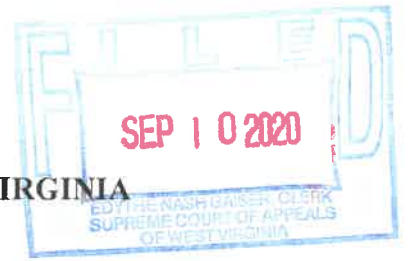


FILE COPY



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,

Plaintiff/Counterclaim Defendant/Cross-claimant;

v.

**KANAWHA COUNTY CIRCUIT COURT
Civil Action No. 20-C-350
Honorable Tod J. Kaufman**

**SMITH/PACKETT MED-COM, LLC,
a Virginia Limited Liability Company,**

Defendant;

And

**SP WV, LLC,
a Virginia Liability Company,**

Defendant;

And

**WV IL-AL INVESTORS, LLC,
a Virginia Limited Liability Company,**

Defendant;

And

CARTER BANK & TRUST,

Defendant;

And

JARRETT CONSTRUCTION SERVICES, INC.,

Defendant/Counterclaimant/Third-Party Plaintiff;

v.

ECS MID-ATLANTIC, LLC

Third-Party Defendant/Crossclaim Defendant.

**DO NOT REMOVE
FROM FILE**

TO: The Honorable Chief Justice Tim Armstead

**JOINT MOTION TO REFER ACTION
TO THE BUSINESS COURT DIVISION**

Third-Party and Crossclaim Defendant, ECS Mid-Atlantic, LLC; Defendants, Smith/Packett Med-Com, LLC; SP WV, LLC; WV IL-AL Investors, LLC; and Carter Bank & Trust; and Defendant/Counterclaimant/Third-Party Plaintiff, Jarrett Construction Services, Inc.; by and through counsel, jointly file the following Motion pursuant to Rule 29.06 of the West Virginia Trial Court Rules (“TCR”) requesting referral of this matter to the Business Court Division of West Virginia. In support of this motion, the parties state as follows:

1. This dispute arises out of the design and construction of a four story, 194,800 square foot independent living and assisted living facility in Charleston, West Virginia, known as The Crossings at Southridge (the “Project”).
2. This multi-million-dollar Project interested numerous entities involved with ownership, design, and construction of the facility – including the entities named in this civil action.
 - a. Smith/Packett Med-Com, LLC; SP WV, LLC; and WV IL-AL Investors, LLC, are collectively or independently the Project owner.
 - b. Mountain State Pipeline & Excavating, LLC (“MSPE”) was a prime contractor for Project site preparation.
 - c. Carter Bank & Trust has some interest in the real property involved with the Project.
 - d. Jarrett Construction Services, Inc. (“Jarrett”) was a separate prime contractor related to the Project.
 - e. ECS Mid-Atlantic, LLC (“ECS”) provided subsurface exploration and geotechnical analysis related to the Project.

- f. Numerous other prime contractors, subcontractors, material providers, and other entities performed work or provided information related to this project.
- 3. On or about May 1, 2020, MSPE filed a complaint in this civil action against the defendants. On or about June 22, 2020 Jarrett filed its third-party complaint against ECS. Subsequently, MSPE filed Crossclaims against ECS. MSPE has filed numerous motions to dismiss claims against MSPE. At the time of this motion, all named parties have filed an answer and there is no pending hearing or other deadlines. The Circuit Court has not yet entered a scheduling order in this matter.
- 4. The various claims in this civil action include:
 - a. breach of contract,
 - b. breach of indemnity,
 - c. breach of warranty,
 - d. civil conspiracy,
 - e. fraud, deceit, inducement, and misrepresentation,
 - f. mechanic's lien enforcement,
 - g. multiple requests for declaratory judgment,
 - h. oral contractual modification,
 - i. professional negligence by and against multiple parties,
 - j. punitive damages,
 - k. tortious interference, and
 - l. unjust enrichment.
- 5. The majority of such claims arise out of the parties' contractual relationships and the adequacy of services performed.

6. West Virginia defines “Business Litigation” is defined as an action pending in circuit court in which:

- (1) the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and
- (2) the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and
- (3) the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

West Virginia Trial Court Rule 29.04(a).

7. This matter meets the conditions for “Business Litigation” as defined by TCR 29.04(a).

The principal claims involve business entities’ contractual transactions and also business operations as the conduct of the parties is likewise disputed. Specialized treatment of this dispute will facilitate a fair and reasonable resolution of the controversy through applying legal principles to a variety of disputes. Further specialized treatment is necessary for the application of industry standard or party intent to determine obligations where contracts

may be silent, ambiguous, or allegedly altered. Finally, no exceptions under TCR 29.04(a)(3) appear to apply to this matter.

8. This matter involves sophisticated and complex commercial issues surrounding the design and construction of a large facility in or near Charleston, West Virginia. Those sophisticated and complex issues include the professional standard of care of engineers and contractors, interpreting and applying numerous construction contracts and related documents, and understanding the duties and responsibilities of various entities intertwined in a large construction project. A significant amount of electronic and traditional discovery is required and ongoing. Damages in this matter potentially require the analysis of delay costs, business finances, construction costs, and construction damages through detailed causal analysis. Multiple expert witnesses (type and quantity) are involved in this matter. Thus, specialized treatment of these issues in the Business Court is further warranted to improve the expectation of a fair and reasonable resolution of this controversy as required by TCR 29.04(a)(2).
9. Movant asserts that there are no related actions currently pending. Movant further asserts that it may be necessary to file third-party actions as litigation progresses depending on the results of discovery and the possible opinions of testifying experts. However, this litigation includes all parties intended to be named at this time.
10. As required by Trial Court Rule 29.06(a)(1), the Docket Sheet is attached and marked as Exhibit A. The complaint is attached as Exhibit B. The Answers, which incorporate Jarrett's third-party complaint, are attached and collectively marked as Exhibit C.

11. Movant does not request an expedited review under Trial Court Rule 29.06(a)(4) and movant gives concurrent notice that all affected parties may file a memorandum stating their position in accordance with Trial Court Rule 29.

CONCLUSION

WHEREFORE, for the foregoing reasons, the undersigned parties respectfully request the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division together with such other relief as the Court may deem proper.

Drafted by:

**Third-party Defendant,
ECS MID-ATLANTIC, LLC,
By Counsel:**



Christopher A. Brumley (WV State Bar #7697)
Evan S. Aldridge (WV State Bar #13373)
FLAHERTY SENSABAUGH BONASSO, PLLC
P.O. Box 3843
Charleston, WV 25303
Telephone: (304) 345-0200
Facsimile: (304) 345-0260
cbrumley@flahertylegal.com
ealdridge@flahertylegal.com

Joined by:

**Defendants,
SMITH/PACKETT MED-COM, LLC
SP WV, LLC
WV IL-AL INVESTORS, LLC
By Counsel:**

Robert A. Lockhart with permission ESA

Robert A. Lockhart (WV State Bar #4657)
CIPRIANI & WERNER, P.C.
500 Lee Street East, Suite 900
Charleston, WV 25301
Telephone: (304) 341-0500
Facsimile: (304) 341-0507
rlockhart@c-wlaw.com

**Defendant,
CARTER BANK & TRUST
By Counsel:**

Clifford F. Kinney with permission ESA

Clifford F. Kinney, Jr. (WV Bar #6220)
Joseph A. Ford (WV Bar #12984)
SPILMAN THOMAS & BATTLE, PLLC
300 Kanawha Boulevard, East (ZIP 25301)
P.O. Box 273
Charleston, WV 25321-0273
Telephone: (304) 340-3800
Facsimile: (304) 340-3801
ckinney@spilmanlaw.com
jford@spilmanlaw.com

Counterclaimant/Third-Party Plaintiff
JARRETT CONSTRUCTION SERVICES, INC.
By Counsel:

Robert H. Sweeney, Jr. with Permission ESA

Robert H. Sweeney, Jr. (WV State Bar #5831)

Oscar R. Molina (WV State Bar #13024)

JENKINS FENSTERMAKER, PLLC

P.O. Box 2688

Huntington, WV 25726-2688

Telephone: (304) 523-2100

Facsimile: (304) 523-2347

RHS@JenkinsFenstermaker.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,

Plaintiff/Counterclaim Defendant/Cross-claimant;

v.

**KANAWHA COUNTY CIRCUIT COURT
Civil Action No. 20-C-350
Honorable Tod J. Kaufman**

**SMITH/PACKETT MED-COM, LLC,
a Virginia Limited Liability Company,**

Defendant;

And

**SP WV, LLC,
a Virginia Liability Company,**

Defendant;

And

**WV IL-AL INVESTORS, LLC,
a Virginia Limited Liability Company**

Defendant;

And

CARTER BANK & TRUST,

Defendant;

And

JARRETT CONSTRUCTION SERVICES, INC.,

Defendant/Counterclaimant/Third-Party Plaintiff;

v.

ECS MID-ATLANTIC, LLC

Third-Party Defendant/Crossclaim Defendant.

EXHIBIT A

MOUNTAIN STATE PIPELINE & EXCA VS. SMITH/PACKETT MED-COM, LLC

LINE DATE ACTION

1 05/01/20 # CASE INFO SHEET; COMPLAINT; F FEE; RCPT 579688; \$275.00
2 05/18/20 # ISSUED SUM & 2 CPYS AS TO WV IL-AL INVESTORS LLC
3 05/18/20 # ISSUED SUM & 2 CPYS AS TO SP WV, LLC
4 05/18/20 # ISSUED SUM & 2 CPYS AS TO SMITH/PACKETT MED-COM, LLC
5 05/18/20 # ISSUED SUM & 2 CPYS AS TO JARRETT CONSTRUCTION SERVICES
6 05/18/20 # ISSUED SUM & 2 CPYS AS TO CARTER BANK & TRUST
7 05/19/20 # RE-ISSUED SUM & 5 CPYS
8 05/28/20 @ LET FR SS DTD 5/21/20; SUM & AMD C (5/21/20 SS) AS TO SP WV
9 05/28/20 @ LET FR SS DTD 5/21/20; SUM & AMD C (5/21/20 SS) AS TO WV IL-AL
10 05/28/20 @ LET FR SS DTD 5/21/20; SUM & AMD C (5/21/20 SS) AS TO JARRETT
11 CONSTRUCTION SERVICES, INC
12 06/01/20 # LET FR SS DTD 5/26/20; SUM W/RET ON AMD C (5/26/20 SS) AS TO
13 CARTER BANK & TRUST
14 06/01/20 # LET FR SS DTD 5/26/20; SUM W/RET ON AMD C (5/26/20 SS) AS TO
15 SMITH/PACKETT MED-COM LLC
16 06/22/20 @ CASE INFO; ANS OF JARRETT CONSTRUCTION & COUNTER-CLAIM AGAINST
17 MOUNTAIN STATE PIPELINE & EXCAVATING & 3RD PARY C AGAINST ECS
18 MID-ATLANTIC, LLC W/ATTACH & COS; ISSUED SUM & 2 COPY
19 06/23/20 # CASE INFO SHEET; WV IL-AL INVESTORS, LLC, SP WV, LLC &
20 SMITH/PACKETT MED-COM, LLC'S ANS & CC W/COS; F FEE; RCPT
21 560656 & 580678; \$600.00
22 06/26/20 # CASE INFO SHEET; CARTER BANK & TRUST'S ANS TO C W/COS
23 07/02/20 # LET FR SS DTD 6/30/20; SUM ON ANS, CC & 3RD PTY C (6/30/20
24 SS) AS TO ECS MID-ATLANTIC LLC
25 07/08/20 # MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S MOT TO DIS JCSI'S
26 CC W/EXH'S & COS
27 07/08/20 # MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S MEMO OF LAW &
28 POINTS OF AUTHORITY IN SUPP W/COS
29 07/09/20 # MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S CR CL AGAINST 3RD
30 PTY D, ECS MID-ATLANTIC LLC W/COS
31 07/14/20 # MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S MEMO OF LAW IN
32 SUPP OF MOT TO DIS SMITH/PACKETT D'S CC & ALTERNATIVE MOT TO
33 REQUIRE SMITH/PACKETT D'S TO PLEAD MORE DEFINITE STATEMENT &
34 MOT TO STRIKE INSUFFICIENT DEFENSE & IMMATERIAL CC ALLEGATIONS
35 W/COS
36 07/14/20 # MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S MOT TO DIS SMITH/
37 PACKETT D'S CC & ALTERNATIVE MOT TO QUIRE SMITH/PACKETT D'S TO
38 PLEAD MORE DEFINITE STATEMENT & MOT TO STRIKE INSUFFICIENT
39 DEFENSE & IMMATERIAL CC ALLEGATIONS W/EXH'S & COS
40 07/14/20 # MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S MEMO OF LAW IN
41 SUPP OF MOT TO DIS CC W/COS
42 07/14/20 # MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S MOT TO DIS SMITH/
43 PACKETT D'S CC COUNT ONE FOR NEGLIGENCE & BREACH OF CONTRACT
44 & ALTERNATIVE MOT TO REQUIRE SMITH/PACKETT TO PLEAD MORE
45 DEFINITE STATEMENT & MOT TO STRIKE INSUFFICIENT DEFENSE &
46 IMMATERIAL CC ALLEGATIONS W/EXH'S & COS
47 07/27/20 # COS AS TO MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S 1ST
48 INTERROG'S & REQ FOR PROD TO SP WV, LLC
49 07/27/20 # COS AS TO MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S 1ST
50 INTERROG'S & REQ FOR PROD TO SMITH/PACKETT MED-COM, LLC
51 07/27/20 # COS AS TO MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S 1ST
52 INTERROG'S & REQ FOR PROD TO WV IL-AL INVESTORS, LLC
53 07/29/20 # CASE INFO SHEET; ECS MID-ATLANTIC LLC'S ANS TO MOUNTAIN
54 STATE PIPELINE & EXCAVATING LLC'S CR CL W/COS

