:40:42Cabell County Circuit Clerk's Office  
Docket Entries for case CK-6-2020-C-84  
Style: ACME ENTERPRISES, INC.,

v.

MC DEVELOPMENT COMPANY, INC.

Judge: Judge Chris Chiles

Page: 1

Seq	Date	Description
1	03/12/2020	Other: CIS, Complaint W/ Exhibits A-C, 30 Day Summs Rtd To Atty For Srvc
2	07/06/2020	Other: ROS by S.O.S. to MC Development Company 6-30-20
3	07/20/2020	Answer: Def MC Development Company's Answer & Counterclaim, COS W/ Exhibit A (Richard Bolen - Dinsmore)
4	08/10/2020	Other: ACME Enterprises Answer to counterclaim, COS



S U M M O N S

CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

ACME ENTERPRISES, INC.,

v.

2020-C-84

Judge Chris Chiles

MC DEVELOPMENT COMPANY, INC.  
Court & Madison Street  
Louisa, KY 41230

To the Above-Named Defendant(s):  
IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and  
required to serve upon Tracey A. Dent Rohrbaugh  
Plaintiff's Attorney, whose address is 400 Foxcroft Ave.  
Suite 100  
Martinsburg, WV 25401

an answer, including any related counter-claim you may have, to the complaint  
filed against you in the above-styled civil action, a true copy of which is  
herewith delivered to you. You are required to serve your answer within 20  
days after service of this summons upon you, exclusive of the day of service.  
If you fail to do so, judgement by default will be taken against you for the  
relief demanded in the complaint and you will be thereafter barred from  
asserting in another action any claim you may have which must be asserted by  
counter-claim in the above-styled civil action.  
DATED: 3/12/2020

Jeffrey E. Hood, Clerk  
Cabell County Circuit Court

By: 

Return to:  
Jeffrey Hood, Circuit Clerk  
750 Fifth Avenue  
Huntington, WV 25701



S U M M O N S

CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

ACME ENTERPRISES, INC.,

v.

2020-C-84

Judge Chris Chiles

MC DEVELOPMENT COMPANY, INC.  
Court & Madison Street  
Louisa, KY 41230

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Plaintiff's Attorney, whose address is 400 Foxcroft Ave.  
Suite 100

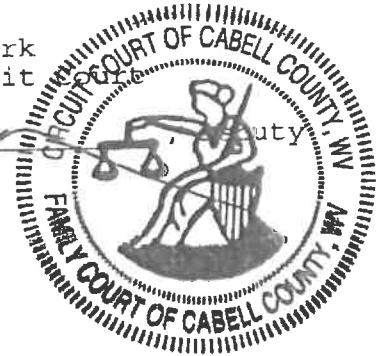
Martinsburg, WV 25401

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asserting in another action any claim you may have which must be asserted by  
counter-claim in the above-styled civil action.  
DATED: 3/12/2020

Jeffrey E. Hood, Clerk  
Cabell County Circuit

By *Walt Wilson*

Return to:  
Jeffrey Hood, Circuit Clerk  
750 Fifth Avenue  
Huntington, WV 25701



S U M M O N S

CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

ACME ENTERPRISES, INC.,

v.

2020-C-84

Judge Chris Chiles

MC DEVELOPMENT COMPANY, INC.  
Court & Madison Street  
Louisa, KY 41230

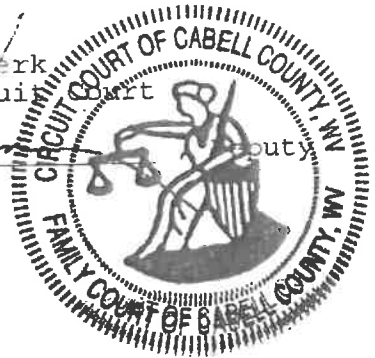
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IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and  
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Plaintiff's Attorney, whose address is 400 Foxcroft Ave.  
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asserting in another action any claim you may have which must be asserted by  
counter-claim in the above-styled civil action.  
DATED: 3/12/2020

Jeffrey B. Hood, Clerk  
Cabell County Circuit Court

By: *Mark W. [Signature]*

Return to:  
Jeffrey Hood, Circuit Clerk  
750 Fifth Avenue  
Huntington, WV 25701



IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

**CIVIL CASE INFORMATION STATEMENT**  
(Civil Cases Other than Domestic Relations)

**I. CASE STYLE:**

**Plaintiff(s)**  
ACME ENTERPRISES, INC.,  
a Michigan corporation,

Case No. 20-c-84  
Judge: /s/ CHRISTOPHER D. CHILES

vs.

**Defendant(s)**  
MC DEVELOPMENT COMPANY, INC.

**Days to  
Answer**  
30

**Type of Service**

Name  
Court and Madison Street  
Street Address  
Louisa, Kentucky 41230  
City, State, Zip Code

FILED  
2020 MAR 12 PM 9:54  
J.E. HOOD  
CIRCUIT CLERK  
CABELL COUNTY, WV

**II. TYPE OF CASE:**

- |  |   |
|--|---|
| <input checked="" type="checkbox"/> General Civil                        | <input type="checkbox"/> Adoption                           |
| <input type="checkbox"/> Mass Litigation [As defined in T.C.R. 26.04(a)] | <input type="checkbox"/> Administrative Agency Appeal       |
| <input type="checkbox"/> Asbestos  | <input type="checkbox"/> Civil Appeal from Magistrate Court |
| <input type="checkbox"/> FELA Asbestos                                   | <input type="checkbox"/> Miscellaneous Civil Petition       |
| <input type="checkbox"/> Other: _____                                    | <input type="checkbox"/> Mental Hygiene                     |
| <input type="checkbox"/> Habeas Corpus/Other Extraordinary Writ          | <input type="checkbox"/> Guardianship                       |
| <input type="checkbox"/> Other: _____                                    | <input type="checkbox"/> Medical Malpractice                |

**III. JURY DEMAND:** ☒ Yes ☐ No CASE WILL BE READY FOR TRIAL BY (Month/Year): 6 / 2021

**IV. DO YOU OR ANY  
OF YOUR CLIENTS  
OR WITNESSES  
IN THIS CASE  
REQUIRE SPECIAL  
ACCOMMODATIONS?**

☐ Yes ☒ No

**IF YES, PLEASE SPECIFY:**

- ☐ Wheelchair accessible hearing room and other facilities  
☐ Reader or other auxiliary aid for the visually impaired  
☐ Interpreter or other auxiliary aid for the deaf and hard of hearing  
☐ Spokesperson or other auxiliary aid for the speech impaired  
☐ Foreign language interpreter-specify language: \_\_\_\_\_  
☐ Other: \_\_\_\_\_

Attorney Name: Tracey A. Rohrbaugh (WVSB #6662)

Firm: Kay Casto & Chaney PLLC

Address: 400 Foxcroft Avenue, Suite 100, Martinsburg, WV 25401

Telephone: (304) 901-7502

Representing:

- ☒ Plaintiff ☐ Defendant  
☐ Cross-Defendant ☐ Cross-Complainant  
☐ 3rd-Party Plaintiff ☐ 3rd-Party Defendant

☐ Proceeding Without an Attorney

Original and \_\_\_\_\_ copies of complaint enclosed/attached.

Dated: 3 / 11 / 2020

Signature: Tracey A. Rohrbaugh

FILED

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

2020 MAR 12 AM 9:54

JE HOOD  
CIRCUIT CLERK  
CABELL CO WV

**ACME ENTERPRISES, INC.,**  
a Michigan corporation,

*Plaintiff,*

v.

Civil Action No. 20-C-84

**M C DEVELOPMENT COMPANY, INC.,**  
a Kentucky corporation,

/s/ **CHRISTOPHER D. CHILES**

*Defendant.*

### COMPLAINT

COMES NOW the Plaintiff, Acme Enterprises, Inc. (hereinafter "Acme"), by counsel, and for its Complaint against the Defendant does state and aver as follows:

#### **Background and Parties**

1. This is an action to enforce a mechanic's lien and for breach of contract. Acme seeks damages from M C Development Company, Inc. (hereinafter "MCDC"), for the value of labor and materials supplied by Acme in the construction of a Taco Bell restaurant (hereinafter "the Project") at 100 Kinetic Drive, Huntington, Cabell County, West Virginia (hereinafter "the Property").

2. The Plaintiff, Acme Enterprises, Inc., is a Michigan corporation with its principal place of business located at 1571 Martin Road, Roseville, Michigan.

3. The Defendant, MCDC, is a Kentucky corporation, with its principal place of business located at Court and Madison Streets, Louisa, Kentucky and is and was, at all relevant times, the owner of the Property.

### **Jurisdiction and Venue**

4. Jurisdiction and venue are proper in this Court, because the parties contracted for construction of the Project on Property located in Cabell County, West Virginia.

### **Facts**

5. On or about August 28, 2018, Acme entered a contract with MCDC for construction of a Taco Bell restaurant (hereinafter "the Restaurant") on the Property. A copy of the Contract between the parties is attached hereto and incorporated herewith as **Exhibit A**. The initial Contract sum was One Million One Hundred Seventy-One Thousand Six Hundred Thirty-Three Dollars (\$1,171,633.00).

6. In accordance with the parties' Contract, and in anticipation of being paid for its work, Acme began its work on or about September 2018, and the project was substantially complete as of October 29, 2019.

7. During the course of the Project, there were a number of necessary change orders generated as a result of delay, inconsistencies in the construction plans, and other unforeseen circumstances.

8. MCDC disputed many of the proposed change orders generated by Acme for its work and refused to approve them. Nevertheless, believing that the issues could be resolved, and as a showing of good faith, Acme continued to work on the Project.

9. On September 12, 2019, Acme filed a Notice of Mechanic's Lien against MCDC, for the sum of \$242,897.54, for work performed, and materials provided, by Acme for which MCDC refused to pay. The lien was timely recorded on September 12, 2019 in the Office of the Clerk of the Cabell County Commission in Mechanic's Lien Book 22, at Page 554, and it claimed a lien on the interest in and upon the real estate, buildings, structures and improvements

situate on the described Property, as more fully identified in the Notice of Mechanics' Lien which is incorporated herewith. *See Exhibit B.*

10. Acme substantially completed its work on the Project on or about October 29, 2019. Thereafter, it invoiced MCDC for the balance due pursuant to the original contract and approved change orders.

11. Notwithstanding the terms of the Contract, MCDC failed and refused to pay Acme in a timely manner for the labor and materials supplied for the Project. Furthermore, MCDC refused to approve change orders that were necessary to advance Acme's work on the Project.

12. As a result of MCDC's failure and refusal to pay Acme the balance due pursuant to its contract and change orders, Acme filed a revised Notice of Lien on February 4, 2020, in the amount of Three Hundred Seventy-Four Thousand Five Hundred Nine Dollars and 30 Cents (\$374,509.30). Said lien was timely recorded on February 4, 2020, in the Office of the Clerk of the Cabell County Commission in Mechanic's Lien Book 22, at Page 588, and it claimed a lien on the interest in and upon the real estate, buildings, structures and improvements situate on the described Property, as more fully identified in the revised Notice of Mechanics' Lien which is incorporated herewith. *See Exhibit C.*

13. The Notices of Lien were timely filed for recording in the appropriate Clerk's office prior to or within 100 days from the time Acme last supplied labor and materials to MCDC, and this Complaint has been filed within six (6) months of the date the Notices of Mechanic's Liens were filed for recording in the office of the Clerk of the Cabell County Commission.

14. As of the filing of this Complaint, MCDC has still failed and refused to pay Acme the remaining balance due of \$374,509.30 for labor and materials supplied to the Project.

### **Count I – Enforcement of Mechanic's Lien**

15. Acme realleges, and incorporates herein, each and every allegation contained in Paragraphs 1 through 14 of the Complaint as if fully set forth in this paragraph.

16. From the time the Contract was entered into through October 29, 2019, Acme furnished labor and materials for the benefit of the Property and MCDC.

17. Notwithstanding the fact that Acme supplied labor and materials to the Project, MCDC refused to pay Acme according to the terms of the Contract.

18. On February 4, 2020, and within 100 days of the date that Acme ceased to furnish labor and materials for the Project on the Property, Acme recorded, with the Clerk of the Cabell County Commission, a Notice of Mechanic's Lien on the Property in the updated amount of \$374,509.30.

19. Pursuant to the terms of the Contract, MCDC still owes Acme \$374,509.30 for labor and materials supplied for the benefit of the Project.

20. Pursuant to the provisions of West Virginia Code § 38-2-1 *et seq.*, Acme seeks to enforce its Mechanic's Lien, and, accordingly, it has filed this action within six (6) months of the time the lien was recorded.

WHEREFORE, as a direct and proximate result of Defendant's failure to pay what is owed to Plaintiff, Plaintiff seeks to enforce its Mechanic's Lien in the amount of \$374,509.30, or whatever amount is reasonably proven at trial to remain due and owing, plus all interest, costs and fees recoverable by law. Plaintiff requests that the Court order a sale of the Property in



satisfaction of the lien plus interest, costs, fees and such other sums as the Court may deem appropriate.

### **Count II – Breach of Contract**

21. Acme incorporates the allegations of Paragraphs 1 through 20 of the Complaint as if set forth in this paragraph verbatim.

22. According to the terms of the Contract between the parties, MCDC agreed to pay Acme for its Work on the Project.

23. Acme performed its Work pursuant to the parties' Contract, and it deserves to be paid for its Work.

24. MCDC breached its contractual obligations by failing to pay Acme in a timely manner for its Work, including labor and materials supplied to the Project.