A TRUE COPY

TESTED
Clerk
CIRCUIT COURT KANAWHA COUNTY, WV/VA

MOUNTAIN STATE PIPELINE & EXCA VS. SMITH/PACKETT MED-COM, LLC

LINE	DATE	ACTION
55	07/29/20	# ECS MID-ATLANTIC LLC'S ANS TO JARRETT CONSTRUCTION SERVICES
56		3RD PTY C W/COS
57	07/31/20	# COS AS TO MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S 1ST REQ
58		FOR ADM'S TO JARRETT CONSTRUCTION SERVICES
59	07/31/20	# COS AS TO MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S 1ST
60		INTERROG'S & REQ FOR PROD TO JARRETT CONSTRUCTION SERVICE
61	08/03/20	# NOT OF APPEARANCE W/COS
62	08/03/20	# COS AS TO MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S
63		1ST REQ FOR ADM'S TO ECS MID-ATLANTIC LLC
64	08/11/20	# COS AS TO MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S 1ST
65		INTERROG'S & REQ FOR PROD TO CARTER BANK & TRUST
66	08/11/20	# COS AS TO MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S 1ST
67		INTERROG'S & REQ FOR PROD TO ECS MID-ATLANTIC LLC
68	08/13/20	# COS AS TO ECS MID-ATLANTIC LLC'S 1ST INTERROG'S & REQ FOR
69		PROD TO MOUNTAIN STATE PIPELINE & EXCAVATING LLC
70	08/26/20	# MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S SUPPLEMENTAL
71		EXH "H" TO MOT TO COMPEL SITE INSPECTION W/EXH & COS
72	08/26/20	# MOUNTAIN STATE PIPELINE & EXCAVATING LLC'S MOT TO COMPEL
73		SITE INSPECTION W/EXH'S & COS
74	08/26/20	# COS AS TO RULE 34 NOT OF ENTRY UPON LAND FOR INSPECTION
75	08/31/20	# COS AS TO SMITH/PACKETT MED-COM LLC'S ANS' & RESP'S TO P'S
76		1ST INTERROG'S & REQ FOR PROD
77	08/31/20	# COS AS TO SP WV, LLC'S ANS' & RESP'S TO P'S 1ST INTERROG'S &
78		REQ FOR PROD
79	08/31/20	# WV IL-AL INVESTORS LLC'S ANS' & RESP'S TO P'S 1ST INTERROG'S &
80		REQ FOR PROD
81	08/31/20	# COS AS TO JARRETT CONSTRUCTION SERVICES RESP'S TO MOUNTAIN
82		STATE PIPELINE & EXCAVATING LLC'S 1ST REQ FOR ADM'S
83	09/02/20	# COS AS TO JARRETT CONSTRUCTION SERVICES OBJ'S TO MOUNTAIN
84		STATE & PIPELINE & EXCAVATING LLC'S 1ST INTERROG'S & REQ
85		FOR PROD
86	09/02/20	# JARRETT CONSTRUCTINO SERVICES MOT FOR PROT O W/EXH'S & COS
87	09/02/20	# COS AS TO ECS MID-ATLANTIC LLC'S RESP'S TO MOUNTAIN STATE
88		PIPELINE & EXCAVATING LLC'S 1ST REQ FOR ADM'S
89	09/02/20	# NOT OF DEPO W/COS; NOT OF DEPO W/COS; NOT OF DEPO W/COS

EXHIBIT B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

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

Defendant;

AND

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

Defendant;

AND

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

Defendant;

AND

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

Defendant;

AND

CARTER BANK & TRUST,
A Virginia Banking Corporation,

Defendant.

COMPLAINT

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

FILED

2023 JUL 11 AM 8:20

Civil Action No:

20-C-350

Kaufman

follows:

THE PARTIES

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

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

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

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

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

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

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

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

JURISDICTION AND VENUE

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

GENERAL AND SPECIFIC ALLEGATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNT 1 – BREACH OF CONTRACT

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

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

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

COUNT 2 - BREACH OF WARRANTY

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

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

COUNT 3 - FRAUD, DECEIT, INDUCEMENT, AND MISREPRESENTATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNT 5 – TORTIOUS INTERFERENCE – JARRETT CONSTRUCTION SERVICES

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

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

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

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

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

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

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

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

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

COUNT 6 – ORAL MODIFICATION, IMPLIED IN FACT CONTRACT

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

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

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

ORAL MODIFICATIONS FOR EXTRA WORK/IMPLIED IN FACT CONTRACT

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

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

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

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

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

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

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

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

COUNT 8 – DECLARATORY JUDGMENT RELIEF

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

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

COUNT 9 – JOINT VENTURE, CIVIL CONSPIRACY LIABILITY

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

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

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

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

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

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

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

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

COUNT 10 MECHANIC'S LIEN ENFORCEMENT, SMITH/PACKETT AND CARTER BANK & TRUST

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

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

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

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

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

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

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

COUNT 11 PUNITIVE DAMAGES AND ATTORNEYS' FEES AND COSTS

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

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

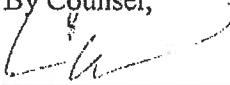
Ad Damnum - Prayer for Relief

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

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

PLAINTIFF DEMANDS A TRIAL BY JURY.

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



Carl J. Roncaglione, Jr., Esq. (W/Va. Bar #5723)
1018 Kanawha Boulevard East
Suite 401 Boulevard Tower
Charleston WV 25301
(304) 342-3945/(304)342-3947

EXHIBIT C



JENKINS
FENSTERMAKER, PLLC
ATTORNEYS & COUNSELLORS

325 8TH STREET • HUNTINGTON, WV 25701
MAILING ADDRESS P.O. BOX 2688 • HUNTINGTON, WV 25726-2688
304.523.2100 • F: 304.523.2347

WWW.JENKINSFENSTERMAKER.COM

Robert H. Sweeney, Jr., Esquire
Direct dial: 304-399-9713
E-mail: rhs@jenkinsfenstermaker.com

File No. 8252.0123

June 18, 2020

Cathy S. Gatson, Clerk
Kanawha County Circuit Court
PO Box 2351
Charleston, WV 25328

Re: *Mountain State Pipeline & Excavating, LLC v Smith/Packet Med-Com, LLC, et al.*
Kanawha County Circuit Court Civil Action No. 20-C-350

Dear Ms. Gatson:

Enclosed for filing, please find a *Civil Case Information Sheet* and *Jarett Construction Services, Inc.'s Answer to Complaint, Counterclaim against Plaintiff Mountain State Pipeline & Excavating, LLC and Third-Party Complaint against ECS Mid-Atlantic, LLC* in the above-reference civil action.

We have also enclosed an additional copy of the *Answer to Complaint, Counterclaim against Plaintiff, Mountain State Pipeline & Excavating, LLC and Third-Party Complaint against ECS Mid-Atlantic, LLC* for return of a time-stamped copy to our office along with an executed Summons (three copies of the Summons have been enclosed).

Also, please find this firm's Check Number 34556 made payable to the Kanawha County Circuit Clerk in the amount of \$200.00 as the filing fee for same.

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

Very truly yours

Robert H. Sweeney, Jr.

RHS/jlw
Enclosures

cc: Carl Roncaglione, Jr., Esq.
Clifford F. Kinney, Jr., Esq.
John D. "Jack" Hoblitzell, Esq.
Robert A. Lockhart, Esq.
Christopher A. Brumley, Esq./Evan S. Aldridge, Esq.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PLAINTIFF: MOUNTAIN STATE PIPELINE & EXCAVATING, LLC

CASE NUMBER: 20-C-350

DEFENDANTS: JARRETT CONSTRUCTION SERVICES, INC., ET AL.

II. TYPE OF CASE

☒ General Civil

☐ Adoption

☐ Mass Litigation
(As defined in T.C.R. Rule XIX (c))

☐ Administrative Agency Appeal

- ☐ Asbestos
- ☐ Carpal Tunnel Syndrome
- ☐ Diet Drugs
- ☐ Environmental
- ☐ Industrial Hearing Loss
- ☐ Silicone Implants
- ☐ Other: _____

☐ Civil Appeal from Magistrate Court

☐ Miscellaneous Civil Petition

☐ Mental Hygiene

☐ Guardianship

☐ Medical Malpractice

☐ Habeas Corpus/Other Extraordinary Writ

☐ Other

III. JURY DEMAND: ☒ Yes ☐ No

CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR): June 18, 2021

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE? ☐ YES ☒ NO
IF YES, PLEASE SPECIFY:

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

Attorney Name: Robert H. Sweeney, Esq. (WVSB #5813)

Firm: Jenkins Fenstermaker, PLLC


Address: P. O. Box 2688, Huntington, WV 25726-2688

Telephone: (304) 523-2100

Representing:

☐ Plaintiffs ☒ Defendant
Jarrett Construction Services, Inc.

Dated: June 18, 2020


Signature
JAK
w/
permission

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,

Plaintiff,

v.

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

Defendant;

And

**CIVIL ACTION NO: 20-C-350 KAN
Judge Kaufman**

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

Defendant;

And

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

Defendant;

And

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

Defendant;

And

CARTER BANK & TRUST,

Defendant;

And

JARRETT CONSTRUCTION SERVICES, INC.,

Counterclaimant/Third-Party Plaintiff,

v.

ECS MID-ATLANTIC, LLC

Third-Party Defendant,

**JARRETT CONSTRUCTION SERVICES, INC.'S ANSWER TO COMPLAINT,
COUNTERCLAIM AGAINST PLAINTIFF MOUNTAIN STATE PIPELINE &
EXCAVATING, LLC AND THIRD-PARTY COMPLAINT
AGAINST ECS MID-ATLANTIC, LLC**

Comes now, Jarrett Construction Services, Inc., by its counsel, Robert H. Sweeney, Esquire and Jenkins Fenstermaker, PLLC, and in response to Mountain State Pipeline & Excavating, LLC's Complaint, responds as follows:

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim against this Defendant for which relief can be granted. As a result, Plaintiff's complaint should be dismissed.

SECOND DEFENSE

1. Answering Paragraph 1 of the Complaint, this Defendant admits the allegations contained therein.

2. Answering Paragraph 2 of the Complaint, Defendant denies the allegations as stated. This Defendant admits that Smith/Packett Med-Com, LLC maintains a place of business in Roanoke, Virginia. With regard to the remaining allegations, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

3. Answering Paragraph 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

4. Answering Paragraph 4 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

5. Answering Paragraph 5 of the Complaint, Defendant denies the allegations as stated. This Defendant admits that it entered into contracts with WV IL-AL Investors, LLC. Those contracts speak for themselves. With regard to the remaining allegations, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

6. Answering Paragraph 6 of the Complaint, this Defendant admits the allegations contained therein.

7. Answering Paragraph 7 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

8. Answering Paragraph 8 of the Complaint, this Defendant admits that any dispute arising under the Plaintiff's agreement must be litigated in the Circuit Court of Kanawha County.

9. Answering Paragraph 9 of the Complaint, Defendant denies the allegations as stated. This Defendant admits that it entered into contracts with WV IL-AL Investors, LLC. Those contracts speak for themselves. With regard to the remaining allegations as stated in the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

10. Answering Paragraph 10 of the Complaint, Defendant denies the allegations as stated. This Defendant admits that it entered into contracts with WV IL-AL Investors, LLC. Those contracts speak for themselves. With regard to the remaining allegations as stated in the

Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

11. Answering paragraph 11 of the Complaint, Defendant denies the allegations as stated.

12. Answering Paragraph 12 of the Complaint, Defendant denies the allegations as stated. This Defendant admits that it is not a party to the contract between the Plaintiff and WV IL-AL Investors, LLC. However, Plaintiff agreed to defend and indemnify this Defendant under the terms of the contract between the Plaintiff and WV IL-AL Investors, LLC. Any remaining allegations are denied.

13. Answering Paragraph 13 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

14. Answering paragraph 14 of the Complaint, Defendant denies the allegations as stated. The Defendant is aware of allegations that the services performed by ECS Mid-Atlantic, LLC in connection with the Project did not meet the professional standard of care. With regard to the remaining allegations as stated in the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

15. Answering Paragraph 15 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

16. Answering Paragraph 16 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

17. Answering Paragraph 17 of the Complaint, Defendant denies the allegations as stated. This Defendant denies that it was involved in any of the design aspects of the project at issue, referred into the Complaint as the Project Manual. With regard to the remaining allegations as stated in the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

18. Answering Paragraph 18 of the Complaint, Defendant denies the allegations as stated. This Defendant admits that a portion of the Plaintiff's scope of work included the construction of a field on the property of the Bible Center Church. With regard to the remaining allegations as stated in the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

19. Answering Paragraph 19 of the Complaint, Defendant denies the allegations as stated. This Defendant denies that it was involved in any of the design aspects of the project at issue, referred into the Complaint as the Project Manual. With regard to the remaining allegations as stated in the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

20. Answering Paragraph 20 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

21. Answering Paragraph 21 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

22. Answering Paragraph 22 of the Complaint, Defendant denies the allegations as stated. This Defendant denies that it has been negligent, deceitful, or malicious or that it has engaged in any acts or omissions that have proximately caused Plaintiff any injury. Further, this Defendant is without knowledge or information to confirm that John James, P.E. made any statement to on March 2, 2020 to WV IL-AL Investors, LLC concerning the slide in issue. With regard to the remaining allegations, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

23. Answering Paragraph 23 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

24. Answering paragraph 24 of the Complaint, Defendant denies the allegations as stated. This Defendant denies that it was involved in any of the design aspects of the project at issue, referred into the Complaint as the Project Manual. With regard to the remaining allegations as stated in the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

25. Answering Paragraph 25 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and demand strict proof thereof.

26. Answering Paragraph 26 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

27. Answering Paragraph 27 of the Complaint, Defendant denies the allegations as stated. The Project Manual speaks for itself. With regard to the remaining allegations, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

28. Answering Paragraph 28 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

29. Answering paragraph 29 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

30. Answering Paragraph 30 of the Complaint, this Defendant denies the allegations as stated. This Defendant admits that the plaintiff entered into a contract with WV IL-AL Investors, LLC. That contract speaks for itself. With regard to the remaining allegations, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

31. Answering Paragraph 31 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

32. Answering Paragraph 32 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

33. Answering Paragraph 33 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

34. Answering Paragraph 34 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

35. Answering Paragraph 35 of the Complaint, Defendant denies the allegations as stated. This Defendant denies that it caused any delays or extensions of the contract time, or that it caused any injury to the Plaintiff. With regard to the remaining allegations, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

36. Answering Paragraph 36 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

37. Answering Paragraph 37 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

38. Answering Paragraph 38 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

39. Answering Paragraph 39 of the Complaint, Defendant denies the allegations as stated. This Defendant admits that the Plaintiff performed work on a field on the property of the Bible Center Church. This Defendant denies that the Plaintiff completed the work on the field on the Bible Center property. Any remaining allegations are denied.

40. Answering Paragraph 40 of the Complaint, Defendant denies the allegations as stated. The Plaintiff's contract with WV IL-AL Investors, Inc. stated that pre-requisites to substantial completion shall be approval of the WV Fire Marshall to permit beneficial use of the Project and completion of all work necessary for the Project to pass licensure, fire or other inspection necessary to operate the project for its intended use.

extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

49. Answering Paragraph 49 of Count 1 of the Complaint, Defendant denies the allegations as stated.

50. In response to Paragraph 50 of Count 2 of the Complaint, this Defendant adopts and incorporates by reference its responses to Paragraphs 1 through 49 as if set forth in full herein.

51. Answering Paragraph 51 of Count 2 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

52. In response to Paragraph 52 of Count 3 of the Complaint, this Defendant adopts and incorporates by reference its responses to Paragraphs 1 through 51 as if set forth in full herein.

53. Answering Paragraph 53 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

54. Answering Paragraph 54 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the

extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

55. Answering Paragraph 55 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

56. Answering Paragraph 56 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

57. Answering Paragraph 57 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

58. Answering Paragraph 58 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

59. Answering Paragraph 59 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained

therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

60. Answering Paragraph 60 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

61. Answering Paragraph 61 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

62. Answering Paragraph 62 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

63. Answering Paragraph 63 of Count 3 of the Complaint, This Defendant denies the allegations as stated. The Defendant admits that a slip occurred on January 8, 2019. With regard to the remaining allegations, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

64. Answering Paragraph 64 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

65. Answering Paragraph 65 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

66. Answering Paragraph 66 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

67. Answering Paragraph 67 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

68. Answering Paragraph 68 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the

extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

69. Answering Paragraph 69 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

70. Answering Paragraph 70 of Count 3 of the Complaint, Defendant denies the allegations as stated. This Defendant denies that the Plaintiff has completed its contract. With regard to the remaining allegations, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

71. Answering Paragraph 71 of Count 3 of the Complaint, Defendant denies the allegations as stated.

72. Answering Paragraph 72 of Count 3 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant.

73. In response to Paragraph 73 of Count 4 of the Complaint, this Defendant adopts and incorporates by reference its responses to Paragraphs 1 through 72 as if set forth in full herein.

74. Answering Paragraph 74 of Count 4 of the Complaint, Defendant denies the allegations as stated. This Defendant admits that it entered into separate agreements with WV IL-AL Investors, LLC. Those agreements speak for themselves.

75. Answering Paragraph 75 of Count 4 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

76. Answering Paragraph 76 of Count 4 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

77. Answering Paragraph 77 of Count 4 of the Complaint, this paragraph states a legal conclusion, which this Defendant can neither admit nor deny. To the extent that it requires an admission or denial, it is denied, and Defendant demands strict proof thereof.

78. Answering Paragraph 78 of Count 4 of the Complaint, this paragraph states a legal conclusion, which this Defendant can neither admit nor deny. To the extent that it requires an admission or denial, it is denied, and Defendant demands strict proof thereof.

79. Answering Paragraph 79 of Count 4 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

80. Answering Paragraph 80 of Count 4 of the Complaint, Defendant denies the allegations as stated. This Defendant denies that it acted maliciously or that is caused any injury to the Plaintiff. With regard to the remaining allegations, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

81. Answering Paragraph 81 of Count 4 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

82. In response to Paragraph 82 of Count 5 of the Complaint, this Defendant adopts and incorporates by reference its responses to Paragraphs 1 through 81 as if set forth in full herein.

83. Answering Paragraph 83 of Count 5 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

84. Answering Paragraph 84 of Count 5 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

85. Answering Paragraph 85 of Count 5 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

86. Answering Paragraph 86 of Count 5 of the Complaint, Defendant denies the allegations as stated. The Defendant denies that it has prevented the Plaintiff's performance. With regard to the remaining allegations, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

87. Answering Paragraph 87 of Count 5 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

88. Answering Paragraph 88 of Count 5 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

89. Answering Paragraph 89 of Count 5 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

90. In response to Paragraph 90 of Count 6 of the Complaint, this Defendant adopts and incorporates by reference its responses to Paragraphs 1 through 89 as if set forth in full herein.

91. Answering Paragraph 91 of Count 6 of the Complaint, this paragraph states a legal conclusion, which this Defendant can neither admit nor deny. To the extent that it requires an admission or denial, it is denied, and Defendant demands strict proof thereof.

92. Answering Paragraph 92 of Count 6 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

93. Answering Paragraph 93 of Count 6 of the Complaint, Defendant denies the allegations as stated. This Defendant denies that it acted maliciously or that it caused Plaintiff any injuries. With regard to the remaining allegations, this Defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies the same, and demands strict proof thereof.

94. Answering Paragraph 94 of Count 6 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant.

95. Answering Paragraph 95 of Count 6 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant.

96. In response to Paragraph 96 of Count 7 of the Complaint, this Defendant adopts and incorporates by reference its responses to Paragraphs 1 through 95 as if set forth in full herein.

97. Answering Paragraph 97 of Count 7 of the Complaint, this paragraph states a legal conclusion, which this Defendant can neither admit nor deny. To the extent that it requires an admission or denial, it is denied, and Defendant demands strict proof thereof.

98. Answering Paragraph 98 of Count 7 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant.

99. In response to Paragraph 99 of Count 8 of the Complaint, this Defendant adopts and incorporates by reference its responses to Paragraphs 1 through 98 as if set forth in full herein.

100. Answering Paragraph 100 of Count 8 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same and demands strict proof thereof.

101. In response to Paragraph 101 of Count 9 of the Complaint, this Defendant adopts and incorporates by reference its responses to Paragraphs 1 through 100 as if set forth in full herein.

102. Answering Paragraph 102 of Count 9 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

103. Answering Paragraph 103 of Count 9 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

104. Answering Paragraph 104 of Count 9 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

105. Answering Paragraph 105 of Count 9 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

106. Answering Paragraph 106 of Count 9 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

107. In response to Paragraph 107 of Count 10 of the Complaint, this Defendant adopts and incorporates by reference its responses to Paragraphs 1 through 106 as if set forth in full herein.

108. Answering Paragraph 108 of Count 10 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

109. Answering Paragraph 109 of Count 10 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

110. Answering Paragraph 110 of Count 10 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

111. Answering Paragraph 111 of Count 10 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

112. Answering Paragraph 112 of Count 10 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, as the allegations in this paragraph pertain to a party other than this Defendant. To the extent that an admission or denial is necessary, the allegations are denied, and Defendant demands strict proof thereof.

113. In response to Paragraph 113 of Count 11 of the Complaint, this Defendant adopts and incorporates by reference its responses to Paragraphs 1 through 112 as if set forth in full herein.

114. Answering Paragraph 114 of Count 11 of the Complaint, this Defendant denies the allegations contained therein, and demands strict proof thereof.