25. MCDC owes Acme \$374,509.30, according to the terms of the Contract and subsequent change orders.

26. As a direct and proximate result of MCDC's breach, Acme has suffered damages in the amount of \$374,509.30, plus general damages, interest, its attorney fees and costs incurred in pursuing this Complaint.

WHEREFORE, Acme demands judgment against MCDC in the amount of \$374,509.30, plus general damages in an amount to be proven at trial, plus interest, its attorney fees and costs incurred in pursuit of this Complaint.

### **Count III – Quantum Meruit/Unjust Enrichment**

27. Plaintiff incorporates into this paragraph all allegations of Paragraphs 1 through 26 of the Complaint as if set forth verbatim in this paragraph.

28. Acme performed the above-described work under such circumstances that it reasonably expected to be paid for its Work.

29. Defendant MCDC was unjustly enriched by the Work that Acme performed on its Property. The benefits that Defendant MCDC received and retained from Acme's Work were such that it would be inequitable and unconscionable to permit Defendant MCDC to receive and retain those benefits without paying for them.

30. As a direct and proximate result of Defendant MCDC's failure to pay for labor and materials provided by Acme, Acme is entitled to recover damages under theories of *quantum meruit* and/or unjust enrichment, including the reasonable value of the work it performed and materials it provided to Defendant MCDC.

WHEREFORE, Plaintiff Acme demands judgment against Defendant MCDC, as follows:

- (a) An award of compensatory damages in the amount of \$374,509.30;
- (b) Damages for annoyance and inconvenience and such other general damages as may be proven at trial;
- (c) To the extent necessary, to enforce Plaintiff's Mechanic's Lien for the materials and labor supplied by Acme to the benefit of MCDC and its Property by ordering the sale of the Property in satisfaction of the lien plus interest, costs, fees and such other sums as the Court may deem appropriate;;
- (d) An award of pre- and post-judgment interest;

- (e) An award of attorneys' fees and costs incurred by Acme to collect the sums due;  
and  
(f) Such other and further relief as the Court deems just and proper.

PLAINTIFF DEMANDS TRIAL BY JURY.

**ACME ENTERPRISES, INC.**  
**Plaintiff, By Counsel**



---

Victoria L. Wilson (WVSB No. 10607)  
Kay Casto & Chaney PLLC  
707 Virginia Street, East  
Suite 1500  
Charleston, WV 25301  
Phone: (304) 345-8900  
Email: [vwilson@kaycasto.com](mailto:vwilson@kaycasto.com)

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Phone: (304) 901-7502  
Email: [trohrbaugh@kaycasto.com](mailto:trohrbaugh@kaycasto.com)



# TDS CONSTRUCTION CONTRACT

This Contract ("Contract") consists of this Construction Contract and the Construction Documents (as defined below)

Contractor must notify Owner/Developer if there are any items missing from the Construction Documents

Contract Date: 08/26/2016

Owner/Developer: *M. B. Development, Inc.*  
Eric B. Cleveland  
Address: P.O. Box 27  
City, State, Zip: Louisville, KY 40230-0027

Construction Manager: Clint Langley YUM Restaurant Services Group, Inc. ("YRSG" or the "Construction Manager")

Contractor: Acme Enterprises, Inc.  
Address: 15751 Martin Road  
City, State, Zip: Roseville, MI 48066  
Telephone:  
Fax:  
Vendor No.:

Architect: CMA  
Address: 1300 Summit Avenue, Suite 300  
City, State, Zip: Ft. Worth, TX 76102

Site No. (unless Remodel): 311250

Facility No. (for Remodel): 034857

Entity No. (for all projects): 437761

In consideration of the premises set forth below, Owner/Developer and Contractor agree as follows:

1. **Contractor's Work.** Contractor shall construct or remodel on the Premises (as defined below) a 14,000 sq. ft. restaurant (the "Restaurant") and other improvements in accordance with the plans, specifications and other documents listed below and as otherwise described in this Contract (such construction being referred to herein as the "Work"), which documents are incorporated herein by this reference. These documents (hereinafter the "Construction Documents") are described as follows:

	Prepared by:	Date:
Invitation to Bid	Owner/Developer	6/4/16
Bid Proposal	Contractor	8/29/16
Geotechnical Report	Triad Eng	7/21/16
Addendum 1	CMA	6/1/16
Bid Clarification Letter	Contractor	8/29/16
Permit Set	CMA	4/30/16
Bid Set	CMA	5/30/16
Specifications	CMA	4/30/16

Contractor hereby acknowledges receipt of the Construction Documents in triplicate. Contractor shall initiate one of such sets and deliver such initiated set to Owner/Developer upon execution of this Contract.

Contractor is responsible to ensure that the Construction Documents are complete and secure. Contractor will not release any of the contents of the Construction Documents without Owner/Developer's written approval.

"Remodel" includes any conversion, brand addition, re-image or other actions that do not pertain to the ground-up construction of a new facility.

2. **Contractor.** Contractor shall supervise and direct the Work, using its best skill and attention, and shall be solely responsible for all construction means, methods, techniques, sequences and procedures. Unless otherwise noted, Contractor shall be responsible for coordinating all portions of the Work and shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation and other facilities and services necessary for the proper execution of the Work. Contractor shall be responsible for the acts and omissions of its employees and subcontractors, their agents and employees, and for all other persons performing any of the Work under any agreement with, or otherwise on behalf of, Contractor.

3. **The Premises.** The Restaurant shall be constructed/remodeled on the real property (the "Premises") located as follows:

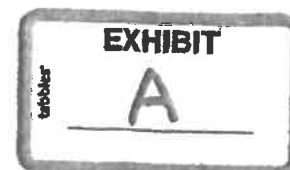
Address: 100 Kinetic Drive

City, State, Zip: Huntington, WV, 25701

4. **Contract Sum.** For the proper performance of the Work, Owner/Developer shall pay Contractor the contract sum ("Contract Sum") in accordance with the terms hereof. The Contract Sum includes, and Contractor shall be responsible for, all federal, state and local taxes, including excise taxes, sales and use taxes, and retailers' occupational taxes. The Contract Sum is: One Million, One Hundred, Seventy-One Thousand, Six Hundred, Thirty-Three Dollars and no/100 (\$1,171,633.00). The Contract Sum does not include the purchase price and shipping cost of the items specifically identified as Owner/Developer supplied in the Construction Documents or inclusion to Bid Letter, but Contractor shall be responsible for receiving, unloading, inventorying, warehousing, protecting, assembling and installing such items and all such costs are included in the Contract Price.

5. **Construction Schedule.** Within five (5) days after award of the Contract, Contractor shall prepare and submit to Owner/Developer a construction schedule (the "Construction Schedule") for the Work indicating the starting and completion dates for the various stages of the Work and the sequence of construction. The Construction Schedule shall cover all activities, milestones and trades required for the execution of the Work with scheduling and delivery dates for long lead time materials and equipment. The Construction Schedule is subject to the approval of Owner/Developer. Contractor shall maintain a copy of the Construction Schedule at the job site, updated weekly during the course of the Work; provided, however, that the Substantial Completion date identified in the Construction Schedule may not be changed except pursuant to a written Change Order executed by Contractor and Owner/Developer. Contractor shall commence construction within five (5) calendar days after written notice to proceed from Owner/Developer. Substantial Completion of the Work shall be no later than Eighty (80) calendar days after the date of the issuance of such written notice to proceed by the Owner/Developer. For purposes of this Section 5, "Substantial Completion" shall be the earlier of the date the Restaurant opens for business or the date a Certificate of Occupancy is issued. Contractor shall be responsible for obtaining the Certificate of Occupancy. By executing this Contract, the Contractor acknowledges and confirms that it can substantially complete the Work within the number of calendar days indicated above.

6. **Performance and Payment Bonds.** If requested by Owner/Developer, Contractor will provide Owner/Developer with payment and performance bonds in the full amount of the Contract Sum naming



Contractor as obligor and Owner/Developer as obligee in such form as is approved by Owner/Developer and with a surety company approved by Owner/Developer. The cost of the premium shall be added to the Contract Sum. Contractor shall ensure that such premium is the lowest rate available to Contractor from such surety.

At Owner/Developer's election, Contractor shall furnish Owner/Developer (within five (5) business days after Owner/Developer's request, as same are made from time to time) with information deemed necessary by Owner/Developer to show that Contractor is financially sound and capable of fully performing under this Contract. If, in Owner/Developer's judgment, Contractor is reasonably found not financially sound or capable, then Owner/Developer may, by written notice, immediately terminate this Contract without further obligation to Contractor other than to pay Contractor for the value of the Work properly performed at the time of termination.

7. **Permits.** Contractor shall obtain all licenses, permits, approvals and certificates (collectively, the "Permits") necessary to complete the Work in compliance with all applicable laws, ordinances, rules, and regulations. At Owner/Developer's election, Owner/Developer may obtain any of the Permits.

8. **Insurance.** During the term of this Contract and until the Final Payment (as hereinafter defined) is made, Contractor shall at all times maintain the following insurance coverage from insurance companies that are licensed to do business in the state where the Premises are located and that have a General Rating of "A" or better as set forth in the most current issue of Best's Key Rating Insurance Guide:

- a. If the Contract Sum is less than or equal to \$350,000, Commercial General Liability Insurance with a limit for each occurrence not less than \$1,000,000 and a general aggregate limit not less than \$1,000,000. If the Contract Sum is greater than \$350,000, Commercial General Liability Insurance with a limit for each occurrence not less than \$3,000,000 and a general aggregate limit not less than \$3,000,000.
- b. Workers' Compensation Insurance in accordance with applicable state requirements.
- c. Employers' Liability Insurance in an amount not less than \$1,000,000.
- d. Comprehensive Automobile Liability Insurance including owned, non-owned and hired coverage in an amount not less than \$1,000,000 Combined Single Limit.
- e. Such other insurance required by law, ordinance, rule or regulation.

Contractor shall include Owner/Developer, YRSG and each of their respective directors, owners, partners, members, employees and affiliates as additional insureds to the insurance policies described above (excluding the Workers' Compensation). The insurance coverage afforded under the policies described herein shall be primary and non-contributing with respect to any insurance carried independently by the additional insureds. All such insurance policies shall indicate that as respects the insureds (whether named or otherwise), cross-liability and severability of interests shall exist for all coverages provided thereunder. Prior to commencement of the Work, Contractor shall furnish Owner/Developer with Certificates of Insurance for each of the above insurance policies; providing, among other things, that Owner/Developer will receive at least thirty (30) days prior written notice of any material change in, or cancellation of, such insurance; and (b) identifying the additional insureds on the policies required above.

9. **Risk of Loss.** Contractor shall purchase and maintain property insurance in the amount of the total Contract Sum as well as subsequent modifications thereto for the entire Work at the site on a replacement cost basis without voluntary deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or

otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made. This insurance shall include interests of the Owner, the Contractor and subcontractors in the Work. Property insurance shall be on an "all-risk" policy form and shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, telework, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's services and expenses required as a result of such insured loss. Coverage for other perils shall not be required unless otherwise provided in the Contract Documents. If the property insurance requires minimum deductibles, Contractor shall pay costs not covered because of such deductibles. Unless otherwise provided in the Contract Documents, the property insurance shall cover portions of the Work stored off the site after written approval of the Owner of the value established in the approval and also portions of the Work in transit.

10. **Custody of Plans.** During the performance of the Work, Contractor shall retain in its sole custody (except as required for the performance of the Work), all Construction Documents and any other drawings, plans, specifications and any copies thereof furnished to Contractor by Owner/Developer. A co-signed set of such Construction Documents and other drawings, plans, and specifications shall be kept on the Premises at all times during the course of construction. All drawings, plans, specifications and copies thereof furnished by Owner/Developer shall remain the property of Owner/Developer and shall be returned to Owner/Developer at the completion of the Work.

11. **Payment.** Throughout the course of this Contract, Contractor shall submit to Owner/Developer not more than five (5) progress payment requests when Contractor has completed Work associated with milestones specified on the payment schedule to be provided by the Owner/Developer. Contractor shall submit all progress payment requests in the form provided by the Construction Manager. Progress payments shall reflect the value of the Work in place, less amounts already paid to Contractor, less ten percent (10%) retainage or the maximum amount allowable as law (hereinafter "Retainage") and any amounts necessary to complete the Work. The last such progress payment request shall also include a complete list of all subcontractors and material suppliers, including names, addresses, and telephone numbers, used for the Work. Upon satisfactory progress of the Work and Owner/Developer's receipt of completed and signed progress payment requests in form reasonably satisfactory to Owner/Developer and with all supporting documentation, Owner/Developer will make progress payments on this Contract with thirty (30) days of receipt of the request. Notwithstanding the foregoing, Owner/Developer may withhold all or a portion of a payment when in Owner/Developer's opinion it is necessary to withhold such amount to protect Owner/Developer from loss or liability due to (a) defective Work not remedied, (b) claims made or liens filed or threatened to be filed with respect to the Work, (c) the failure of Contractor to make payment promptly to subcontractors or material suppliers for labor, materials or equipment, (d) damage to Owner/Developer or another contractor or subcontractor, (e) the probability, based on facts reasonably satisfactory to Owner/Developer, that the Work will not be completed when and as required by the Construction Schedule or (f) the substantial failure by the Contractor to carry out the Work in accordance with the Construction Documents. In addition, Owner/Developer may reduce any payments due Contractor under this Contract by amounts owed by Contractor to Owner/Developer or any Affiliate (as hereinafter defined) under any contract or other agreement between Contractor and Owner/Developer and/or such Affiliate ("Affiliate Contract"), and/or Owner/Developer may reduce any payments due Contractor under any Affiliate Contract by amounts owed by Contractor to Owner/Developer under this Contract. For purposes of this Contract, an "Affiliate" with respect to any entity or person shall be any entity controlling, controlled by or under common control with such entity or person.

Owner/Developer may make payments by joint check or other method that Owner/Developer determines is prudent.

**FINAL PAYMENT.** Final completion shall be deemed to have occurred after the Restaurant is open or a final certificate of Occupancy has been received, all finished construction items (including all items identified on the Final Punchlist as described below) are completed, and all test reports, certifications, warranties, warranty books, permits, permitted set of Construction Documents, all final Change Orders have been approved by and delivered to Owner/Developer and all other requirements of this Contract have been satisfied ("Final Completion"). All remaining amounts due to Contractor under this Contract (the "Final Payment") shall be paid at Final Completion.

In addition to other requirements of this Contract, as a prerequisite to Final Completion and Final Payment, the following documents must be delivered to Owner/Developer in final form, fully completed and validly executed:

- a. A final and unconditional waiver of lien from Contractor, each subcontractor and each supplier in form and content provided by Owner/Developer, each of which shall be duly executed by Contractor, the subcontractor or the supplier, as the case may be, certifying that such party (i) has been paid in full and (ii) releases the Owner/Developer and Premises from any claims or liens (Owner/Developer shall have the right to require that said waivers be notarized);
- b. Certificate of Occupancy;
- c. As required by Owner/Developer in the bid documents, Concrete or Asphalt Paving Certification (certifying sub-base, base and surface preparation and application);
- d. As required by Owner/Developer in the bid documents, Engineer's Inspection Report certifying all concrete work, including mix, reinforcing and form work;
- e. Original permitted Construction Documents retained with as-built information;
- f. Certification of any other item or material reasonably requested by Owner/Developer; and
- g. Contractor's certification that all Work has been finally and properly completed, including all items on the Final Punchlist.

All items required in connection with the Final Payment shall be completed and submitted by Contractor within thirty (30) days after the earlier of the date the Restaurant opens and the date it is ready to open.

If Contractor does not timely comply with any of the requirements set forth above for the Final Payment, Owner/Developer may retain any unpaid portion of the Contract Sum to protect Owner/Developer against any lien rights or claims, until all requirements for the Final Payment have been satisfied.

**12. Mechanic's Liens and Other Claims.** Contractor shall pay all subcontractors and material suppliers in a timely manner to prevent mechanic's liens, other liens, claims or causes of action being filed against the Premises, Owner/Developer, Owner of the Premises or otherwise with respect to the Work. If Owner/Developer receives a claim, cause of action, notice of a lien to be filed, or if a lien is filed due to Contractor's nonpayment, Owner/Developer may, in its sole and absolute discretion, after five (5) days notice to Contractor, immediately pay the full amount of any such claim directly or indirectly to the claimant and deduct the same from the Contract Sum. Contractor waives any and all claims or causes of action Contractor has or may have against Owner/Developer for payments made under this Section 12. Owner/Developer may further require Contractor to obtain a bond protecting Owner/Developer and any other parties with an interest in the Premises (such as a landlord or mortgagee) covering any such lien in an amount equal to at least one and one-half times the amount of such lien plus an amount sufficient to cover Owner/Developer's legal fees, interest and increased costs and expenses resulting therefrom. Contractor shall

promptly defend to conclusion against such lien Owner/Developer and any other third parties with an interest in the Premises.

**13. Final Construction Observation Report and Punchlist.** At the time Contractor believes it has achieved Substantial Completion and before the Restaurant is delivered to Owner/Developer's operations team, Contractor shall meet with the Construction Manager, the Architect and/or the Construction Manager's designees and complete a Final Construction Observation Report (the "FCO"). Contractor shall commence with the correction and/or completion of any item on the FCO immediately thereafter. At delivery of the Restaurant, Contractor shall again meet with the Construction Manager, the Architect and/or the Construction Manager's designees to establish a formal list of construction deficiencies (the "Final Punchlist"), which shall include any incomplete items from the FCO. If at the time the Final Punchlist is developed it is determined that less than ninety percent (90%) of the items appearing on the FCO are not complete, Contractor shall be responsible for all costs associated with Owner/Developer's time and expense in monitoring the completion of the FCO and the Final Punchlist, including the cost of an independent consultant. In addition, if the items set forth on the Final Punchlist are not corrected within ten (10) days after the Final Punchlist is developed, Owner/Developer may hire an independent contractor to complete the Work on Contractor's behalf and may deduct the costs from the Final Payment, or at Owner/Developer's option, bill Contractor for the costs of such work, including the cost of any supervisor, for immediate payment. If an item cannot reasonably be corrected within such ten (10) days, the reasons therefor shall be explained in writing on the Final Punchlist to Owner/Developer's satisfaction and Owner/Developer may grant an extension of time in its discretion. The preparation of the FCO or the Final Punchlist by Owner/Developer shall in no way waive or alter the rights of Owner/Developer or the obligations of Contractor hereunder, including, without limitation, rights or obligations pursuant to representations and warranties contained herein.

**14. Change Orders.** Owner/Developer may make any changes to the Work, without violating this Contract, pursuant to the change order process hereinafter described. All such changes shall be performed under the conditions of the original Contract, except that no extra work or modification shall be done or paid for without a written Change Order from Owner/Developer ("Change Order"). The Contract Sum shall be increased or decreased by an amount agreed to in writing by the parties prior to the commencement of any such changed Work using Owner/Developer's approved Construction Change Order Request Form, which amount shall not include more than a ten percent (10%) mark-up to Contractor for overhead and profit. Contractor shall provide reasonable documentation supporting the actual and reasonable costs of any Change Order Work, including without limitation subcontractor's and materials invoices.

The Contract Sum and milestone dates on the Construction Schedule (including, without limitation, the date for Substantial Completion identified on the Construction Schedule) may only be adjusted by written Change Order executed by Owner/Developer and Contractor.

**15. Default by Contractor.** Should Contractor become insolvent, or should Contractor refuse or fail to supply enough properly skilled workers or proper materials, or should Contractor fail to make payments to subcontractors or materials suppliers for material or labor in accordance with the respective agreements between Contractor and subcontractors or materials suppliers, as the case may be, or should Contractor disregard laws, ordinances, rules, regulations or orders of a public authority having jurisdiction, or should the Contractor otherwise commit a breach of this Contract and/or fail to perform any work required by the Contract, then Owner/Developer may, in addition to any other rights or remedies it may have at law, in equity or under this Contract, terminate this Contract after five (5) days written notice and/or complete the Work by means selected by Owner/Developer in its sole discretion. Upon termination of this Contract, Owner/Developer may take possession of the Premises and of all materials, equipment, tools, and construction equipment and machinery thereon, even if owned by Contractor. If the unpaid balance of the Contract Sum exceeds the cost of finishing the Work, such excess shall be paid to Contractor. If

such costs exceed the unpaid balance, Contractor shall promptly pay the difference to Owner/Developer. Owner/Developer may, in its sole discretion, also terminate any other contracts or agreements Owner/Developer has with Contractor and/or any Affiliates of Contractor.

16. **Owner/Developer's Inspections and Right to Stop the Work and Carry Out the Work.** The Construction Manager shall have the right to inspect the Work and reject any of the Work which does not conform to the Construction Documents. If Contractor fails to correct defective Work or fails to supply materials or equipment in accordance with this Contract, Owner/Developer may order Contractor to stop the Work until it is corrected, and Contractor shall not be entitled to an extension of time in connection therewith. Owner/Developer may also stop the Work for the purpose of performing special inspections or testing of the Work. Should any of the Work be found faulty as a result of special inspections or tests, Contractor shall correct the Work immediately and pay all costs of correcting the Work and all fees for said inspections or tests. Should the Work be satisfactory, Owner/Developer will pay the fees for said inspections or tests, and will grant an appropriate extension of time to Contractor for any delay caused by such inspections or tests.

If Contractor fails to correct defective Work as required, or fails to carry out the Work in accordance with the Construction Documents, Owner/Developer may, without prejudice to any other remedies Owner/Developer might have, correct such defective Work, and deduct the cost of same from payments then or thereafter due under this Contract. If such payments are not sufficient to cover such cost, Contractor shall promptly pay the difference to Owner/Developer upon demand.

17. **Termination Without Cause.** Owner/Developer may terminate the Contract without cause upon ten (10) days prior written notice to Contractor. In such event, Contractor shall cease the Work and take such actions as are reasonably necessary to wind up the Work and vacate the job site. Contractor shall be entitled to receive reimbursement for all out-of-pocket costs incurred up to the date of termination, plus a percentage of profit and overhead equal to the percentage of Work completed prior to the receipt of Owner/Developer's notice.

18. **Owner/Developer's Construction Manager.** The Construction Manager shall supervise Contractor and the Work in accordance with this Contract and accepted industry practices on behalf of Owner/Developer. Contractor and Owner/Developer hereby acknowledge and agree that Construction Manager is authorized to approve and execute on behalf of Owner/Developer Change Orders or single expenditures, provided such Change Orders and/or expenditures total less than \$25,001 in the aggregate, without obtaining the express consent of Owner/Developer. Notwithstanding anything herein to the contrary, the Construction Manager shall have no (i) obligation to Contractor, including without limitation any and all obligations of Owner/Developer hereunder and (ii) liability for the actions, omissions, negligence or misconduct of Contractor or Owner/Developer or any of their respective employees, subcontractors or suppliers. Neither the Construction Manager nor any affiliate, subsidiary or parent of Construction Manager is intended to be nor will be construed to be a party to this agreement.

19. **Contractor's Supervision of the Work.** Contractor shall employ a competent qualified superintendent who shall be in attendance at the Premises during the performance of the Work, and who shall at all times maintain good discipline and order with Contractor's employees, subcontractors, suppliers, messengers and laborers. Contractor's superintendent shall be approved by the Owner/Developer. The superintendent shall not be replaced or reassigned to any other project prior to the Final Completion of the Work without Owner/Developer's prior consent. Contractor shall supplement its staff with whatever additional supervisory personnel are required to assure that Substantial Completion and Final Completion shall occur when and as required by this Contract. Contractor shall review all Construction Documents and prior instructions and shall immediately report to Owner/Developer any error, inconsistency or omission Contractor may discover. Contractor shall not commence the

Work without the Construction Documents and any other appropriate plans, specifications or interpretations.

Contractor agrees to use only subcontractors and material suppliers approved by Owner/Developer, except in the event of an emergency, in which case Contractor may, in Contractor's good faith discretion, substitute a subcontractor or material supplier and shall notify the Construction Manager of such change in writing within three (3) days.

Contractor shall maintain two (2) separate phone lines at the job site (one ("1") line for a Remodel). One line will be for voice communication and one for a fax machine. Contractor shall place a fax machine in the superintendent's job site office. A cellular phone with voice mail will satisfy the voice communication requirement.

20. **Protection of Work and Property.** Contractor shall continuously maintain adequate protection for the Work from damage and the elements and shall protect and take all reasonable precautions to protect Owner/Developer, the Premises, any third party and the property of any third party from injury or loss during the course of the Work.

Contractor shall comply with all applicable rules and regulations of any public authority having jurisdiction for the safety of persons or property. Contractor shall erect and maintain as required by existing conditions and progress of the Work all reasonable safeguards for safety and protection, including posting danger signs, promulgating safety regulations and notifying Owner/Developer and users of adjacent utilities and properties.

If the severity of the elements makes it impossible to continue operations in a safe manner in spite of all reasonable precautions, Contractor shall cease work and immediately notify Owner/Developer. All Work damaged due to Contractor's negligence shall be removed and replaced at Contractor's expense.

Contractor shall provide and maintain a water-tight storage space, secure from theft, for storage of all equipment required by the Construction Documents or otherwise needed for the performance of the Work. Contractor shall keep the Premises and surrounding area free from accumulation of debris or rubbish. At the completion of the Work, Contractor shall remove all waste materials, rubbish, tools, construction equipment, machinery and surplus materials from the Premises, except for those items owned by Owner/Developer, which shall be stored or disposed of as directed by Owner/Developer.

21. **Indemnity.** Contractor shall indemnify, defend and hold harmless Owner/Developer, Construction Manager, Architect and each of their respective directors, owners, partners, members, employees and agents, and any subsidiaries or Affiliates, from and against any and all claims, demands, suits, liabilities, injuries (personal or bodily), property damage, causes of action, losses, expenses, damages or penalties, including, without limitation, court costs and reasonable attorneys' fees; arising or resulting from, or occasioned by or in connection with (i) the performance by Contractor of the Work and its services, duties and obligations under this Contract, (ii) the inaccuracy of any warranty or representation of Contractor contained in this Contract, (iii) any act or omission in act by Contractor, a subcontractor, a sub-subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, and/or (iv) any breach, default, violation or nonperformance by Contractor of any term, covenant, condition, duty or obligation provided in this Contract. This indemnification, defense and hold harmless obligation shall survive the termination or expiration of this Contract, whether by lapse of time or otherwise. This indemnification obligation shall not be limited (i) by a limitation on the amount or type of damages, compensation or benefits payable by or for Contractor, a subcontractor or any other party under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts, or (ii) pursuant to any common law or case law.