WHEREFORE, having answered the Plaintiff's Complaint, Jarrett Construction Services, Inc. requests that this Honorable Court dismiss this Complaint and award Jarrett Construction Services, Inc. its attorney's fees, costs and expenses, and any other relief the Court deems just and appropriate.

THIRD DEFENSE

Plaintiff's Complaint violates the requirements of Rule 8(a) of the West Virginia Rules of Civil Procedure, in that it is neither a short, plain nor intelligible statement showing that the Plaintiff is entitled to relief.

FOURTH DEFENSE

Assuming that Plaintiff can establish an enforceable contract, Plaintiff cannot enforce or maintain an action on such contract since he materially breached his alleged contract or agreement prior to the alleged breach by this or any Defendant.

FIFTH DEFENSE

This Defendant was prevented from performing its obligations pursuant to its contract by the wrongful conduct of Plaintiff, which caused this Defendant damages.

SIXTH DEFENSE

Any breach or default on its contract by this Defendant was due to the impossibility of performance from events not caused by this Defendant.

SEVENTH DEFENSE

Any breach or default on the contract by this Defendant was slight and minor, did not constitute a major breach and, therefore, caused no injury or damage to Plaintiff.

EIGHTH DEFENSE

Plaintiff's Complaint should be dismissed on the grounds that Plaintiff has failed to plead fraud with particularity as required by Rule 9(b) of the West Virginia Rules of Civil Procedure.

NINTH DEFENSE

Plaintiff did not justifiably or reasonably rely on any statement or representation of Defendant, and, therefore, Plaintiff is not entitled to maintain an action for fraud or misrepresentation against this Defendant.

TENTH DEFENSE

Plaintiff's claim is barred because the Defendant made no misrepresentations or false statements to the Plaintiff.

ELEVENTH DEFENSE

Plaintiff's claim is barred because this Defendant's representations and/or statements were truthful at the time said representations and/or statements were made and at all times relevant to this action.

TWELFTH DEFENSE

Defendant invokes the doctrine of mitigation of damages and alleges that Plaintiff failed to mitigate such damages, if any, and, therefore, Plaintiff's recovery, if any, should be reduced by the amount of damages, which might have been avoided by mitigation.

THIRTEENTH DEFENSE

This Defendant did not participate, engage, or assist in any act or conduct which could form the basis of an award of compensatory damages and compensatory damages are, therefore, not recoverable to any extent whatsoever against this Defendant.

FOURTEENTH DEFENSE

Plaintiff's claims, or some of them, that seek exemplary or punitive damages violate Defendant's right to procedural and substantive due process as provided by the Fifth and Fourteenth Amendments to the United States Constitution and Article III, Section 10, and all other applicable provisions, of the Constitution of the State of West Virginia.

FIFTEENTH DEFENSE

Plaintiff's claim for punitive damages violates the Contract Clause of the United States Constitution.

SIXTEENTH DEFENSE

This Defendant did not participate, engage, or assist in any act or conduct which could form the basis of an award of punitive damages and punitive damages are, therefore, not recoverable to any extent whatsoever against this Defendant.

SEVENTEENTH DEFENSE

Plaintiff's cause of action against Defendant is barred by the doctrine of laches.

EIGHTEENTH DEFENSE

Plaintiff, by his actions, has waived and/or is estopped from maintaining this action against Defendant.

NINETEENTH DEFENSE

Plaintiff's Complaint is barred by the doctrine of unclean hands and he is therefore not entitled to any equitable relief requested.

TWENTIETH DEFENSE

If Defendant is found to be liable to Plaintiff for any injuries and damages, it is entitled to contribution and/or indemnification from any other co-Defendant found to be jointly liable.

TWENTY-FIRST DEFENSE

Plaintiff's claim is barred by the affirmative defense of comparative negligence, in that the negligence of Plaintiff equals or exceeds the negligence, if any, of Defendant.

TWENTY-SECOND DEFENSE

Plaintiff's claim is barred by the affirmative defense of comparative assumption of the risk.

TWENTY-THIRD DEFENSE

The alleged damages, if any, suffered by Plaintiff were not proximately caused by any act or omission of Defendant.

TWENTY-FOURTH DEFENSE

Plaintiff's damages, if any, were not proximately caused by the actions of Defendant but by the intervening negligence or actions of other corporations, entities or individuals.

TWENTY-FIFTH DEFENSE

Plaintiff's claim against Defendant for punitive damages should be dismissed as punitive damages are not recoverable in a breach of contract action, and there is no allegation or evidence in this action of any independent, willful tort sufficient to support an award of punitive damages.

TWENTY-SIXTH DEFENSE

The damages and injuries, if any, suffered by the plaintiff were proximately caused or contributed to by plaintiff's unforeseeable idiosyncratic conditions, unusual susceptibility or hypersensitive reactions for which Defendant is not responsible.

TWENTY-SEVENTH DEFENSE

Defendant denies any allegations contained in Plaintiff's Complaint not specifically admitted herein.

TWENTY-EIGHTH DEFENSE

Defendant asserts the affirmative defenses of accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, failure of consideration, fraud, illegality, injury by fellow servant, license, payment, release, res judicata and/or statute of frauds.

TWENTY-NINTH DEFENSE

Defendant reserves the right to assert additional defenses, affirmative or otherwise, as may be identified through further discovery and investigation

DEFENDANT JARRETT CONSTRUCTION SERVICES, INC.'S
COUNTERCLAIM AGAINST PLAINTIFF MOUNTAIN
STATE PIPELINE & EXCAVATING, LLC AND THIRD-PARTY COMPLAINT
AGAINST ECS MID-ATLANTIC, LLC

Comes now, Jarrett Construction Services, Inc. (JCSI), pursuant to Rules 8(a), 13 and 14 of the West Virginia Rules of Civil Procedure, asserts this Counterclaim against Mountain State Pipeline & Excavation, LLC (MSPE) and, in the alternative, Third-Party Complaint against ECS Mid-Atlantic, LLC (ECS), and states as follows:

FACTUAL AND PROCEDURAL BACKGROUND

1. Defendant WV IL-AL Investors, LLC ("Owner") is identified as the Owner in the contract documents referencing the construction project known among the parties as The Crossings at Southridge, and which is the subject of Plaintiff's Complaint, which is attached hereto and incorporated herein.

2. MSPE entered into a contract with the Owner on April 27, 2018 to perform site preparation work on the Crossings Project.

3. Defendant JCSI entered into two contracts with Owner on March 29, 2018 to perform construction services on the Crossings Project as Constructor and Construction Manager at Risk.

4. On or about January 8, 2019, a slip occurred in a slope below the A Wing of the Crossings Project. The slope where the slip occurred had been prepared by MSPE under its contract with the Owner. The occurrence of the slip has caused substantial delay in the work to be performed under the JCSI contracts, causing JCSI damages.

5. The slope was part of the reports and design prepared by ECS Mid-Atlantic, Inc. (ECS), a geotechnical engineering firm hired by the Owner to provide geotechnical analysis, reports and design documents for the site of the Crossings Project. ECS performed site

evaluation and prepared reports, drawings and specifications necessary for the design and construction of the slope below the A Wing.

6. JCSI did not design the slope in issue, and did not prepare any of the drawings or specifications for the construction of the slope below the A Wing where the slip occurred.

7. JCSI did not perform any of the site work on the slope in issue, all of which was performed exclusively by MSPE.

8. Several geotechnical engineers who examined the slip after January 8, 2019 have opined that a pre-existing subsurface slip reactivated in an area of the project site where MSPE was performing site preparation work, which was not noted on the ECS drawings or in the ECS report or specifications.

9. In August 2019, and in contravention of the other geotechnical engineers, ECS concluded that the slope stability issues arose from the failure of MSPE to properly daylight the toe drain on the slope that suffered the slip, as was required by the ECS report, drawings and specifications.

10. No party has implicated JCSI in the cause of the failure of the slope below the A Wing. JCSI has been delayed and damaged as a result of the impact from the failure of the slope below the A Wing.

COUNT I – NEGLIGENCE BY MSPE

11. JCSI restates and realleges paragraphs 1 through 10 as if fully restated herein.

12. MSPE agreed to perform the work under its agreement with the Owner in a workmanlike manner and in conformity with the plans and specifications, so as not to damage, inhibit, or delay the work of the Project, including the work of JCSI.

13. Based on the allegations of ECS, MSPE breached its duty by failing to perform site preparation and other services on the Crossings Project with the ordinary skill, care, and

diligence commensurate with that rendered by members of MSPE's industry and/or profession in the same or similar circumstances, and in conformity with the plans and specifications.

14. As a direct and proximate result of such breaches of duty by MSPE, JCSI has been forced to incur costs, expenses, and other damages, including attorney fees, resulting from delays and changes in the scope of JCSI's work, and in accordance with various contract provisions that exist in the contract documents between JCSI and Owner.

15. MSPE is liable to JCSI for such costs, expenses, and other damages, including attorney fees, as a result of negligent acts and/or omissions as on the subject Project.

COUNT II – BREACH OF CONTRACT BY MSPE

16. JCSI restates and realleges paragraphs 1 through 15 as if fully restated herein.

17. Pursuant to the contract between MSPE and the Owner, MSPE agreed to perform its work in a good and workmanlike manner and in conformity with the plans and specifications, and further agreed that time was of the essence in the performance of its work on the project.

18. Daylighting of the toe drains on the slope below the A Wings was a material contract requirement of MSPE's contract with the owner, and according to the report of ECS, MSPE materially breached its agreement by failing to do so, resulting in the slope failure below the A Wing.

19. Further deficiencies in the work performed by MSPE have caused disruptions to the work flow on the Crossings Project and have caused JCSI damages, as a beneficiary under the agreement between MSPE and the Owner. In July 2018, no MSPE personnel were on site for a week, which was followed by several months where MSPE had no management on site. MSPE further delayed the project by not having the excavation work completed by September 15, 2018, even though this original deadline was scheduled with MSPE's input through direct conversation and planning.

20. MSPE's failure to meet that deadline caused JCSI to spend \$100,000.00 to control and mitigate for mud in the winter.

21. Further, delays occurred over the presence of organic materials and improperly sized particles in the soil, which were squarely within MSPE's scope of work, and which resulted in time lost while the soil was brought into conformity with the contract documents.

22. MSPE also failed to properly prepare the field on the property of the Bible Center Church, which was within its scope, and which required JCSI to retain another contractor to remove rocks and debris left in the field by MSPE.

23. MSPE has also refused to complete its contract, including the installation of pond skimmer, removal of silt fences, re-spreading of top soil, and other items within the scope of its agreement with the Owner.

24. As a direct and proximate result of the deficiencies, delays, and poor workmanship identified herein and which are ongoing, Owner and JCSI have been forced to incur costs, expenses, and other damages, including attorney fees, resulting from delays and changes in the scope of work, and in accordance with various contract provisions that exist in the contract documents between JCSI and Owner.

25. MSPE is liable to JCSI for such costs, expenses, and other damages, including attorney fees, as a result of the deficiencies, delays, and poor workmanship identified herein, and elsewhere, or which shall be developed more fully during discovery.

COUNT III – MSPE'S BREACH OF THE OBLIGATION TO INDEMNIFY

26. JCSI restates and realleges paragraphs 1 through 25 as if fully restated herein.

27. MSPE agreed to defend, indemnify and hold harmless the Owner and JCSI from any claims arising from the performance of MSPE's work under its agreement with the owner.

28. JCSI has been made subject to claims by the Owner and other multi-prime contractors arising from the alleged breaches of MSPE under its agreement with the Owner, and has suffered substantial damages.

29. MSPE has failed to defend, indemnify and hold harmless JCSI as required under MSPE's agreement with the Owner.

30. JCSI has been damaged as a result of MSPE's breach of its obligation to indemnify JCSI.

COUNT IV – NEGLIGENCE BY ECS

31. JCSI restates and realleges paragraphs 1 through 10 as if fully restated herein.

32. Plaintiff's Complaint alleges that the Owner employed design professionals to prepare portions of the Project Manual and contract and bidding documents, including the Civil Drawings and Specifications, along with Terradon Corporation's Hydrology Study, and ECS MidAtlantic, LLC's Report of Subsurface Exploration and Geotechnical Analysis.

33. Plaintiff's Complaint further alleges that the Project documents, including ECS's Report of Subsurface Exploration and Geotechnical Analysis, failed to identify the Project site's pre-existing, defective, and inadequate underlying subsurface structure and conditions, which instead contained unsuitable soil, unsuitable subsurface bedrock, and unsuitable subsurface water conditions, including a pre-existing, defective, deficient, and weakened subsurface slip plane.

34. ECS, as a design professional, owed a duty of care to JCSI, as a contractor which was employed by the same project owner as the design professionals, and which relied upon the design professionals' work product in carrying out JCSI's obligations to the owner, due to the special relationship that exists among the owner, contractor and design professionals.

35. ECS breached the duty of care by failing to render professional services with the ordinary skill, care, and diligence commensurate with that rendered by members of its profession in the same or similar circumstances.

36. As a direct and proximate result of such breach of duty by ECS, JCSI has been forced to incur costs, expenses, and other damages, including attorney fees, in accordance with various contract provisions that exist in the contract documents between JCSI and the Owner.

37. ECS is liable to JCSI for such costs, expenses, and other damages, including attorney fees, as a result of negligent acts and/or omissions as design professionals on the subject Project.

COUNT V – BREACH OF WARRANTY BY ECS

38. JCSI restates and realleges paragraphs 1 through 37 as if fully restated herein.

39. ECS, as a design professional providing plans and specifications that were relied upon by JCSI and other contractors in carrying out aspects of the Project, impliedly warranted to JCSI that such plans and specifications were prepared with the ordinary skill, care, and diligence commensurate with that rendered by members of their respective professions.

40. ECS breached the implied warranty by failing to render professional services with the ordinary skill, care, and diligence commensurate with that rendered by members of its professions in the same or similar circumstances.

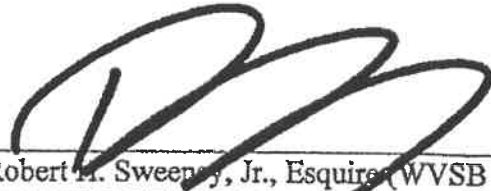
41. As a direct and proximate result of such breach of warranty by ECS, JCSI has been forced to incur costs, expenses, and other damages, including attorney fees, in accordance with various contract provisions that exist in the contract documents between JCSI and the Owner.

42. ECS is liable to JCSI for such costs, expenses, and other damages, including attorney fees, as a result of the breach of the implied warranty as stated herein.

WHEREFORE, Defendant Jarrett Construction Services, Inc. respectfully demands judgment in its favor for all costs, expenses, and other damages, including attorney fees, against MSPE and ECS, and this Defendant prays for such other relief as the Court deems just and proper.

JARRETT CONSTRUCTION SERVICES, INC.

By Counsel,



Robert M. Sweeney, Jr., Esquire (WVSB # 5831)
JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, West Virginia 25726-2688
Phone: (304) 523-2100
Fax: (304) 523-2147

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,

Plaintiff,

v.

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

Defendant;

And

CIVIL ACTION NO: 20-C-350 KAN
Judge Kaufman

SP WV, LLC, a Virginia Manager-Managed Limited Liability
Company and "Pass Through Entity" acting as the Sole Member
Of Defendant, WV-IL-AL Investors, LLC,

Defendant;

And

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

Defendant;

And

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

Defendant;

And

CARTER BANK & TRUST,

Defendant;

And

JARRETT CONSTRUCTION SERVICES, INC.,

Counterclaimant/Third-Party Plaintiff,

v.

ECS MID-ATLANTIC, LLC

Third-Party Defendant,

CERTIFICATE OF SERVICE


I, Robert H. Sweeney, Jr., counsel for Jarrett Construction Services, Inc., do hereby certify that I have served the foregoing "*Jarrett Construction Services, Inc.'s Answer to Plaintiff's Complaint and Defendant Jarrett Construction Services, Inc.'s Counterclaim Against Plaintiff Mountain State Pipeline & Excavating, LLC and Third-Party Complaint Against ECS Mid-Atlantic, LLC*" by depositing a true copy thereof in the first-class United States mail, addressed as follows, on this the 18th day of June, 2020:

Carl J. Roncaglione, Jr.
1018 Kanawha Boulevard, East
Suite 401, Boulevard Tower
Charleston, WV 25301
Counsel for Plaintiff

Clifford F. Kinney, Jr.
SPILMAN THOMAS & BATTLE
300 Kanawha Blvd., East
Charleston, WV 25301
Counsel for WV IL-AL Investors, LLC

John D. "Jack" Hoblitzell
KAY CASTO & CHANEY, PLLC
1500 Chase Tower, 15th Floor
707 Virginia Street, East
Charleston, WV 25301

Robert A. Lockhart
CIPRIANI & WERNER
500 Lee Street, East, Suite 900
Charleston, WV 25301



Robert M. Sweep, Jr., Esquire (WVSB # 5831)
JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, West Virginia 25726-2688
Phone: (304) 523-2100
Fax: (304) 523-2547

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CIVIL CASE INFORMATION SHEET

PLAINTIFFS: MOUNTAIN STATE PIPELINE & EXCAVATING, LLC, A West Virginia Limited Liability Company,	CASE NUMBER: Civil Action No. 20-C-350
DEFENDANTS: SMITH/PACKETT MED-COM, LLC, A Virginia Limited Liability Company, and Sole Manager-Member of Defendant, SP WV, LLC, et al.	JUDGE: Honorable Tod J. Kaufman

II. TYPE OF CASE:

☒ General Civil

☐ Mass Litigation [As defined in T.C.R. 26.04(a)]

☐ Asbestos

☐ FELA Asbestos

☐ Other: _____

☐ Adoption

☐ Administrative Agency Appeal

☐ Civil Appeal from Magistrate Court

☐ Miscellaneous Civil Petition

☐ Mental Hygiene

☐ Habeas Corpus/Other Extraordinary Writ

☐ Other: _____

☐ Guardianship

☐ Medical Malpractice

III. JURY DEMAND ☒ Yes ☐ No

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

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE? ☐ Yes ☒ No
IF YES, PLEASE SPECIFY:

☐ Wheelchair accessible hearing room and other facilities

☐ Interpreter or other auxiliary aid for the hearing impaired

☐ Reader or other auxiliary aid for the visually impaired

☐ Spokesperson or other auxiliary aid for the speech impaired

☐ Other: _____

Attorney Name: Clifford F. Kinney, Jr. & Joseph A. Ford
WVSB: 6220 & 12984

Representing: Carter Bank & Trust

Firm: Spilman Thomas & Battle, PLLC

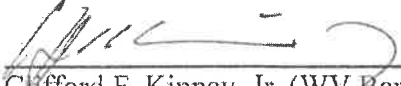
☐ Plaintiff ☒ Defendant

Address: P. O. Box 273, Charleston WV 25321

☐ Cross-Complainant ☐ Cross-Defendant

Telephone: 304/340-3800

Dated: June 24, 2020


Clifford F. Kinney, Jr. (WV Bar # 6220)

☐ Pro Se

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

**Civil Action No: 20-C-350
Honorable Tod J. Kaufman**

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

Defendant;

AND

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

Defendant;

AND

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

Defendant;

AND

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

Defendant;

AND

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

Defendant.

**DEFENDANT CARTER BANK & TRUST'S ANSWER AND
AFFIRMATIVE DEFENSES TO COMPLAINT**

Defendant Carter Bank & Trust, hereby responds and asserts affirmative defenses to the Complaint filed by Plaintiff Mountain State Pipeline & Excavating, LLC ("MSPE"). Carter Bank & Trust answers or otherwise responds to the allegations set forth in the Complaint as follows:

THE PARTIES

1. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 1 of the Complaint.

2. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 2 of the Complaint.

3. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 3 of the Complaint.

4. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 4 of the Complaint.

5. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 5 of the Complaint.

6. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 6 of the Complaint.

7. In response to the allegation set forth in Paragraph 7 of the Complaint, Carter Bank & Trust admits that it is a banking corporation organized under the laws of the Commonwealth of Virginia and that at times, Carter Bank & Trust has done business in Kanawha County, West Virginia. Carter Bank & Trust further states that the Deed of Trust referenced in Paragraph 7 speaks for itself and is the best evidence of the terms contained therein. To the extent the allegations set forth in Paragraph 7 are inconsistent with the express terms and legal effect of said

deed, such allegations are denied. Additionally, Paragraph 7 contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust admits that it claims an interest in the real property subject of this action. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the remaining allegations set forth in Paragraph 7.

JURISDICTION AND VENUE

8. Paragraph 8 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 8.

GENERAL AND SPECIFIC ALLEGATIONS

9. In response to the allegations set forth in Paragraph 9 of the Complaint, Carter Bank & Trust admits it is generally knowledgeable of the Crossings at Southridge project. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 9.

10. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 10 of the Complaint.

11. Carter Bank & Trust denies the allegations set forth in Paragraph 11 of the Complaint to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 11 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

12. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 12 of the Complaint.

13. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 13 of the Complaint.

14. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 14 of the Complaint.

15. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 15 of the Complaint.

16. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 16 of the Complaint.

17. Carter Bank & Trust denies the allegations set forth in Paragraph 17 of the Complaint to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 17 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

18. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 18 of the Complaint.

19. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 19 of the Complaint.

20. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 20 of the Complaint.

21. Paragraph 21 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 21.

22. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 22 of the Complaint.

23. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 23 of the Complaint.

24. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 24 of the Complaint.

25. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 25 of the Complaint.

26. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 26 of the Complaint.

27. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 27 of the Complaint.

28. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 28 of the Complaint.

29. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 29 of the Complaint.

30. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 30 of the Complaint.

31. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 31 of the Complaint.

32. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 32 of the Complaint.

33. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 33 of the Complaint.

34. Paragraph 34 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 34 to the extent they pertain to Carter Bank & Trust. To the extent the allegations set

forth in Paragraph 34 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

35. Paragraph 35 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 35 to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 35 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

36. Paragraph 36 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 36 to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 36 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

37. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 37 of the Complaint.

38. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 38 of the Complaint.

39. Carter Bank & Trust denies the allegations set forth in Paragraph 39 of the Complaint to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 39 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

40. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 40 of the Complaint.

41. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 41 of the Complaint.

42. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 42 of the Complaint.

43. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 43 of the Complaint.

44. In response to the allegations set forth in Paragraph 44 of the Complaint, Carter Bank & Trust admits that it is generally knowledgeable that there was a slide or slip at the project at some point during construction. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 44.

45. Paragraph 45 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 45.

46. Paragraph 46 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 46.

COUNT 1 – BREACH OF CONTRACT

47. Carter Bank & Trust restates its responses to Paragraphs 1 through 46 of the Complaint as if fully stated herein.

48. Paragraph 48 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 48.

49. Paragraph 49 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 49 of the Complaint to the extent they pertain to Carter Bank & Trust. To the extent

the allegations set forth in Paragraph 49 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

COUNT 2 – BREACH OF WARRANTY

50. Carter Bank & Trust restates its responses to Paragraphs 1 through 49 of the Complaint as if fully stated herein.

51. Paragraph 51 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 51 to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 51 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

COUNT 3 – FRAUD, DECEIT, INDUCEMENT, AND MISREPRESENTATION

52. Carter Bank & Trust restates its responses to Paragraphs 1 through 51 of the Complaint as if fully stated herein.

53. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 53 of the Complaint.

54. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 54 of the Complaint.

55. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 55 of the Complaint.

56. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 56 of the Complaint.

57. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 57 of the Complaint.

58. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 58 of the Complaint.