22. **Compliance with Laws.** In its performance of the Work, Contractor shall fully comply, and shall ensure that the Work fully complies, with all applicable federal, state and local laws, ordinances, rules and regulations.

including all amendments thereto (collectively, "Laws"), including but not limited to the Americans with Disabilities Act of 1990 and its implementing regulations and codes, and all other Laws relating to access for individuals with disabilities to public accommodations. Contractor shall ensure that it and its subcontractors comply with and maintain all records required by the United States Citizenship and Immigration Services and applicable immigration Laws. Prior to commencing the Work, Contractor shall review the Construction Documents to confirm their conformity with applicable Laws. If Contractor then or thereafter finds the Construction Documents are at variance with Laws, then Contractor shall immediately notify the Construction Manager in writing before proceeding with the Work. The cost of any necessary changes to comply with Laws shall be agreed to by Owner/Developer before Contractor proceeds with the Work. If any of the Work is performed contrary to Laws, Contractor shall bear all costs required to correct the Work.

23. Contractor's Warranties and Guarantees. Contractor warrants and guarantees that all of the Work shall be done in a first class, workmanlike manner and in accordance with the Construction Documents with new, quality materials and warrants all Work and materials against defects in the material or the workmanship for a period of one (1) year from the date of Final Completion or the opening of the Restaurant (whichever is later), unless stated otherwise in the Construction Documents. If a defect in material or workmanship or a deviation from the Construction Documents is latent, hidden or not readily observable, Contractor's warranty shall be extended for one (1) year from the date of discovery of the defect or deviation. Within ten (10) days after written notice of a defect or deviation, Contractor shall (without expense to Owner/Developer) remedy and repair same and any damage to other work resulting therefrom. If the deficiencies are not timely corrected, Owner/Developer may hire an independent contractor to do the work and shall be reimbursed promptly by Contractor. If any item cannot, with reasonable diligence, be corrected within ten (10) days, Contractor agrees to set forth in writing a reasonable schedule for completion of such work. If the schedule is not met, Owner/Developer may immediately upon notice to Contractor, complete such work and be entitled to prompt reimbursement from Contractor.

Contractor agrees, upon reasonable notice, to meet with the Construction Manager or a designated representative within three (3) months prior to the expiration of one (1) year from the date of the commencement of the foregoing one (1)-year warranty period for a warranty inspection of the Work (the "Warranty Inspection"). During the Warranty Inspection, warranty deficiencies shall be noted, and the list of deficiencies shall be given to Contractor. Contractor agrees to correct all such deficiencies within ten (10) days after the date of the Warranty Inspection. If the deficiencies are not timely corrected, Owner/Developer may hire an independent contractor to do the work and shall be reimbursed promptly by Contractor. If any item cannot, with reasonable diligence, be corrected within ten (10) days, Contractor agrees to set forth in writing a reasonable schedule for completion of such work. If the schedule is not met, Owner/Developer may immediately upon notice to Contractor, complete such work and be entitled to prompt reimbursement from Contractor. The failure to list any warranty deficiencies during the Warranty Inspection shall in no way relieve Contractor from its warranty obligations hereunder.

In addition, but not by way of limitation, Contractor:

- a. Warrants and guarantees all stucco unconditionally for two (2) years after the date of Final Completion from and against popping, peeling, cracking, and/or defects.
- b. Warrants and guarantees the roofing work unconditionally for a period of two (2) years after the date of Final Completion, including without limitation that the roofing and flashing is water tight and free from leaks.
- c. Shall provide a ten (10) year manufacturer's guarantee (from the date of Final Completion) covering any and all repairs or replacements needed to keep the roof, including the field and flashing, water tight.

- d. Warrants and guarantees that the Work fully complies with the Americans with Disabilities Act of 1990 and its implementing regulations and codes, and all other applicable Laws relating to access for individuals with disabilities to public accommodations, for such time as the statute of limitations shall continue to apply for any alleged violations of such laws, regulations and codes;
- e. Warrants and represents that Contractor does not and will not during the course of the Work discriminate against any employee or applicant for employment based on race, color, sex, national origin, religion, age handicap, or other unlawful basis.
- f. Shall provide a five (5) year warranty from the date of Final Completion for termite treatment signed by the applicator and Contractor, and
- g. Shall provide landscape maintenance, including watering of all plant materials and replacement of dead plant materials for a period of sixty (60) days after the date of Final Completion.

No act or omission of Owner/Developer or Construction Manager, including, without limitation, the Warranty Inspection, shall relieve Contractor of Contractor's responsibility for proved deficient workmanship and materials.

Contractor shall cause the following subcontractors to execute and deliver to Owner/Developer upon completion of the Work a written warranty (in form reasonably satisfactory to Owner/Developer) covering all Work performed by such subcontractors: electricians, plumbers, pavers, roofers, insulation, HVAC suppliers and installers. Such warranties shall be for a period of one (1) year from the date of Final Completion or the opening of the Restaurant (whichever is later), unless a warranty for a longer period of time is required under the Construction Documents. All warranties included in or as part of the Work and supplied to Contractor shall be assigned to Owner/Developer.

24. Notices. All notices to be delivered under this Contract shall be in writing, signed by the parties serving same and delivered personally or by registered or certified U.S. Mail, postage prepaid, or by reputable private delivery service postage prepaid and providing a receipt to sender. Each such notice shall be deemed delivered upon actual delivery or refusal. Notices shall be addressed as follows:

To Owner/Developer: Eric R. Clevenger  
Address: P.O. Box 77  
City, State, Zip: Louisville, KY 40230-0077  
Phone No: 506.638-0002

With Copy to: Clint Langley  
Address: 104 Usa Court  
City, State, Zip: McMurray PA 15317  
Attention:  
Fax No:

Contractor: Acme Enterprises, Inc.  
Address: 16317 Martin Road  
City, State, Zip: Rossville, MI 48066  
Attn: Bob Welby  
Fax:

25. Special Conditions. The terms of this Contract are subject to Owner/Developer obtaining all rights of possession as may be required to lawfully perform the Work in the Premises. If Owner/Developer is unable to timely obtain such possession, Owner/Developer shall promptly notify Contractor of such inability, and this Contract shall be null and void and of no further force or effect.

26. Time. All time limits stated in this Contract are of the essence of the Contract, and Contractor, upon execution hereof and receipt of a written notice to proceed from Owner/Developer shall commence the Work and



perform the Work with all diligence until the completion of same within the time limits set forth in the Construction Documents.

If Contractor is delayed in the progress of the Work by a delay in the issuance of permits by the governing agency (not caused by or due to the fault of Contractor), by an act or neglect of Owner/Developer, by changes ordered in the Work by Owner/Developer (not caused by or due to the fault of Contractor), or by extreme and unusual weather conditions that could not be reasonably foreseen given the location of the Premises, then Contractor shall be entitled to submit a Claim (in the time period required by Section 27) seeking a Change Order extending the date of Substantial Completion in the Construction Schedule by the period of time by which Contractor is actually delayed in the progress of the Work by such event. Such an extension of time shall be Contractor's sole and exclusive remedy for any such delay.

27. **Claims.** A claim is a demand or assertion by Contractor seeking, as a matter of right, the payment of money, or an extension of time or other relief with respect to the terms of the Contract (hereinafter "Claim"). Written notice of any Claim must be given to Owner/Developer by Contractor within ten (10) calendar days after occurrence of the event giving rise to such Claim; otherwise, it shall be waived. Claims must be made by written notice. The responsibility to substantiate a Claim shall rest with Contractor. Pending final resolution of a Claim, unless otherwise agreed to in writing by Owner/Developer, Contractor shall proceed diligently with performance of the Contract, and Owner/Developer shall continue to make payments in accordance with the Contract.

28. **Liquidated Damages.** In addition to other damages Owner/Developer may recover from Contractor for Contractor's unexcused delay in substantially completing the Work on or before the time for Substantial Completion as provided in Section 5 above (or as extended in writing by Owner/Developer), Owner/Developer shall be entitled to recover liquidated damages from Contractor in the amount of \$500.00 for each calendar day that Substantial Completion is delayed, and such amount shall be withheld from the Final Payment hereunder. The parties agree that it would be difficult to assess the actual amount of Owner/Developer's damages, and the amount of \$500.00 for each calendar day of delay is a reasonable estimate of same. This sum is not to be construed as a penalty, and shall be paid to Owner/Developer as compensation for the damages incurred as a result of the delay in obtaining Substantial Completion of the Work.

29. **Code of Conduct.** All employees of Owner/Developer and/or YRSC are obliged under a "Code of Conduct" to perform business in an ethical manner, thus prohibiting them from accepting any privileges, in fact or appearance, which might compromise their ability to execute a bona fide business transaction. Further, this prohibits them from seeking any improper advantage through contribution of funds, equipment or facilities or the provision of other gifts or benefits to public officials or political organizations. Specifically, no illegal or improper payment is to be made to any person or entity. By execution of this Contract, Contractor acknowledges awareness of Owner/Developer's Code of Conduct. Additionally Contractor acknowledges its intention to cooperate with Owner/Developer in developing only ethical business relationships. Should Contractor encounter any business activity in its efforts to establish a business relationship with any representative of Owner/Developer which suggests a violation of its Code of Conduct, Contractor shall communicate such encounter to a Senior Director or Vice President of Development of Owner/Developer.

30. **Owner/Developer's Right to Audit.** Owner/Developer shall also have the right to inspect and copy, with Contractor's assistance and cooperation, Contractor's books and financial reports relating to the Work, the Project and Contractor's financial condition.

31. **Independent Contractor.** Contractor is acting as an independent contractor and has full responsibility for control and supervision of the Work, and Owner/Developer and Construction Manager shall not in any manner be answerable or accountable for any violation of any laws, or for

any injury or damage occasioned by Contractor's actions, or the actions of any in its employ to any person or their properties.

32. **Site Conditions.** Contractor represents that it has taken steps reasonably necessary to ascertain the nature and location of the Work, and that it has investigated and satisfied itself as to the general, local and site conditions which can affect the Work, the Premises and/or the performance of the Work. Therefore, Contractor shall not be entitled to any adjustment to the Contract Sum or Construction Schedule based on any general, local or site conditions, including, but not limited to, concealed or unknown site conditions.

33. **Hazardous Substances.** The Contractor shall not bring or store any Hazardous Substances (as defined below) to or on the Premises. If, in the course of performance of the Work, Contractor encounters on the Project site any matter which it reasonably believes is a Hazardous Substance, Contractor shall immediately suspend the Work in the area affected and shall immediately report the condition orally and in writing to the Owner, Construction Manager, and Architect. If it is determined that such condition involves a Hazardous Substance introduced to the Premises or negligently exacerbated after the date of this Contract by Contractor, its subcontractors or any party for whom they may be liable, then any required, necessary or appropriate remedial actions shall be performed by Contractor at its sole cost and expense. If it is determined that such condition involves a Hazardous Substance that existed at the Premises prior to the date of this Contract and Contractor did not bring the Hazardous Substance to the Premises, then any required remedial actions shall be performed or caused to be performed by the Owner at its sole cost and expense.

"Hazardous Substance" shall mean and refer to any hazardous, toxic or dangerous waste, substance or material defined as a "hazardous waste", "hazardous material", "hazardous substance", "extremely hazardous waste", "restricted hazardous waste", "toxic substance", "industrial waste", "mill tailing", "mining waste", "radio waste" or "special waste" in (i) any provision of state or local law; (ii) the Comprehensive Environmental Response, Compensation and Liability Act as amended (42 U.S.C. Sec. 9601 et seq.); (iii) the Emergency Planning & Community Right-to-Know Act of 1986, as amended (42 U.S.C. Sec. 11001 et seq.); (iv) the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. Sec. 6901 et seq.); (v) the Toxic Substances Control Act, as amended (15 U.S.C. Sec. 2601 et seq.); (vi) the Federal Water Pollution Control Act of 1972, as amended (33 U.S.C. Sec. 1251 et seq.); (vii) the Federal Clean Air Act, as amended (42 U.S.C. Sec. 1701 et seq.); (viii) the Occupational Safety and Health Act, as amended (29 U.S.C. Sec. 651 et seq.); (ix) the Surface Mining Control and Reclamation Act, as amended (30 U.S.C. Sec. 1201 et seq.); (x) any so-called "Superfund" or "Superfund" law; or (xi) any other federal, state or local statute, law, ordinance, code, rule or regulation.

#### 34. Miscellaneous Provisions:

- a. Contractor may not assign this Contract without the prior written consent of Owner/Developer, and Contractor shall not factor or pledge this Contract.
- b. No right or remedy conferred upon or reserved to Owner/Developer in this Contract is intended to be exclusive of any other right or remedy herein or by law provided, but each shall be cumulative and in addition to every other right or remedy given herein or now or hereafter existing at law or in equity.
- c. In the event of any conflict between this Contract and the other Construction Documents, this Contract shall govern.
- d. In the event any provision of this Contract is found to be invalid or unenforceable, the remainder of this Contract shall continue in full force and effect.