59. Carter Bank & Trust denies the allegations set forth in Paragraph 59 of the Complaint to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 59 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

60. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 60 of the Complaint.

61. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 61 of the Complaint.

62. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 62 of the Complaint.

63. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 63 of the Complaint.

64. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 64 of the Complaint.

65. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 65 of the Complaint.

66. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 66.

67. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 67 of the Complaint.

68. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 68 of the Complaint.

69. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 69 of the Complaint.

70. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 70 of the Complaint.

71. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 71 of the Complaint.

72. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 72 of the Complaint.

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

73. Carter Bank & Trust restates its responses to Paragraphs 1 through 72 of the Complaint as if fully stated herein.

74. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 74 of the Complaint.

75. Paragraph 75 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 75.

76. Paragraph 76 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 76.

77. Paragraph 77 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 77.

78. Paragraph 78 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 78.

79. Paragraph 79 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 79.

80. Carter Bank & Trust denies the allegations set forth in Paragraph 80 of the Complaint to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 80 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

81. Paragraph 81 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 81 to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 81 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

COUNT 5 – TORTIOUS INTERFERENCE – JARRETT CONSTRUCTION SERVICES

82. Carter Bank & Trust restates its responses to Paragraphs 1 through 81 of the Complaint as if fully stated herein.

83. Paragraph 83 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 83.

84. Paragraph 84 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 84.

85. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 85 of the Complaint.

86. Paragraph 86 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 86.

87. Paragraph 87 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 87.

88. Paragraph 88 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 88.

89. Paragraph 89 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 89.

COUNT 6 – ORAL MODIFICATION, IMPLIED IN FACT CONTRACT

90. Carter Bank & Trust restates its responses to Paragraphs 1 through 89 of the Complaint as if fully stated herein.

91. Paragraph 91 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 91.

92. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 92.

93. Paragraph 93 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 93.

94. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 94.

95. Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 95.

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

96. Carter Bank & Trust restates its responses to Paragraphs 1 through 95 of the Complaint as if fully stated herein.

97. Paragraph 97 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 97.

98. Paragraph 98 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 98 to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 98 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

COUNT 8 – DECLARATORY JUDGMENT RELIEF

99. Carter Bank & Trust restates its responses to Paragraphs 1 through 98 of the Complaint as if fully stated herein.

100. Paragraph 100 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth

in Paragraph 100 to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 100 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

COUNT 9 – JOINT VENTURE, CIVIL CONSPIRACY LIABILITY

101. Carter Bank & Trust restates its responses to Paragraphs 1 through 100 of the Complaint as if fully stated herein.

102. Paragraph 102 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 102 to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 102 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

103. Paragraph 103 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 103 to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 103 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

104. Paragraph 104 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 104 to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 104 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

105. Paragraph 105 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 105.

106. Paragraph 106 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 106 to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 106 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

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

107. Carter Bank & Trust restates its responses to Paragraphs 1 through 106 of the Complaint as if fully stated herein.

108. Carter Bank & Trust denies the allegations set forth in Paragraph 108 of the Complaint to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 108 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

109. Carter Bank & Trust denies the allegations set forth in Paragraph 109 of the Complaint.

110. Carter Bank & Trust denies the allegations set forth in Paragraph 110 of the Complaint.

111. Paragraph 111 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 111 of the Complaint.

112. Paragraph 112 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 112 of the Complaint.

COUNT 11 PUNITIVE DAMAGES AND ATTORNEYS' FEES AND COSTS

113. Carter Bank & Trust restates its responses to Paragraphs 1 through 112 of the Complaint as if fully stated herein.

114. Paragraph 114 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, Carter Bank & Trust denies the allegations set forth in Paragraph 114 to the extent they pertain to Carter Bank & Trust. To the extent the allegations set forth in Paragraph 114 refer to other party defendants, Carter Bank & Trust is without knowledge or information sufficient to form a belief as to the truth of the same.

Ad Damnum – Prayer for Relief

Carter Bank & Trust denies that MSPE is entitled to the relief sought in the “*Ad Damnum – Prayer for Relief*” section of the Complaint from Carter Bank & Trust.

115. Carter Bank & Trust denies any allegations contained in the Complaint that are not specifically admitted herein.

AFFIRMATIVE AND OTHER DEFENSES

Having responded to the Complaint, Carter Bank & Trust asserts the following affirmative and other defenses:

1. The Complaint fails to state a claim upon which relief may be granted against Carter Bank & Trust.
2. Carter Bank & Trust had no involvement in the actual construction of the project at issue in the Complaint, it is the lender on a deed of trust, which encumbers the real property on which the project at issue is being constructed.
3. Carter Bank & Trust asserts that the damages or harm, if any, of which MSPE complain were not proximately caused by any act or omission of Carter Bank & Trust.

4. Carter Bank & Trust asserts that the damages or harm, if any, alleged by MSPE were caused solely by the acts and omissions of others, and not by acts or omissions on the part of Carter Bank & Trust.

5. Carter Bank & Trust asserts a lack of privity with MSPE.

6. Carter Bank & Trust asserts that MSPE has failed to fully perform its obligations.

7. Carter Bank & Trust asserts that to the extent established in discovery, the damages or harm, if any, suffered by MSPE, if any, was the result of its own actions and/or negligence.

8. Carter Bank & Trust asserts that to the extent established in discovery, MSPE has failed to mitigate its damages, if any.

9. Carter Bank & Trust asserts that MSPE is not entitled to an award of damages against Carter Bank & Trust because its damages are speculative.

10. Carter Bank & Trust asserts that MSPE's claims are barred for failure to join one or more indispensable parties.

11. Carter Bank & Trust asserts the defenses set forth in Rule 8(c) of the West Virginia Rules of Civil Procedure including, but not limited to, the following: accord and satisfaction; estoppel; payment; release; waiver; and, any other matter constituting an avoidance or affirmative defense.

12. Carter Bank & Trust reserves the defenses of ratification, course of performance, course of dealings, and custom and usage.

13. Carter Bank & Trust reserves all affirmative defenses set forth in Rule 12(b) of the West Virginia Rules of Civil Procedure.

14. Carter Bank & Trust denies that there has been any intentional, malicious, willful, wanton, reckless, or fraudulent conduct or that it engaged in any conduct with the intent to injure MSPE.

15. Carter Bank & Trust asserts that MSPE has failed to plead special damages with the required particularity.

16. Carter Bank & Trust asserts that the Complaint fails to state a claim upon which punitive damages could be awarded against Carter Bank & Trust because no alleged act or omission by Carter Bank & Trust was willful, unconscionable, oppressive, fraudulent, wanton, malicious, reckless, intentional, or with actual malice, with reckless disregard for the safety of MSPE, or with conscious disregard and indifference to the rights, safety, and welfare of others. In addition, any such claim would violate the excessive fines clauses of the United States Constitution, Defendant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution, and its right to equal protection under the Fourteenth Amendment to the United States Constitution and relevant portions of the West Virginia Constitution.

17. Carter Bank & Trust asserts that the Complaint fails to state a cause of action upon which attorneys' fees are recoverable.

18. Carter Bank & Trust reserves the right to assert such claims, defenses, counterclaims, cross-claims, third-party claims, or other claims as investigation and discovery may prove applicable and hereby reserves unto itself all of its rights, including, but not limited to, the right to seek contribution and indemnification, associated with any such claim or potential claim. Carter Bank & Trust is entitled to the benefit of all defenses and presumptions contained in or arising from any rule of law or statute, and expressly reserves the right to assert such defenses as more facts become known.

19. Carter Bank & Trust denies that MSPE is entitled to the relief it requests and demands its fees and costs from MSPE in responding to this lawsuit.

Carter Bank & Trust demands a trial by jury.

CARTER BANK & TRUST

By: Spilman Thomas & Battle, PLLC



Clifford F. Kinney, Jr. (WV Bar # 6220)

Joseph A. Ford (WV Bar #12984)

300 Kanawha Boulevard, East (ZIP 25301)

P.O. Box 273

Charleston, WV 25321-0273

(304) 340-3800

(304) 340-3801 (*facsimile*)

ckinney@spilmanlaw.com

jford@spilmanlaw.com

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

**Civil Action No: 20-C-350
Honorable Tod J. Kaufman**

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

Defendant;

AND

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

Defendant;

AND

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

Defendant;

AND

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

Defendant;

AND

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

Defendant.

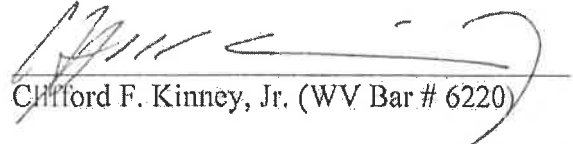
CERTIFICATE OF SERVICE

I, Clifford F. Kinney, Jr., certify that service of the foregoing **Defendant Carter Bank & Trust's Answer and Affirmative Defenses to Complaint** has been made by placing a true and exact copy in the United States Mail, postage prepaid, on this 24th day of June, 2020, addressed as follows:

Carl J. Roncaglione, Jr., Esq.
1018 Kanawha Boulevard, East
Suite 400 Boulevard Tower
Charleston, WV 25301
Counsel for Plaintiff

Robert A. Lockhart, Esq.
Cipriani & Warner, P.C.
500 Lee Street, East, Suite 900
Charleston, WV 25301
*Counsel for Defendant Smith/Packett
Med-Com, LLC; SP WV, LLC; and,
WV IL-AL Investors, LLC*

Robert H. Sweeney, Jr., Esq.
Jenkins Fenstermaker, PLLC
P.O. Box 2688
Huntington, WV 25726-2688
*Counsel for Defendant
Jarrett Construction Services, Inc.*


Clifford F. Kinney, Jr. (WV Bar # 6220)

CIVIL CASE INFORMATION STATEMENT
CIVIL CASES
(Other than Domestic Relations)

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

CASE NUMBER: 20-C-350

DEFENDANTS: WV IL-AL INVESTORS, LLC, SP WV, LLC and
SMITH/PACKETT MED-COM, LLC, et al.

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. Rule XIX (c)) | <input type="checkbox"/> Administrative Agency Appeal |
| <input type="checkbox"/> Asbestos | <input type="checkbox"/> Civil Appeal from Magistrate Court |
| <input type="checkbox"/> Carpal Tunnel Syndrome | <input type="checkbox"/> Miscellaneous Civil Petition |
| <input type="checkbox"/> Diet Drugs | <input type="checkbox"/> Mental Hygiene |
| <input type="checkbox"/> Environmental | <input type="checkbox"/> Guardianship |
| <input type="checkbox"/> Industrial Hearing Loss | <input type="checkbox"/> Medical Malpractice |
| <input type="checkbox"/> Silicone Implants | |
| <input type="checkbox"/> Other: _____ | |

III. JURY DEMAND: ☒ Yes ☐ No

CASE WILL BE READY FOR TRIAL BY (Month / Year): November 2021

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY? ☐ Yes ☒ No

IF YES, PLEASE SPECIFY:

- ☐ Wheelchair accessible hearing room and other facilities
- ☐ Interpreter or other auxiliary aid for the hearing impaired
- ☐ Reader or other auxiliary aid for the visually impaired
- ☐ Spokesperson or other auxiliary aid for the speech impaired
- ☐ Other – Unknown at this time

Attorney Name(s): Robert A. Lockhart

Representing: WV IL-AL Investors, LLC, SP WV, LLC and
Smith/Packett Med-Com, LLC

Firm: Cipriani & Werner, P.C.

☐ Plaintiff ☒ Defendants

Address: 500 Lee Street, East
Laidley Tower, Suite 900
Charleston, WV 25301

☐ Cross-Complainant ☐ Cross-Defendant

Telephone: (304) 341-0500

Dated: June 22, 2020

Robert A. Lockhart by RLM #8825
Signature

☐ Proceeding Without an Attorney

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

Civil Action No.: 20-C-350
Judge Tod Kaufman

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

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

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

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

CARTER BANK & TRUST,
A Virginia Banking Corporation,

Defendants.