- e. This Contract shall be construed in accordance with the laws of the state in which the Premises are located.
- f. This Contract is binding upon the parties, their heirs, successors and approved assignees.
- g. Owner/Developer shall have the right to enter into contracts with separate contractors with respect to the Premises, and Contractor agrees to cooperate with such separate contractors and coordinate the Work with the work of separate contractors. Arrangements between Owner/Developer and separate contractors shall not serve to relieve Contractor of any of its obligations hereunder.
- h. This Contract shall not be construed to create a contractual relationship of any kind between the Owner/Developer and a subcontractor or supplier of Contractor or between any persons or entities other than Owner/Developer and Contractor.
- i. This Contract represents the entire agreement between the parties and supersedes all prior or contemporaneous written or oral communications.
- j. This Contract may be amended or modified only by an instrument in writing signed by the parties.

IN WITNESS WHEREOF, Owner/Developer and Contractor, through their duly authorized signatories, have executed this Contract as set forth below:

OWNERS/DEVELOPER: *M. C. Rosales, Jr.*  
 By: *[Signature]*  
 Print Name: \_\_\_\_\_  
 Its: *J.P.*  
 Date: *10/19/18*

CONTRACTOR: Acme Enterprises  
 By: *[Signature]*  
 Print Name: *JEFF LOMBARD*  
 Its: *Vice President*  
 Date: *9/4/2018*

State Contractor's License No.:

Return To: Robert L. Bandy, Esquire /  
P.O. Box 2031  
Charleston, West Virginia 25327

Cabell County  
Phyllis Smith, Clerk  
Instrument 6031336  
09/12/2019 @ 12:23:02 PM  
MECHANICS LIEN  
Book 22 @ Page 554  
Pages Recorded 1  
Recording Cost \$ 11.00

**NOTICE OF LIEN PURSUANT TO W.VA. CODE §§ 38-2-1 & 38-2-3**

TO: M C Development Company, Inc. Eric B. Clevenger Mark W. Clevenger  
Attn: Mark W. Clevenger P.O. Box 27 216 Main-Cross St.  
P.O. Box 27 Louisa, KY 41230 Louisa, KY 41230  
Louisa, KY 41230

Notice is hereby given, in accordance with the laws of the State of West Virginia, that the undersigned, Acme Enterprises, Inc., the contractor and material provider to M C Development Company, Inc. in the construction of a Taco Bell restaurant, claims a lien to secure the payment of the sum of **Two Hundred Forty-Two Thousand Eight Hundred Ninety-Seven Dollars and Fifty-Four Cents (\$242,897.54)** upon the interest of M C Development Company, Inc. in and to 1.169 AC 4 POLE CREEK, 16<sup>TH</sup> STREET RD, also known as 100 Kinetic Drive, Huntington, WV 25701, and upon all buildings, structures, and improvements thereon.

Acme Enterprises, Inc.

By:   
ROBERT L. BANDY

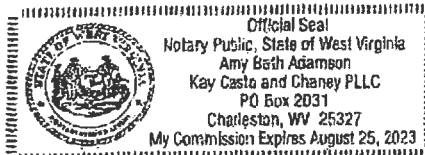
Its: Attorney

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA,

ROBERT L. BANDY, being first duly sworn, upon his oath says that the statements contained in the foregoing notice of lien are true, as he verily believes.

Taken, subscribed and sworn to before me this 10<sup>th</sup> day of September, 2019.

My commission expires August 25, 2023.



  
NOTARY PUBLIC

(This instrument was prepared by Robert L. Bandy, Attorney at Law, KAY CASTO & CHANEY PLLC, P.O. Box 2031, Charleston, West Virginia 25327.)

WEST VIRGINIA, CABELL COUNTY CLERK'S OFFICE  
This instrument was this day presented in this office  
and thereupon, together with the certificate  
thereto annexed, is admitted to record.  
TESTE: CABELL COUNTY CLERK'S OFFICE

SEP 12 2019



Return To: Tracey A. Rohrbaugh, Esquire  
Kay Casto & Chaney PLLC  
400 Foxcroft Ave., Suite 100  
Martinsburg, West Virginia 25401

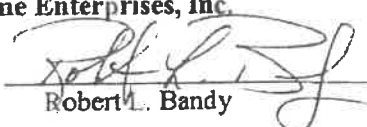
Cabell County  
Phyllis Smith, Clerk  
Instrument 6050644  
02/04/2020 @ 03:31:13 PM  
MECHANICS LIEN  
Book 22 @ Page 562  
Pages Recorded 2  
Recording Cost \$ 11.00

**NOTICE OF MECHANIC'S LIEN**

TO: M C Development Company, Inc. Eric B. Clevenger Mark W. Clevenger  
Attn: Mark W. Clevenger P.O. Box 27 216 Main-Cross St.  
P.O. Box 27 Louisa, KY 41230 Louisa, KY 41230  
Louisa, KY 41230

Notice is hereby given, in accordance with the laws of the State of West Virginia, that the undersigned, Acme Enterprises, Inc., the contractor and material provider to M C Development Company, Inc. in the construction of a Taco Bell restaurant, claims a lien to secure the payment of the sum of Three Hundred Seventy-Four Thousand Five Hundred Nine Dollars and 30 Cents (\$374,509.30) upon the interest of M C Development Company, Inc. in and to 1.169 AC 4 POLE CREEK, 16<sup>TH</sup> STREET RD, also known as 100 Kinetic Drive, Huntington, WV 25701, and upon all buildings, structures, and improvements thereon. A Statement of Account is attached hereto as Exhibit A and made a part of this Notice of Lien.

Acme Enterprises, Inc.

By:   
Robert L. Bandy

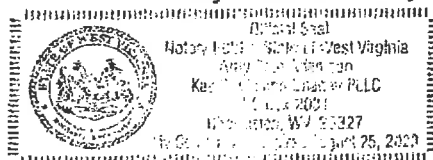
Its: Attorney

STATE OF WEST VIRGINIA,  
COUNTY OF KANAWHA, to wit:

ROBERT L. BANDY, attorney for Acme Enterprises, Inc., being first duly sworn, upon his oath says that the statements contained in the foregoing Notice of Mechanic's Lien are true, as he verily believes.

Taken, subscribed and sworn to before me this 4<sup>th</sup> day of February, 2020.

My commission expires August 25, 2023.



  
NOTARY PUBLIC

(This instrument was prepared by Tracey A. Rohrbaugh, Attorney at Law, KAY CASTO & CHANEY PLLC, 400 Foxcroft Ave., Suite 100, Martinsburg, West Virginia 25401.)



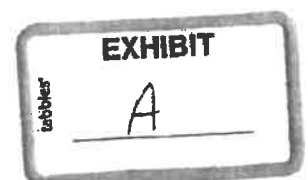
**STATEMENT OF ACCOUNT**

Amounts outstanding:

Draw #5:	\$115,358.22
Draw #6 (retention):	\$119,175.80
Open Change orders:	\$139,975.28
<b>TOTAL DUE:</b>	<b>\$374,509.30</b>

WEST VIRGINIA, CABELL COUNTY CLERK'S OFFICE  
This instrument was this day presented in this office,  
and thereupon, together with the certificate  
thereto annexed, is admitted to record.  
TESTE: CABELL COUNTY CLERK'S OFFICE

FEB 04 2020





*Legal Counsel.*

DINSMORE & SHOHL LLP  
611 Third Avenue  
Huntington, WV 25701  
www.dinsmore.com

Richard J. Bolen  
Direct Dial: (304) 691-8420  
E-mail: richard.bolen@dinsmore.com

July 20, 2020

Jeffrey E. Hood  
Circuit Clerk of Cabell County  
Cabell County Courthouse  
750 Fifth Avenue  
Huntington, WV 25701

RE: *ACME Enterprises, Inc. v. M C Development Company, Inc.*  
Circuit Court of Cabell County, WV  
Civil Action No. 20-C-84

Dear Mr. Hood:

Enclosed for filing in your usual manner, please find the "**Answer and Counterclaim of M C Development Company, Inc.**" and "**Certificate of Service**" in connection with the above-referenced civil action. Copies have been served this day on counsel of record.

Thank you for your assistance in this matter.

Sincerely,

Richard J. Bolen

RJB:lga

Enclosures

cc: Victoria L. Wilson, Esquire  
Tracy A. Rohrbaugh, Esquire

2020 JUL 20 PM 4:21  
COPY  
JE HOOD  
CIRCUIT CLERK  
CABELL CO. WV

FILED

**FILED**  
**IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA**

ACME ENTERPRISES, INC.,  
A Michigan corporation,

Plaintiff,

vs.

M C DEVELOPMENT COMPANY, INC.,  
A Kentucky corporation,

Defendant.

2020 JUL 20 PM 4: 21

**COPY**  
C. E. HOOD  
CIRCUIT CLERK  
CABELL CO. WV

Civil Action No.: 20-C-84

**ANSWER AND COUNTERCLAIM OF M C DEVELOPMENT COMPANY, INC.**

**ANSWER**

Defendant M C Development Company, Inc. (hereinafter "MCDC") by and through counsel, Richard Bolen, Janet Holbrook, David Bolen and Melissa Veltri all of Dinsmore & Shohl LLP, for answer to the Complaint of Plaintiff (hereinafter "ACME") states as follows:

**FIRST DEFENSE**

The Complaint fails to state any claim or claims against MCDC upon which relief can be granted, as the allegations contained therein are insufficient to support a claim for damages against MCDC or any other relief.

**SECOND DEFENSE**

1. Answering paragraph 1 of the Complaint, MCDC denies the allegations contained therein, in that the Complaint does not seek damages "for the value of the labor and materials supplied by ACME in the construction of Taco Bell restaurant" ("Project") at 100 Kinetic Drive, Huntington, Cabell County, West Virginia ("the Property"), but rather seeks damages which substantially exceed the "value of the labor and materials supplied by ACME in the construction of the Project."

2. MCDC admits that ACME is a Michigan corporation but denies that its principal place of business is located at 1571 Martin Road, Roseville, Michigan.

3. MCDC admits that it is a Kentucky corporation and that its principal place of business is located at Court and Madison Streets, Louisa, Kentucky and at all times relevant it is and has been the owner of the Property.

4. Answering Paragraph 4 of the Complaint, MCDC admits the allegations in Paragraph 4 of the Complaint.

5. Answering Paragraph 5 of the Complaint, MCDC admits that ACME and MCDC entered into a contract for the construction of the Taco Bell restaurant ("the Restaurant") on the Property ("the Contract") and that a copy of the Contract is attached as Exhibit A to the Complaint. MCDC also admits that the initial contract sum was \$1,171,633.00.

6. Answering Paragraph 6 of the Complaint, MCDC states that is without knowledge or information sufficient to form a belief as to whether ACME commenced work on the Project in September, 2018 or whether the Project was "substantially complete" as of October 29, 2019. MCDC further states that it is without knowledge or information sufficient to form a belief as to the truth of whether ACME began work on the Project "in anticipation of being paid for its work", but assumes that to have been the case but demands strict proof thereof.

7. Answering Paragraph 7 of the Complaint, MCDC denies that there were "a number of necessary change orders generated as a result of delay, inconsistencies in the construction plans, and other unforeseen circumstances."

8. Answering Paragraph 8 of the Complaint, MCDC admits that it disputed many of the proposed change orders generated by ACME, in each case for reasons which were appropriate. MCDC states that it is without knowledge and information as to whether ACME



continued work on the Project “believing that the issues could be resolved and as a showing of good faith” and accordingly demands strict proof thereof.

9. Answering Paragraph 9 of the Complaint, MCDC admits that ACME filed a Notice of Lien against MCDC in the sum of \$242,897.54 on September 12, 2019 but denies that that amount was due and owing under the Contract. MCDC admits that such Notice of Lien was recorded on September 12, 2019 in the Office of the Clerk of the County Commission of Cabell County, West Virginia in Mechanics’ Lien Book 22, at Page 554 and admits that Exhibit B to the Complaint is a copy of such Notice of Lien as recorded.

10. Answering Paragraph 10 of the Complaint, MCDC states that it is without knowledge or information sufficient to form a belief as to whether ACME had substantially completed its work on the project before October 29, 2019 but alleges that ACME continued to bill allegedly for services under the Contract thereafter. MCDC denies that the subsequent billing by ACME was “pursuant to the original Contract and approved change orders”.

11. Answering Paragraph 11 of the Complaint, MCDC denies that it refused to pay ACME pursuant to the Contract and MCDC alleges that ACME’s billing exceeded any sums due under the Contract. MCDC denies that it refused to approve proposed change orders that “were necessary to advance ACME’s work on the property”. MCDC alleges that it refused to approve change orders which were inappropriate and not in compliance with the terms of the Contract.

12. Answering Paragraph 12 of the Complaint, MCDC admits that ACME filed a Notice of Mechanics’ Lien on February 4, 2020 in the amount of \$374,509.30 but denies that that Notice of Mechanics’ Lien was filed by ACME “as a result of MCDC’s failure and refusal to pay ACME pursuant to the Contract and change orders”. MCDC specifically denies that it owes ACME \$374,509.30. MCDC admits that Exhibit C to the Complaint is a copy of the

Notice of Mechanics' Lien of February 4, 2020 as filed in the Office of the Clerk of the County Commission of Cabell County.

13. Answering Paragraph 13 of the Complaint, MCDC states that it is without knowledge or information sufficient to form a belief as to the allegations contains therein and accordingly demands strict proof thereof.

14. Answering Paragraph 14 of the Complaint, MCDC admits that it has failed and refused to pay ACME \$374,509.30, for the simple reason that MCDC does not owe ACME that amount of money under the Contract or for the Project or otherwise.

15. Answering Paragraph 15 of the Complaint, MCDC alleges and incorporates herein its answers to Paragraph 1 through 14 as if fully set forth herein.

16. Answering Paragraph 16 of the Complaint, MCDC states that it is without knowledge or information sufficient to form a belief as to whether ACME furnished labor and materials for the benefit of the Property through October 29, 2019 and accordingly demands strict proof thereof.

17. Answering Paragraph 17 of the Complaint, MCDC specifically denies that it refused to pay ACME according to the terms of the Contract.

18. Answering Paragraph 18 of the Complaint, MCDC states that it is without knowledge or information sufficient to form a belief as to whether ACME ceased to furnish labor and materials for the project on February 4, 2020 but does admit that ACME recorded with the Clerk of the Cabell County Commission a Notice of Mechanic's Lien in the updated amount of \$374,509.30 on February 4, 2020 and accordingly demands strict proof as to when ACME ceased to furnish labor and materials to the Project.

19. Answering Paragraph 19 of the Complaint, MCDC specifically denies that it still owes ACME \$374,509.30 for labor and materials supplied for the benefit of the project or otherwise.

20. Answering Paragraph 20 of the Complaint, MCDC states that the allegations contained therein constitute conclusions of law and not allegations of facts susceptible to answer herein and accordingly denies the same.

21. Answering Paragraph 21 of the Complaint, MCDC denies all other allegations of Count I of the Complaint, including the demand or prayer for relief.

22. MCDC incorporates herein its answers to the allegations of Paragraphs 1-21 of the Complaint as if set forth in this Paragraph.

23. Answering Paragraph 22 of the Complaint, MCDC admits that it agreed to pay ACME a fixed, agreed amount for its work on the Project if timely performed pursuant to the Contract and in accordance with the plans and specifications for the Project.

24. Answering Paragraph 23 of the Complaint, MCDC denies that ACME performed its work pursuant to the parties' Contract and accordingly denies that it deserves to be paid as claimed.

25. Answering Paragraph 24 of the Complaint, MCDC denies that it failed to pay ACME in a timely manner for its work.

26. Answering Paragraph 25 of the Complaint, MCDC denies that it owes ACME \$374,509.30 either pursuant to terms of the Contract or pursuant to any subsequent approved change orders.

27. Answering Paragraph 26 of the Complaint, MCDC denies that ACME has suffered damages in the amount of \$374,509.30 or any other amount.

28. MCDC denies all other allegations of Count II of the Complaint, including, but not limited to the demand or prayer for relief.

29. Answering Paragraph 27 of the Complaint, MCDC incorporates into this Paragraph its responses to Paragraphs 1-27 of the Complaint.

30. Answering Paragraph 28 of the Complaint, MCDC states that it is without knowledge or information sufficient to form a belief as to whether ACME “reasonably expected to be paid for its work”, and accordingly denies the same.

31. Answering Paragraph 29 of the Complaint, MCDC denies that it was unjustly enriched by the work that ACME performed on the Project and further denies that it would be inequitable or unconscionable to permit MCDC to receive and retain the benefit of the work performed.

32. Answering Paragraph 30 of the Complaint, MCDC denies that ACME is entitled to recover damages under theories of quantum meruit and/or unjust enrichment or otherwise.

### **COUNT III**

33. MCDC denies all other allegations of Count III of the Complaint, including the demand or prayer for relief.

### **THIRD DEFENSE**

MCDC denies that it is liable for ACME’s demands for judgment or any other sums since in fact no sums are due and owing to ACME under the contract.

### **FOURTH DEFENSE**

ACME’s claims are or may be barred by the applicable statute of limitations, the doctrine of laches, and/or may be otherwise time barred.

#### **FIFTH DEFENSE**

The damages or losses of which ACME complains were not caused or contributed to by any wrongful act or omission on the part of MCDC.

#### **SIXTH DEFENSE**

To the extent that ACME has allegedly suffered damages, ACME has, or may have failed to mitigate those damages, and accordingly, should be barred from recovery of the same.

#### **SEVENTH DEFENSE**

MCDC raises and incorporates fully herein all defenses which may be available under the law, including, without limitation, every defense set forth in Rule 8 of the West Virginia Rules of Civil Procedure.

#### **EIGHTH DEFENSE**

MCDC asserts the defenses of waiver, estoppel, unclean hands, res judicata and collateral estoppel, to the extent they may be applicable.

#### **NINTH DEFENSE**

ACME's damages and/or expenses, if any, were the direct and proximate result of ACME's own acts, omissions, negligence, fault and/or breach of Contract.

#### **TENTH DEFENSE**

To the extent the Complaint alleges or that the allegations contained therein could be construed such as to allege malice, intent, oppression, willfulness, or a conscious disregard for ACME's rights on the part of MCDC, such allegations should be stricken because they are not stated with particularity.

### **ELEVENTH DEFENSE**

MCDC reserves the right to add additional defenses as the facts and discovery warrant.

WHEREFORE, MCDC requests that the Complaint be dismissed with prejudice, that ACME's requested relief be denied, that MCDC be awarded its attorney fees and costs incurred in the defense of said Complaint, and that MCDC be awarded such other relief as the Court deems just and proper.

**MCDC demands a trial by jury.**

### **COUNTERCLAIM**

For its counterclaim against ACME, MCDC states as follows:

1. MCDC states that it is a Kentucky corporation authorized to do business in the State of West Virginia with its principal place of business located at Court and Madison Streets, Louisa, Kentucky.
2. ACME is, upon information and belief, a Michigan corporation qualified to do business in the State of West Virginia and has an office address of 15751 Martin Road, Roseville, MI.
3. Venue of this Counterclaim is, upon information and belief, proper in this court.

### **FACTS**

4. MCDC and ACME are parties to a construction contract dated August 28, 2016 ("Contract"), a copy of which is attached to the Complaint in this action as Exhibit A.
5. Pursuant to the terms of the Contract, ACME was to construct a Taco Bell restaurant and other improvements (hereinafter the "Project") in accordance with the plans, specifications and other documents identified therein and as otherwise described in the Contract on premises located at 100 Kinetic Drive, Huntington, Cabell County, West Virginia

("the Property"). Such construction work is referred to herein and in the Contract as the "Work".

6. In Section 23 of the Contract "Contractor's Warranties and Guarantees", ACME warranted and guaranteed that "...all of the Work shall be done in a first class, workmanlike manner and accordance with the Construction Documents with new, quality materials and warrants all Work and materials against defects in the material or the workmanship for a period of one (1) year from the date of Final Completion or the opening of the Restaurant (whichever is later), unless stated otherwise in the Construction Documents."

7. To this day, the Work on the Project has not been fully and correctly done in a first class, workmanlike manner and in accordance with requirements of the Contract and all Construction Documents (defined in the Contract).

8. MCDC has attempted to work with ACME in regard to ACME completing the Work on the Project fully and correctly in a first class, workmanlike manner and in accordance with requirements of the Contract and Construction Documents. However, ACME has yet to complete the Work or to do so in a first class, workmanlike manner.

9. On or about October 18, 2019 ACME and MCDC signed and agreed to a punch list for the Project ("Punch List") detailing incomplete work and work which needed to be revised. A copy of the Punch List is attached hereto as **Exhibit 1** and incorporated herein by reference and made a part hereof.

10. Notwithstanding the fact that ACME has been repeatedly advised by MCDC of deficiencies in the Work and the Project, ACME has corrected only some of those deficiencies and has utterly failed to address or complete others.

11. The Work and the Project to this day have never been fully and correctly completed in a first class, workmanlike manner and in accordance with the requirements of the Contract or the Construction Documents by ACME.

12. MCDC has complained to representatives of ACME on numerous occasions with respect to all of the foregoing matters, including making oral and written complaints about the deficiencies in the Work and about the fact that ACME has failed to appropriately complete the Work.

13. Nevertheless, ACME has continued to fail to comply with its contractual obligations and has failed to complete the Work in a first class, workmanlike manner and in accordance with the requirements of the Contract and Construction Documents.

14. Attached hereto marked for identification as **Exhibit 2** and incorporated herein by reference is a document marked "Kinetic Park – Outstanding Punch List and Other Items" which was prepared on or about May 11, 2020 showing the items included on the Punch List which have never been completed. The items with a check mark (✓) have to some extent at least been completed and all items which do not have a check mark have not been completed.

### **COUNT I**

#### **Breach of Contract**

15. MCDC incorporates by reference as if fully set forth herein all allegations contained in Paragraphs 1-14 above.

16. The Contract between MCDC and ACME is a valid and enforceable Contract.

17. ACME has materially breached the Contract in numerous respects as described herein and otherwise.



18. As a result of ACME's material breaches of the Contract and failure to properly complete the Work and the Project and failure to complete and correct the Punch List items, which the parties' agreed would be completed as set forth on Exhibit 1, with the costs thereof paid by ACME, MCDC has incurred damages, costs, and expenses and will continue to incur damages, costs and expenses in the future, which are properly owed by ACME under the Contract including the expenditures paid for by MCDC but necessitated by ACME's failure to perform under the Contract including the expenditures listed on Exhibit 3, a copy of which is attached hereto and incorporated herein by reference, which were paid by MCDC but were ACME's expenses and necessitated by ACME's failure to perform under the Contract.

19. As a result of ACME's material breaches of the Contract, ACME is also responsible for all costs associated with MCDC's time and expenses in monitoring the completion of the Work.

20. MCDC is entitled to recover damages, including but not limited to damages for completion of outside concrete, approximately \$30,000, completion of stone on the face of the building, approximately \$40,000, correction of silt fence issue, approximately \$6,000, completion of electric, HVAC and refrigeration, approximately \$35,000, or a total of \$111,000 or more to complete the work correctly under the Contract, \$11,100 or more to monitor the completion of the work and \$19,257.66 in expenditures by MCDC, listed on Exhibit 3, or a total of approximately \$141,357 for which ACME is liable.

WHEREFORE, MCDC is entitled to recover from ACME any and all damages, including but not limited to contractual damages, the damages set forth herein and attorneys' fees and expenses that it has and will continue to suffer along with other legal or equitable relief to which MCDC may be entitled.

## **COUNT II**

### **Breach of Duty of Good Faith and Fair Dealing**

21. MCDC incorporates by reference as if fully set forth herein all allegations contained in Paragraphs 1-20.
22. When ACME entered into the Contract it undertook a duty of good faith and fair dealing.
23. ACME has breached the duty of good faith and fair dealing owed to MCDC.
24. As a result of ACME's breach of the duty of good faith and fair dealing, MCDC has incurred and will incur damages, costs and expenses.

WHEREFORE, MCDC is entitled to recover from ACME any and all damages, costs and expenses, including, but not limited to attorneys' fees and expenses, which it has suffered and will continue to suffer along with any other legal or equitable relief to which MCDC may be entitled.

## **COUNT III**

### **Slander of Title**

MCDC incorporates by reference as if fully set forth herein all allegations contained in Paragraphs 1-24 above.

25. ACME has wrongfully and in bad faith filed two notices of mechanic's lien attached to the Complaint as Exhibit B and C.
26. In regard to the Work that is the subject of the Contract, MCDC has rightfully failed to pay amounts, which would become due to ACME only upon completion of the Work, and ACME has failed to perform all of the Work in a first class, workmanlike manner and in accordance with the Contract requirements.

27. ACME knows and has been aware:

(a) That MCDC has incurred and will incur expenses, costs and damages in regard to the Work and the Project in excess of the amount that would otherwise be owed to ACME, according to the allegations of the Complaint in this action.

(b) That the two notices of mechanic's lien filed by ACME are not valid or enforceable.

(c) That the notices of mechanic's lien filed by ACME are fraudulent under West Virginia law. See, W.Va. Code §38-16-403.

28. Despite such knowledge, ACME nonetheless filed and continues to have pending two invalid notices of mechanic's lien.

29. ACME has knowingly and maliciously communicated orally and in writing false statements which have disparaged MCDC's title to the Property, including such Notices of Lien, Exhibits B and C to the Complaint.

30. At the time that ACME filed the aforesaid notices of mechanic's lien, Exhibits B and C to the Complaint, the last of which was filed on or about February 4, 2020, ACME was well aware that MCDC did not owe it \$374,509.30 or any other amount even remotely close to that number. Accordingly, ACME knew when it filed such notice of lien that it was incorrectly stating the amount for which it was claiming a lien against MCDC's property and therefore knew that the filing of such notice of lien was false, fraudulent and contrary to West Virginia law.

31. ACME has knowingly and maliciously communicated orally and in writing false statements, including Exhibits B and C to the Complaint, which have disparaged MCDC's title to its property.

32. MCDC has suffered special damages as a result of the knowingly and maliciously communicated false statements consisting of the diminution in the fair market value of the Property and potential loss of market for MCDC's ownership interest in the Property.

WHEREFORE, MCDC is entitled to recover from ACME any and all compensatory and punitive damages, including, but not limited to attorneys' fees and expenses that it has suffered and will continue to suffer along with any other legal or equitable relief to which MCDC may be entitled due to ACME's slander of title and wrongful and actionable notice of lien and wrongful failure to release such lien, all of which was done knowingly and intentionally.

#### **COUNT IV**

##### **Liquidated Damages**

33. Paragraph 28 of the Contract (Exhibit A to the Complaint) provides "Liquidated Damages, in addition to other damages, Owner/Developer may recover from Contractor for Contractor's unexcused delay in substantially completing the Work on or before the time for Substantial Completion as provided in Section 5 above (or as extended in writing by Owner/Developer), Owner/Developer shall be entitled to recover liquidated damages from Contractor in the amount of \$500.00 for each calendar day that Substantial Completion is delayed and such amount shall be withheld from the Final Payment hereunder. The parties agree that it would be difficult to assess the actual amount of Owner/Developer's damages, and the amount of \$500.00 for each calendar day of delay is a reasonable estimate of same. This sum is not to be construed as a penalty, and shall be paid to Owner/Developer as compensation for the damages incurred as a result of the delay in obtaining Substantial Completion of the Work."