**DEFENDANTS WV IL-AL INVESTORS, LLC, SP WV, LLC AND
SMITH/PACKETT MED-COM, LLC'S ANSWER AND COUNTERCLAIM**

COMES NOW Defendants WV IL-AL Investors, LLC ("WV IL-AL Investors"), SP WV, LLC ("WV SP") and Smith/Packett Med-Com, LLC ("Smith/Packett") (collectively, "these Defendants"), by counsel, Robert A. Lockhart and Cipriani & Werner, P.C., in response to the Complaint filed against them, and state as follows:

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

In response to the specific allegations contained in the Complaint, these Defendants state as follows:

THE PARTIES

1. These Defendants admit the allegations in Paragraph 1 of the Complaint.
2. These Defendants admit that Smith Packett is a Virginia limited liability company, organized under the laws of Virginia, with its principal place of business at 4423, Pheasant Ridge Road, Suite 300, Roanoke, Virginia 24014, and was the sole member of WV SP, and denies the remaining allegations in Paragraph 2 of the Complaint.
3. These Defendants admit that WV SP is a Virginia limited liability company, organized under the laws of Virginia, formed June 26, 2017, with its principal place of business at 4423, Pheasant Ridge Road, Suite 300, Roanoke, Virginia 24014, and was the sole member of WV IL-AL Investors, and denies the remaining allegations in Paragraph 3 of the Complaint.
4. These Defendants admit that WV IL-AL Investors is a Virginia limited liability company, organized under the laws of Virginia, formed April 27, 2017, with its principal place of business at 4423, Pheasant Ridge Road, Suite 300, Roanoke, Virginia 24014, and conducted business at The Crossings at Southridge, 801 Peyton Way, South Charleston, Kanawha County, West Virginia, and denies the remaining allegations in Paragraph 4 of the Complaint.
5. These Defendants deny that Smith/Packett or WV SP engaged Jarrett Construction Services ("Jarrett") to act in any capacity for the Project and admit the remaining allegations in Paragraph 5 of the Complaint.
6. These Defendants admit the allegations in Paragraph 6 of the Complaint.
7. These Defendants admit the allegations in Paragraph 7 of the Complaint.

JURISDICTION AND VENUE

8. Paragraph 8 of the complaint contains conclusions of law to which no response is required.

GENERAL AND SPECIFIC ALLEGATIONS

9. These Defendants deny that they are breaching parties and that they employed design professionals as their agents, servants, employees and representatives and admit the remaining allegations in Paragraph 9 of the Complaint.

10. In response to the allegations in Paragraph 10 of the Complaint, these Defendants state that the contracts with Jarrett speak for themselves.

11. In response to the allegations in Paragraph 11 of the Complaint, these Defendants deny that they purchased any "project materials" and state that the contracts speak for themselves.

12. These Defendants deny the allegations in Paragraph 12 of the Complaint.

13. These Defendants admit that Smith/Packett entered into a contract with ECS and further states that the contract speaks for itself.

14. These Defendants deny the allegations in Paragraph 14 of the Complaint.

15. These Defendants deny the allegations in Paragraph 15 of the Complaint.

16. These Defendants deny that they inspected Plaintiff's work and that Terradon's inspection was "at all times" or regular and admit the remaining allegations in Paragraph 16 of the Complaint.

17. These Defendants deny that they issued or published any documents containing false representations or that such documents were inadequate or constituted a breach of any

warranty, and further state that the documents referenced in Paragraph 17 of the Complaint speak for themselves.

18. In response to the allegations in Paragraph 18 of the Complaint, these Defendants state that the Project Manual and MSPE's contract speak for themselves regarding the scope of MSPE's work.

19. These Defendant deny that Plaintiff is a non-breaching party and that the referenced documents were prepared by their agents, servants, employees and representatives and admit the remaining allegations in Paragraph 19 of the Complaint.

20. These Defendants deny the allegations in Paragraph 20 of the Complaint

21. These Defendants deny the allegations in Paragraph 21 of the Complaint.

22. These Defendants deny the allegations in Paragraph 22 of the Complaint.

23. These Defendants admit that construction of the project has and will require additional engineering, architectural design and construction and deny the remaining allegations in Paragraph 23 of the Complaint.

24. These Defendants deny the allegations in Paragraph 24 of the Complaint.

25. In response to the allegations in Paragraph 25 of the Complaint, these Defendants admit that a NPDES permit was issued to WV IL-AL Investors on November 18, 2017 and state that the document speaks for itself.

26. These Defendants deny that the Project Manual was issued to induce MSPE to submit a bid, and admit the remaining allegations in Paragraph 26 of the Complaint.

27. In response the allegations in Paragraph 27 of the Complaint, these Defendants state that the documents referenced therein speak for themselves.

28. These Defendants deny the allegations in Paragraph 28 of the Complaint.

29. These Defendants deny that MSPE's bid was solicited and admit the remaining allegations in Paragraph 29 of the Complaint.

30. These Defendants admit the allegations in Paragraph 30 of the Complaint as to WV IL-AL Investors and deny them as to WV SP and Smith/Packett.

31. These Defendants admit that MSPE began work at the site in or around March or April 2018 and deny the remaining allegations in Paragraph 31 of the Complaint.

32. These Defendants are without sufficient information to admit or deny the allegations in Paragraph 32 of the Complaint.

33. These Defendants are without sufficient information to admit or deny the allegations in Paragraph 33 of the Complaint.

34. These Defendants deny the allegations in Paragraph 34 of the Complaint.

35. These Defendants deny the allegations in Paragraph 35 of the Complaint.

36. These Defendants deny the allegations in Paragraph 36 of the Complaint.

37. These Defendants deny the allegations in Paragraph 37 of the Complaint.

38. These Defendants deny the allegations in Paragraph 38 of the Complaint.

39. These Defendants deny the allegations in Paragraph 39 of the Complaint.

40. These Defendants deny the allegations in Paragraph 40 of the Complaint.

41. These Defendant's deny that the Project was brought "to a standstill," admit that, as a result of MSPE's acts or omissions, subsurface water infiltrated into and impacted the site, and are without sufficient information to admit or deny the remaining allegations in Paragraph 41 of the Complaint.

42. These Defendants admit that MPSE was required to perform additional site work as a result of surface and subsurface water infiltration into Building Pad A, are without sufficient

information to admit or deny what specific work was required, and deny the allegation that MPSE was not at fault.

43. These Defendants deny the allegations in Paragraph 43 of the Complaint.

44. These Defendants deny the allegations in Paragraph 44 of the Complaint.

45. These Defendants deny the allegations in Paragraph 45 of the Complaint.

46. These Defendants deny the allegations in Paragraph 46 of the Complaint.

COUNT 1 – BREACH OF CONTRACT

47. In response to the allegations referenced in Paragraph 47 of the Complaint, these Defendants incorporate by reference the foregoing responses to such allegations.

48. These Defendants deny the allegations in Paragraph 48 of the Complaint.

49. These Defendants deny the allegations in Paragraph 49 of the Complaint.

COUNT 2 – BREACH OF WARRANTY

50. In response to the allegations referenced in Paragraph 50 of the Complaint, these Defendants incorporate by reference the foregoing responses to such allegations.

51. These Defendants deny the allegations in Paragraph 51 of the Complaint.

COUNT 3 – FRAUD, DECEIT, INDUCEMENT AND MISREPRESENTATION

52. In response to the allegations referenced in Paragraph 52 of the Complaint, these Defendants incorporate by reference the foregoing responses to such allegations.

53. These Defendants deny the they employed a design professional as their agent, servant, employee or representative and admits the remaining allegations in Paragraph 53 if the Complaint

54. In response to the allegations in Paragraph 54 of the Complaint, these Defendants state that the Project Manual and Civil Drawings and Specifications speak for themselves.

55. In response to the allegations in Paragraph 55 of the Complaint, these Defendants state that the Grading Plan speaks for itself.

56. In response to the allegations in Paragraph 56 of the Complaint, these Defendants state that the Project Manual and Grading Plan speak for themselves.

57. In response to the allegations in Paragraph 57 of the Complaint, these Defendants state that the Grading Plan and Civil Drawings and Specifications speak for themselves.

58. These Defendants deny the allegations in Paragraph 58 of the Complaint.

59. These Defendants deny the allegations in Paragraph 59 of the Complaint.

60. These Defendants deny the allegations in Paragraph 60 of the Complaint.

61. These Defendants deny the allegations in Paragraph 61 of the Complaint.

62. These Defendants deny the allegations in Paragraph 62 of the Complaint.

63. These Defendants admit that, on or about January 8, 2019, a slip occurred and deny the remaining allegations in Paragraph 63 of the Complaint.

64. These Defendants admit that the surface and subsurface water conditions and the resulting slip interfered with a portion of the Project's completion and deny the remaining allegations in Paragraph 64 of the Complaint.

65. In response to the allegation in Paragraph 65 of the Complaint, these Defendants admit that Terradon was retained and authorized to perform QA/QC testing of MSPE's work and to supervise, monitor and observe MSPE's work, but are without sufficient information to admit or deny the extent to which it accomplished those tasks.

66. These Defendants deny the allegations in Paragraph 66 of the Complaint.

67. These Defendants admit that Terradon observed MSPE's work and state that Terradon's written communications referenced in Paragraph 67 speak for themselves.

68. These Defendants deny the allegations in Paragraph 68 of the Complaint.

69. These Defendants deny the allegations in Paragraph 69 of the Complaint.

70. These Defendants deny the allegations in Paragraph 70 of the Complaint.

71. These Defendants deny the allegations in Paragraph 71 of the Complaint.

72. These Defendants deny the allegations in Paragraph 72 of the Complaint.

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

73. In response to the allegations referenced in Paragraph 73 of the Complaint, these Defendants incorporate by reference the foregoing responses to such allegations.

74. – 81. Inasmuch as the allegations in Paragraphs 74 through 81 are not directed to these Defendants, no responses are required.

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

82. In response to the allegations referenced in Paragraph 82 of the Complaint, these Defendants incorporate by reference the foregoing responses to such allegations.

83. – 89. Inasmuch as the allegations in Paragraphs 83 through 89 are not directed to these Defendants, no responses are required.

COUNT 6 – ORAL MODIFICATION, IMPLIED IN FACT CONTRACT

90. In response to the allegations referenced in Paragraph 90 of the Complaint, these Defendants incorporate by reference the foregoing responses to such allegations.

91. Paragraph 91 of the Complaint contains conclusions of law to which no response is required. To the extent a response is required, the allegations contained therein are denied.

92. In response to the allegations in Paragraph 92 of the Complaint, these Defendants admit that MSPE performed additional work and was paid additional monies, denies that

additional monies are owed, and states that Paragraph 92 of the Complaint contains conclusions of law to which no response is required. To the extent a response is required, the allegations contained therein are denied.

93. These Defendants deny the allegations in Paragraph 93 of the Complaint.

94. These Defendants deny the allegations in Paragraph 94 of the Complaint.

95. These Defendants deny the allegations in Paragraph 95 of the Complaint.

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

96. In response to the allegations referenced in Paragraph 96 of the Complaint, these Defendants incorporate by reference the foregoing responses to such allegations.

97. These Defendants deny the allegations in Paragraph 97 of the Complaint.

98. Paragraph 98 of the Complaint contains conclusions of law to which no response is required. To the extent a response is required, the allegations contained therein are denied.

COUNT 8 – DECLARATORY JUDGMENT RELIEF

99. In response to the allegations referenced in Paragraph 99 of the Complaint, these Defendants incorporate by reference the foregoing responses to such allegations.

100. These Defendants deny that MSPE is entitled to the declaratory relief requested in Paragraph 100 of the Complaint.

COUNT 9 – JOINT VENTURE, CIVIL CONSPIRACY LIABILITY

101. In response to the allegations referenced in Paragraph 101 of the Complaint, these Defendants incorporate by reference the foregoing responses to such allegations.