34. In her letter of June 14, 2019, ACME's counsel admitted that although the project was scheduled to be completed within 90 days, MCDC had agreed (as an

accommodation to ACME) to extend that time period for 30 more days, or a total of 120 days, but that notwithstanding that extension, ACME had been “on-site” for 232 days as of June 14, 2019. In that letter ACME’s counsel stated that the “anticipated construction completion date” was June 28, 2019. In fact, the project wasn’t completed for many months thereafter. The project was finally Substantially Completed, according to the allegations of the Complaint, on or about October 29, 2019 resulting in a total delay of the Substantial Completion of the project of 249 days.

35. At the contractual rate of \$500.00 per day, ACME owes MCDC a total of \$124,500.00 in liquidated damages for its delay in the completion of the project.

36. Although ACME has claimed delay damages from MCDC, in fact, Section 26 (second paragraph) of the Contract makes it abundantly clear that the only remedy available to ACME would have been to apply for an extension of the date of Substantial Completion. Although ACME did that and obtained such an extension for 30 days, no other extension was ever requested and ACME is not entitled to any damages whatsoever. In any event, “Such an extension of time shall be Contractor’s sole and exclusive remedy for any such delay.” (Section 26 of the Contract).

### **PRAYER FOR RELIEF**

WHEREFORE, based upon the foregoing allegations, MCDC respectfully requests awards of all general, special, and other damages or relief recoverable at law or in equity as a result of ACME’s breach of the Contract, breach of duty, slander of title, and filing of a fraudulent and illegal lien and liquidated damages under the Contract, including without limitation a mandatory injunction requiring the immediate removal of the false Notice of Mechanic’s Lien, recovery of damages of the amounts expended and to be expended by MCDC in regard to ACME’s failure to

complete the work in a first class, workmanlike manner and in accordance with the Contract, attorneys' fees and costs in connection with this action, prejudgment and post judgment interest on all monetary amounts awarded and all such other and further relief as the court may deem just and equitable.

**MCDC demands a trial by jury.**

M C DEVELOPMENT COMPANY, INC.

By: 

Richard J. Bolen (WVSB #392)  
Janet S. Holbrook (WVSB #5853)  
J. David Bolen (WVSB #8783)  
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*Counsel for Defendant/Counterclaimant M C Development Company, Inc.*

# **EXHIBIT 1**

# PUNCH LIST

Taco Bell, Kinetic Park, Huntington, WV

Pre Punch: \_\_\_\_\_ Final: 10-18-2019

The following documents have been received:

Title	Yes	No
ADA Inspection Completed	<input checked="" type="checkbox"/>	<input type="checkbox"/>
All ADA Issues resolved	<input checked="" type="checkbox"/>	<input type="checkbox"/>
All final inspections received	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Warranty Manual Received	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Test & Balance done and corrected	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Subcontractor List Received	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Certificate of Occupancy Received	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Equipment List and Manual

The following work has not been completed or requires correction. This may not reflect all the items remaining and does not include work that may not be readily visible. Please refer to the Construction Contract for further requirements regarding completion of the Work.

- NO Item:
1. Provide bags for hoodies (wiping) cones, hand dispensers and other parking mechanisms including ADA
  2. Clean and touch up light poles
  3. Replace chipped stone, general clean up area
  4. Ball work to future sign location from ELD
  5. Touch up door frame to wrap sign
  6. Touch up soffit over door (hand dispensers)
  7. Properly terminate (install all wiring in) poles
  8. Whistle drawers will not stay open - the mechanism is broken

Contractor: \_\_\_\_\_ Date: 10/18/19

Contractor: \_\_\_\_\_ Date: 10/18/19



**Abstract**

- ~~John M. [unclear] Contractor Miller [unclear]~~

Kinetic Park Taco Bell  
Pac-Palms Station

38. Clean up dirt along the curb.
39. Properly install the front door.
40. Main entrance double doors are scratched. (Repair/Replace)
41. Remove all scratched and damaged glass from the front door.
42. Clean all stone after repairs are completed.
43. Properly align and level ground lights. Note: One not working and ordered.
44. Test lighting control box when work is complete.
45. Touch up ceiling to map closet.
46. Remove glue from gray wall in Shared Table area.
47. Straighten and caulk base of front wall.
48. There is a chip in the 18" x 18" tile. (Repair/Replace)
49. Gravel fabric is supporting soil on the rear property line. (Need to remove the fabric and properly stabilize the banks) and replace fabric for appropriate time.
50. All equipment must be tested prior to RTO sign off.
51. Repair exterior wall where acupress was relocated. Ensure it is straight in and out.
52. All parking lot lights need to be working and all sensors (not timers).
53. Complete all sidewalks & concrete according to ADA. *duplicate*
54. Install late sensors.
55. Properly compact driveway back to transformer.
56. Replace cracked, stamped concrete.
57. Furnish reports of all materials and construction testing as required by plans and contract.
58. Repair roofing to resolve all roof leaks.
59. Work down sharp edges on all metal trim and stainless surrounds and corners.
60. Repair all damage caused to drywall, ceiling tile etc. due to roof leaks.
61. Finish all unfinished CIV/Building/All Trades/Project Work.
62. Properly align drink cabinet doors.
63. Ensure that junction box and wiring is properly installed for track lighting at slantball.

Owner *[Signature]*

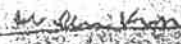
Contractor *[Signature]*

2/3/23

Kinetic Park Taco Bell  
Fire-Plants Shown

1. Run an laser along the curb.
2. Properly terminate the roofline gutters by highest corner.
3. Main entrance double doors are scratched. (Repair/Replace)
4. Remove all cracked and loose pieces of building and exterior.
5. Clean all stone after repairs are completed.
6. Properly align and level graded light is correct. (Duplicate in page 1)
7. Test lighting system before work is completed.
8. Remove any siding to look closer.
9. Remove glue from gray tarpaper in Shared Tents area.
10. Straighten and tank base on steel wall.
11. There is a chip in one 18" x 18" table. (Repair/Replace)
12. Erosion fabric is supporting soil on the rear property line. (Need to remove the fabric and properly stabilize the banks) and replace fabric for appropriate time.
13. All equipment must be tested prior to RTO sign off.
14. Repair exterior wall where scupper was relocated. Ensure it is watertight in and out.
15. All parking lot lights need to be working and on sensors (not timers).
16. Complete all sidewalks & concrete according to ADA. (Duplicate)
17. Install rain sensors.
18. Properly compact driveway stone to transformer.
19. Replace cracked, stamped concrete.
20. Furnish reports of all materials and construction testing as required by plans and contract.
21. Repair roofing to resolve all roof leaks.
22. Work down sharp edges on all metal trims and stainless surrounds and corners.
23. Repair all damage caused to drywall, ceiling tile etc. due to roof leaks.
24. Finish all unfinished Civil/Landscaping/All Trades Project Work.
25. Properly align dish cabinet doors.
26. Ensure that junction box and wiring is properly installed for track lighting at start wall.

Owner 

Contractor 

# EXHIBIT 2

Kinetic Park - Outstanding Punchlist and other items

Set during 07 at 2:15 Exterior 07 at 2:30

Item No. Description

Kinetic Park Outstanding Page 1 of 2

Notes

5	Numerous issues with lighting and equipment control panel	30 min delay but 15 min delay at 2:15	Lighting controls have been tweaked but still not correct.
13	Replace all curbs not backfilled and/or installed properly and are moving away from flatwork. No expansion joint material used between flatwork and cold pours. Curbs must be placed on compacted material per specs.	Revised? Repair Check & verify	Refer to email from Eric 01-31-2020
14	Replace all curbs that are rough and need a lot of work	of which 13 are not	Refer to email from Eric 01-31-2020
16	Need all ADA corrected and verified		
18	Stone is cracking		Replacement stone is cracking as well
20	Parking lot cracking in several areas; replace	10 min there & back to parking lot	Refer to email from Eric 01-31-2020
28	Complete gas line, electrical and sound installation to tree house.	by Repur	Bill said landscaper agreed to install a box for termination of line. Will remain on list until completed.
29	Numerous damaged areas on storefront metal	will keep at ed warehouse	Breakmetal/Flashing between pencil stone and slantwall appears to have pulled out or was not properly finished.
35	Clean up or replace curb along Kinetic		Refer to email from Eric 01-31-2020
47	Erosion fabric is supporting soil on the rear property line. Need to remove fabric, stabilize the bank and replace fabric until appropriate time	originally had backfill along fence line -	
52	Install rain sensors. NOTE: Electrical drawings also call for electrical work to include an outlet and timer for irrigation system.		Issue credit
54	Replace cracked, stamped concrete		Cracks getting larger. Repair to one crack not acceptable
55	Furnish reports of all materials and construction testing as required by contract documents	Should have been furnished as needed.	
56	Repair roof to resolve all leaks.	No more rain	Also need warranty as part of closing docs
57	Cover left off the cable junction box in rear of building and screws are missing		

5-11-20 AROS

1. 3rd Party cleanest company off the HUB table

2. Contractor - Had at the building

3. Check around wall for leaks

Will there be any more punchlist items by 5/11/20

Michael

See correction on hand delivered

Kinetic Park Outstanding Work - Page 2 of 2

The following items are a result of change order work performed after the punchlist was completed or uncovered thereafter, or warranty issues.

1	Properly align drink cabinet doors	IDX to send doors and install per Steve Brown
3	Light at slantwall door now comes on with dining room lights. <i>will check light switch to slant wall</i>	Lighting controls have been tweaked but still not correct.
5	Water runs down the face of the Trespa <i>will check</i>	
6	Circuit D-26 was tripped and will not reset (Buffalo, Flag and slant wall) <i>confirmed to them</i>	<i>check if D-26 is reset</i>
10	Front hydrant has very low pressure. <i>Spice not fixed</i>	
11	Condensing unit for walk-in continues to cycle on and off every few seconds.	Unit is one over the freezer; damaging to equipment!
12	Restaurant appears to have a lot of oil residue. Ensure the air is balanced properly.	Complete all corrections on report and check exhaust
13	Caulking has curled and deteriorated on all curbs. Please remove and replace.	
14	Clip now showing on Trespa towards top of entry tower.	
15	Excessive moisture in cement block at dumpster enclosure	<i>will have to replace in not resolved prior to winter</i>
16	Parking lot striping is peeling	
17	ADA sign bollard needs repainted. <i>Did something that other table says</i>	
18	Men's restroom sensor not working	Electrician came by and set it to stay on all the time.
19	<del>Notes Refer to Alice Murphy and Eric Clevengers emails to Bill Kruger 01-31-2020.</del>	
20	Speaker by Sharing table not working.	
21	Breakers partially tripped on circuits D-13, 15 and 17 (convenience outlets and safe)	<i>colours now it is partially tripped</i>
22	Hole in dining room tile by low hub table. Appears to have a void around the hole	
23	Women's room Vacant/Occupied cylinder sign broken	

Handwritten notes: "Kinetic is found" and "Penetration" with arrows pointing to items 12 and 13.

Recap of current electrical issues we are aware of; may also be listed elsewhere. Recapped here as they are numerous

1	Emergency light by main entry comes on and off <i>light at slant wall door</i>	One by Slantwall now coming on as well
2	Track lighting not coming on with dining room lighting	
3	Light over door in slantwall not coming on at correct time <i>going to ck. tonight</i>	Lighting controls have been tweaked but still not correct.
4	Still have issues with Buffalo and Flagpole timing <i>breaker trips through</i>	Also see Item D-26
6	Verify all POS equipment is on correct dedicated circuits with isolated grounds. (not in contrasting color or marked to let others know not to plug items in other than POS related equipment)	
8	Lighting controls still not working correctly; see numerous emails about issues. This is not only an inconvenience but causes wear on equipment and utility costs.	Lighting controls have been tweaked but still not correct.
9	Phone line is not working	It is Frontier line that is not working
10	Circuit D-26 was tripped and will not reset (Buffalo, Flag and slant wall)	
11	Men's room light sensor not working	Electrician came by and set to stay on all the time.
12	Breakers D-13, 15, 17 partially tripped <i>Spice not fixed</i>	
13	Speaker not working by the Sharing Table	Number 19 above

# EXHIBIT 3

# ACME Credits

Eastham Engineering Footer	\$ 4,443.09
CMA Tower Revision (Architect)	1,465.00
Blue Skin 100 vs 160	2,300.00
Utilities / Trash	4,359.96
Heat Cabinet Door	1,000.54
Edison Bulbs	619.93
Breakers	236.14
Rain Sensor / Timer	1,200.00
Taco Rays Graphic	1,000.00
Speaker Installation	1,625.00
Buffalo & Flag lights	<u>1,008.00</u>
	19,257.66

**\*\*Still trying to research All Credits\*\***



IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

ACME ENTERPRISES, INC.,  
A Michigan corporation,

Plaintiff,

vs.

Civil Action No.: 20-C-84

M C DEVELOPMENT COMPANY,, INC.,  
A Kentucky corporation,

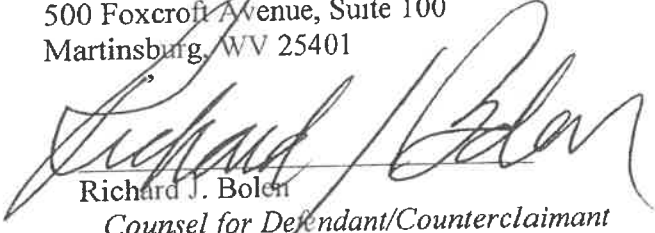
Defendant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Answer and Counterclaim of M C Development Company, Inc. has been served upon counsel of record by depositing the same via first class mail, postage prepaid on the 20<sup>th</sup> day of July, 2020 to:

Victoria L. Wilson  
Kay, Casto & Chaney, PLLC  
707 Virginia Street East, Suite 1500  
Charleston, WV 25301

Tracy A. Rohrbaugh  
Kay, Casto & Chaney, PLLC  
500 Foxcroft Avenue, Suite 100  
Martinsburg, WV 25401

  
Richard J. Bolen

*Counsel for Defendant/Counterclaimant  
M C Development Company, Inc.*

**FILED**  
**IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA**

**ACME ENTERPRISES, INC.,** 27 APR 10 11:08  
a Michigan corporation,

*Plaintiff.*

v.

Civil Action No. 20-C-84  
Judge Chiles

**M C DEVELOPMENT COMPANY, INC.,**  
a Kentucky corporation,

*Defendant.*

**ACME ENTERPRISES, INC.'S ANSWER TO COUNTERCLAIM**

COMES NOW the Plaintiff/Counter-Defendant, Acme Enterprises, Inc. ("Acme"), by counsel, and for its Answer to the Counterclaim pled by M C Development Company, Inc. ("MCDC") does state and aver as follows:

**FIRST DEFENSE**

The Counterclaim fails to state a claim against Acme upon which relief can be granted.

**SECOND DEFENSE**

Acme asserts it is not guilty of any breach of contract, or any other act or omission that proximately caused and/or contributed to the damages allegedly sustained by MCDC.

**THIRD DEFENSE**

Acme asserts that MCDC is barred from asserting these claims against Acme, because it was MCDC's own breach of contract that was the proximate result of any damages it sustained.

#### **FOURTH DEFENSE**

Any damages allegedly sustained by MCDC are not the direct and proximate result of any act or omission on the part of Acme.

#### **FIFTH DEFENSE**

Acme asserts any and all defenses available to it pursuant to the terms of its Contract with MCDC.

#### **SIXTH DEFENSE**

MCDC is estopped from asserting its claims because its own acts or omissions were the sole cause of any damages of which it complains.

#### **SEVENTH DEFENSE**

To the extent that Acme would otherwise owe money to MCDC, the allegation of which is expressly denied, Acme asserts that no sums of money are due and owing from it to MCDC by virtue of set-off.

#### **EIGHTH DEFENSE**

MCDC, by its conduct, has waived its rights to assert this cause of action.

#### **NINTH DEFENSE**

MCDC, by its conduct, has ratified and condoned all acts and conduct of Acme of which it now complains.

#### **TENTH DEFENSE**

MCDC, by its actions, has failed to mitigate its damages or, in the alternative, if MCDC has mitigated its damages, then Acme is entitled to have those mitigated damages credited to the amounts, if any, owed by Acme to MCDC.

#### **ELEVENTH DEFENSE**

Acme has, at all times, acted within its legal rights and with just cause.

#### **TWELFTH DEFENSE**

The damages of which MCDC complains were not the proximate result of any act or omission on the part of Acme.

#### **THIRTEENTH DEFENSE**

MCDC's claim for breach of the duty of good faith and fair dealing is barred, because there is no such independent cause of action in West Virginia.

#### **FOURTEENTH DEFENSE**

To the extent MCDC has a claim for breach of the duty of good faith and fair dealing, which Acme denies, punitive damages are not recoverable.

#### **FIFTEENTH DEFENSE**

MCDC's claim for liquidated damages is barred, because it cannot seek both actual damages and liquidated damages.

#### **SIXTEENTH DEFENSE**

MCDC is barred from recovery of liquidated damages, because any delay was caused, either in whole or in part, by MCDC.

**SEVENTEENTH DEFENSE**

MCDC is barred from recovery of liquidated damages, because any delay resulted from circumstances beyond Acme's control.

**EIGHTEENTH DEFENSE**

Any right MCDC would have had to warranty services was cut off when it failed to pay the amounts due to Acme pursuant to the Contract.

**NINETEENTH DEFENSE**

Acme pleads the affirmative defenses of excuse and justification of circumstance.

**TWENTIETH DEFENSE**

Acme complied with or exceeded the requirements of its scope of work, and completed all of its obligations in a good and workmanlike matter, within industry standards, and in compliance with all codes or other applicable rules or regulations.

**TWENTY-FIRST DEFENSE**

To the extent Defendants/Counterclaim Plaintiffs seek recovery of punitive damages, such claims are barred by Acme's substantive and procedural due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article 3, Section 10 of the West Virginia Constitution.

**TWENTY-SECOND DEFENSE**

In regard to MCDC's attempt to seek recovery of punitive damages, Acme asserts that it is entitled to all limitations upon punitive damages available under West Virginia Code §55-7-29, including the right to move for bifurcation on the issue of punitive damages.

**TWENTY-THIRD DEFENSE**

Acme complied with all requirements of W.Va. Code § 38-2-1 *et. seq.* in recording its mechanic's lien.

**TWENTY-FOURTH DEFENSE**

Acme recorded its mechanic's lien in good faith.

**TWENTY-FIFTH DEFENSE**

MCDC's claim for slander of title is barred based on the defenses of truth, no actual malice on the part of Acme, and no special damages incurred by MCDC as a result of Acme's filing of its notices of mechanic's liens.

**TWENTY-SIXTH DEFENSE**

Acme asserts and reserves, to the extent shown to be applicable in discovery, any and all affirmative defenses required to be asserted under Rule 8(c) of the West Virginia Rules of Civil Procedure.

**TWENTY-SEVENTH DEFENSE**

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

**TWENTY-EIGHTH DEFENSE**

Acme reserves the right to assert such additional affirmative defenses as may be revealed to be appropriate through discovery or trial of this civil action.

**TWENTY-NINTH DEFENSE**

In response to the specific allegations contained within MCDC's Counterclaim, Acme states as follows:

1. Acme admits the allegations contained in Paragraph 1 of the Counterclaim.
2. Acme admits the allegations contained in Paragraph 2 of the Counterclaim.

3. Acme admits the allegations contained in Paragraph 3 of the Counterclaim.
4. Acme admits the allegations contained in Paragraph 4 of the Counterclaim.
5. Acme admits the allegations contained in Paragraph 5 of the Counterclaim.
6. In response to Paragraph 6 of the Counterclaim, Acme admits that Section 23 of the Contract is correctly stated; but Acme denies any implication that this Section takes precedence over any other term of the Contract. Furthermore, Acme affirmatively states that the Contract speaks for itself and is not subject to any self-serving interpretations by MCDC.
7. Acme denies the allegations contained in Paragraph 7 of the Counterclaim.
8. Acme denies the allegations contained in Paragraph 8 of the Counterclaim.
9. In response to Paragraph 9 of the Counterclaim, Acme admits that, on or about October 18, 2019, a punch list was prepared by MCDC and signed off on by Acme, and that a copy is attached to the Counterclaim as Exhibit 1. Acme denies all remaining allegations and implications contained in Paragraph 9 of the Counterclaim.
10. Acme denies the allegations contained in Paragraph 10 of the Counterclaim.
11. Acme denies the allegations contained in Paragraph 11 of the Counterclaim.
12. In response to Paragraph 12 of the Counterclaim, Acme admits that MCDC has repeatedly complained to Acme about its work on the Project, but Acme denies the remaining allegations contained in Paragraph 12 of the Counterclaim and specifically denies that its work on the project was substandard or in violation of the contract.
13. Acme denies Paragraph 13 of the Counterclaim.

14. Acme denies the allegations contained in Paragraph 14 of the Counterclaim.

### **COUNT I**

15. In response to the allegations contained in Paragraph 15 of Count I of the Counterclaim, Acme incorporates its responses to Paragraphs 1 through 14 of the Counterclaim as if fully set forth in this paragraph verbatim.

16. Acme admits the allegations contained in Paragraph 16 of Count I of the Counterclaim.

17. Acme denies the allegations contained in Paragraph 17 of Count I of the Counterclaim and holds Defendant to strict proof thereof.

18. Acme denies the allegations contained in Paragraph 18 of Count I of the Counterclaim.

19. The allegations contained in Paragraph 19 of Count I of the Counterclaim constitutes a legal conclusion to which no response is required. To the extent an answer is deemed required, however, Acme denies the same.

20. The allegations contained in Paragraph 20 of Count I of the Counterclaim constitute a legal conclusion to which no response is required. However, to the extent an answer may be deemed required, either because the allegations are not legal conclusion or are allegations of fact, Acme denies those allegations.



## **COUNT II**

21. In response to the allegations of Paragraph 21 of Count II of the Counterclaim, Acme incorporates its responses to Paragraphs 1 through 20 of the Counterclaim as if fully set forth in this paragraph.

22. The allegations contained in Paragraph 22 of Count II of the Counterclaim constitute a legal conclusion to which no response is required. However, Acme affirmatively asserts that it has at all times operated with good faith and fair dealing in its business relations with MCDC.

23. Acme denies the allegations contained in Paragraph 23 of Count II of the Counterclaim.

24. Acme denies the allegations contained in Paragraph 24 of Count II of the Counterclaim.

## **COUNT III**

In response to the unnumbered paragraph introducing Count III, Acme incorporates its responses to Paragraphs 1 through 24 of the Counterclaim as if fully set forth verbatim in this Count.

25. In response to the allegations of Paragraph 25 of Count III of the Counterclaim, Acme admits that it filed two notices of mechanic's lien, which are attached to the Complaint as Exhibits B and C; but Acme specifically denies that those notices of mechanic's lien were filed wrongfully or in bad faith.

26. Acme denies the allegations contained in Paragraph 26 of Count III of the Counterclaim.

27(a). Acme denies the allegations of Paragraph 27(a) of Count III of the Counterclaim.

27(b). The allegations of Paragraph 27(b) of Count III of the Counterclaim constitute a legal conclusion, to which no response is required. However, to the extent an answer is deemed required, Acme specifically denies those allegations.

27(c). The allegations of Paragraph 27(c) of Count III of the Counterclaim constitute a legal conclusion, to which no response is required. However, to the extent an answer may be deemed required, Acme denies those allegations.

28. Acme denies the allegations of Paragraph 28 of Count III of the Counterclaim.

29. Acme denies the allegations contained in Paragraph 29 of Count III of the Counterclaim.

30. Acme denies the allegations contained in Paragraph 30 of Count III of the Counterclaim.

31. Acme denies the allegations contained in Paragraph 31 of Count III of the Counterclaim.

32. Acme denies the allegations contained in Paragraph 32 of Count III of the Counterclaim.

#### **COUNT IV**

33. In response to the allegations of Paragraph 33 of Count IV of the Counterclaim, Acme admits that Paragraph 28 of the Contract references liquidated damages, but it affirmatively

asserts that the Contract speaks for itself and is not subject to any self-serving allegations or interpretations by MCDC.

34. Acme admits that its counsel sent a letter to MCDC dated June 14, 2019. Acme affirmatively asserts that said correspondence speaks for itself and is not subject to any self-serving allegations or interpretations by MCDC. Furthermore, Acme denies that any of the statements contained within said correspondence are admissible, as it was correspondence sent in furtherance of settlement discussions. Accordingly, the contents of the letter are inadmissible per the Rules of Evidence.

35. Acme denies the allegations contained in Paragraph 35 of Count IV of the Counterclaim.

36. The allegations of Paragraph 36 of Count IV of the Counterclaim constitute a legal conclusion, to which no response is required. However, to the extent an answer may be deemed required, Acme denies the same. Acme further denies that it was at fault for any additional delay referenced in Paragraph 36 of Count IV of the Counterclaim and holds MCDC to strict proof thereof.

37. Acme denies any and all allegations contained in MCDC's PRAYER FOR RELIEF.

38. Acme denies any and all allegations contained in the Counterclaim which have not been expressly admitted herein.

Respectfully submitted this 7<sup>th</sup> day of August, 2020.

**ACME ENTERPRISES, INC.**  
**Plaintiff/Counterclaim Defendant,**  
**By Counsel**



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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

ACME ENTERPRISES, INC.,  
a Michigan corporation,

*Plaintiff,*

v.

Civil Action No. 20-C-84  
Judge Chiles

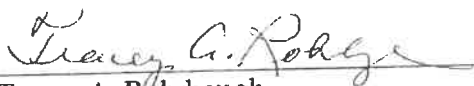
M C DEVELOPMENT COMPANY, INC.,  
a Kentucky corporation,

*Defendant.*

CERTIFICATE OF SERVICE

I, Tracey A. Rohrbaugh, counsel for Plaintiff/Counterclaim Defendant, Acme Enterprises, Inc., do hereby certify that, on the 7<sup>th</sup> day of August, 2020, I served the foregoing *Acme Enterprises, Inc.'s Answer To Counterclaim* upon counsel for the Defendant/Counterclaimant, M C Development Company, Inc., by serving a true copy of the same upon its counsel of record, by first-class United States mail, postage prepaid, addressed as follows:

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