102. These Defendants deny the allegations in Paragraph 102 of the Complaint.

103. These Defendants deny the allegations in Paragraph 103 of the Complaint.

104. These Defendants deny the allegations in Paragraph 104 of the Complaint.

105. These Defendants deny the allegations in Paragraph 105 of the Complaint.

106. These Defendants deny that MSPE is entitled to the relief requested in Paragraph 106 of the Complaint.

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

107. In response to the allegations referenced in Paragraph 107 of the Complaint, these Defendants incorporate by reference the foregoing responses to such allegations.

108. These Defendants deny that MSPE fully performed its contractual responsibilities and admits the remaining allegations in Paragraph 108 of the Complaint.

109. These Defendants deny the allegations in Paragraph 109 of the Complaint.

110. These Defendants deny the allegations in Paragraph 110 of the Complaint.

111. In response to the allegations in Paragraph 111 of the Complaint, these Defendants deny that MSPE is owed any unpaid amounts and states that the Notice of Mechanic’s Lien speaks for itself.

112. These Defendants deny the MSPE is entitled to the relief sought in Paragraph 112 of the Complaint.

**COUNT 11 – PUNITIVE DAMAGES AND
ATTORNEYS’ FEES AND COSTS**

113. In response to the allegations referenced in Paragraph 113 of the Complaint, these Defendants incorporate by reference the foregoing responses to such allegations.

114. These Defendants deny the allegations in Paragraph 114 of the Complaint.

115. These Defendants deny that Plaintiff is entitled to any recovery whatsoever from them.

116. Unless expressly admitted herein, these Defendants deny all allegations in the Complaint, including those allegations for which they have insufficient information to admit or deny.

THIRD DEFENSE

Plaintiff's damages are the result of acts or omissions of parties other than these Defendants.

FOURTH DEFENSE

Plaintiff's damages are the result of its own acts or omissions.

FIFTH DEFENSE

Plaintiff's claims are barred by the doctrine of accord and satisfaction.

SIXTH DEFENSE

Plaintiff's claims are barred by the doctrine of waiver.

SEVENTH DEFENSE

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

EIGHTH DEFENSE

Plaintiff's claims are barred by its breach of contract.

NINTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by its failure to provide contractually required notices of claims.

TENTH DEFENSE

Plaintiffs' claims are barred by its failure to fully perform.

ELEVENTH DEFENSE

Plaintiff's claims are barred due to its failure to perform in accordance with industry standards.

TWELFTH DEFENSE

These Defendants' alleged breaches are excused by Plaintiff's prior breaches.

THIRTEENTH DEFENSE

Plaintiff's claims are barred by its failure to avoid and/or mitigate its damages.

FOURTEENTH DEFENSE

Plaintiff has failed to allege its fraud claims with required specificity.

FIFTEENTH DEFENSE

Plaintiff's claims regarding oral modification of contract fail to adequately allege the material terms of the oral contract.

SIXTEENTH DEFENSE

Plaintiff's claim for punitive damages violates these Defendants' right to procedural and substantive due process under of the West Virginia Constitution and as guaranteed by the Fifth and Fourteenth Amendments to United States Constitution and further violates these Defendants' rights as guaranteed under the Eighth Amendment to the United States Constitution, prohibiting excessive fines.

SEVENTEENTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by these Defendants' right to offset.

EIGHTEENTH DEFENSE

Plaintiff's claims against Smith/Packett are barred due to lack of privity.

NINETEENTH DEFENSE

These Defendants reserve the right to assert any additional affirmative defenses which may become evident in the further development of this litigation.

WHEREFORE, having answered, Defendants WV IL-AL Investors, LLC, SP WV, LLC and Smith/Packett Med-Com, LLC request that the Complaint against them be dismissed and that they be awarded their costs and attorney fees incurred herein, and such further relief as the Court deems appropriate.

COUNTERCLAIM

For their Counterclaim against Plaintiff, Defendants WV IL-AL Investors, LLC ("WV IL-AL Investors"), SP WV, LLC ("WV SP") and Smith/Packett Med-Com, LLC ("Smith/Packett") (collectively "these Defendants") state as follows:

1. These Defendants, desiring to develop and construct an independent living and assisted living facility at 500 Peyton Way, South Charleston, West Virginia, entered into contracts with several parties, including Plaintiff MSPE, for the construction of The Crossings at Southridge ("the Project").
2. On or about April 27, 2018, WV IL-AL Investors entered into a contract with MSPE to perform, among other things, site work and excavation for the Project, which included, but was not limited to, construction of a building pad and sloped fill area.
3. MSPE's acts or omissions and/or the negligent performance of its contractual duties resulted in, among other things, a slip in the aforementioned fill area in January 2019.
4. Such acts or omissions and negligent performance included, but was not limited to, the failure to take necessary steps to provide adequate drainage for the building site and fill area, and the inclusion, or failure to remove, organic materials from the fill used on the Project.

5. MSPE's acts or omissions and/or negligent performance violated its contract with WV IL-AL Investors and resulted in extra work required to remedy such acts, omissions and/or negligent performance.

6. As MSPE was one of several contractors and subcontractors working on the Project, the progress of its work affected the progress of other contractors' and subcontractors' work and the workflow of the Project as a whole.

7. As a result of MSPE's acts or omissions and/or negligent performance, work on the Project has been significantly delayed, resulting in increased costs to these Defendants.

8. MSPE's contract includes provisions for liquidated damages or, alternatively, consequential damages arising from delay attributed to MSPE. Those damages exceed the Court's jurisdictional minimum limits.

WHEREFORE, WV IL-AL Investors, LLC, SP WV, LLC and Smith/Packett Med-Com, LLC, respectfully request that judgment be entered against MSPE and that they be awarded their damages, contractual or otherwise, and such further relief as the Court deems appropriate. These Defendants demand a jury trial.

WV IL-AL INVESTORS, LLC,
SP-WV, LLC, and
SMITH/PACKETT MED-COM, LLC,

By Counsel

 #8825

Robert A. Lockhart, Esq. (WVSB #0657)

CIPRIANI & WERNER, P.C.

500 Lee Street East, Suite 900

Charleston, West Virginia 25301

Telephone: (304) 341-0500

Fax: (304) 341-0507

rlockhart@c-wlaw.com

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

Civil Action No.: 20-C-350
Judge Tod Kaufman

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

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

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

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

CARTER BANK & TRUST,
A Virginia Banking Corporation,

Defendants.

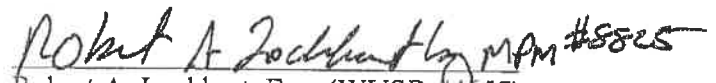
CERTIFICATE OF SERVICE

I, Robert A. Lockhart, Esquire, counsel for Defendants WV IL-AL Investors, LLC, SP-WV, LLC and Smith/Packett Med-Com, LLC, do hereby certify that service of the foregoing "*Defendants WV IL-AL Investors, LLC, SP WV, LLC and Smith/Packett Med-Com, LLC's Answer and Counterclaim*" has been made upon the following, by sending a true copy, via United States mail, this 22nd day of June, 2020:

Carl J. Roncaglione, Jr., Esquire (WVSB #5723)
1018 Kanawha Boulevard East
Boulevard Tower – Suite 400
Charleston, West Virginia 25301
Counsel for Plaintiff

Robert H. Sweeney, Jr., Esquire (WVSB #5831)
Jenkins Fenstermaker, PLLC
Post Office Box 2688
Huntington, West Virginia 25726-2688
Counsel for Jarrett Construction Services, Inc.

Clifford F. Kinney, Jr., Esquire (WVSB #6220)
Spilman Thomas & Battle
300 Kanawha Boulevard, East
Charleston, West Virginia 25301
Counsel for Carter Bank & Trust, LLC


Robert A. Lockhart, Esq. (WVSB #4657)

Carl J. Roncaglione, Jr.

Attorney-at-Law

Phone (304)342-3945

Suite 401 Boulevard Tower
1018 Kanawha Boulevard, East
Charleston WV 25301

Fax (304)342-3947

E-mail: carlironcaglionejr@yahoo.com

Admitted to West Virginia and Alabama State Bar

July 8, 2020

Via Hand-Delivery

Cathy S. Gatson, Clerk
Kanawha County Circuit Court
111 Court Street
Charleston, WV 25301

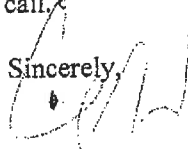
Re: *Mountain State Pipeline & Excavating, LLC v. Smith/Packett Med-Corn, LLC, et al.,
Circuit Court of Kanawha County, Civil Action No. 20-C-350*

Dear Ms. Gatson:

Enclosed for filing in the above referenced matter, please find *Plaintiff, Counterclaim Defendant and Crossclaimant Mountain State Pipeline & Excavating, LLC's Crossclaim against Third-Party Defendant ECS Mid-Atlantic, LLC*. A copy of same has been served upon counsel of record. Thank you for your attention and cooperation in this matter.

As always, if there are questions, please call.

Sincerely,


Carl J. Roncaglione, Jr.

CJRjr/arc

Enclosure

cc: Honorable Tod Kaufman, Judge – via Hand-Delivery
Mountain State Pipeline & Excavating, LLC – via email
Robert A. Lockhart, Esquire – via U.S. Mail and email at rlockhart@c-wlaw.com
Robert H. Sweeney, Esquire – via U.S. Mail and email at rhs@jenkinsfenstermaker.com
Clifford F. Kinney, Esquire – via U.S. Mail and email at ckinney@spilmanlaw.com
Christopher A. Brumley, Esquire – via U.S. Mail and email at cbrumley@flahertylegal.com
Evan S. Aldridge, Esquire – via U.S. Mail and email at ealdridge@flahertylegal.com
Jack D. Hoblitzell, Esquire – via U.S. Mail and email at jdoblitzell@kaycasto.com

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOUNTAIN STATE PIPELINE & EXCAVATING,
LLC,

Plaintiff/Counterclaim Defendant/
Crossclaimant,

v.

Civil Action No.: 20-C-350
Judge Kaufman

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

and

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

and

WV IL-AL INVESTORS, LLC,
a Virginia Member-Managed Limited Liability Company,
Defendant;

and

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

and

CARTER BANK & TRUST,
Defendant;

and

JARRETT CONSTRUCTION SERVICES, INC.,
Defendant/Counterclaimant/
Third-Party Plaintiff,

v.

ECS MID-ATLANTIC, LLC,
Third-Party Defendant/
Crossclaim Defendant.

PLAINTIFF, COUNTERCLAIM DEFENDANT AND CROSSCLAIMANT MOUNTAIN STATE
PIPELINE & EXCAVATING, LLC'S CROSSCLAIM AGAINST THIRD-PARTY DEFENDANT
ECS MID-ATLANTIC, LLC

COMES NOW the Plaintiff, Counterclaim Defendant and Crossclaimant, Mountain State Pipeline & Excavating, LLC, by its undersigned counsel, Carl J. Roncaglione, Jr., Esquire, for its Crossclaim against Third-Party Defendant, ECS Mid-Atlantic, LLC, pursuant to, *inter alia*, Rule 14, W.Va. R. Civ. Proc., and states and avers as follows:

1. Mountain State Pipeline & Excavating, LLC (hereinafter sometimes referred to as "MSPE" and/or "Plaintiff" and/or "Counterclaim Defendant" and/or "Cross-claimant"), is a limited liability company, organized under the laws of the State of West Virginia, with its principal place of business located at or near 109 Elm Street, Elkvew, West Virginia 25071.
2. The Third-Party Defendant and Crossclaim Defendant, ECS Mid-Atlantic, LLC, (hereinafter referred to as "ECS" and/or "Cross-claim Defendant") is, and at all times relevant herein, a Virginia Limited Liability Company, licensed to do business in the State of West Virginia. ECS Mid-Atlantic, LLC lists with the West Virginia Secretary of State, CT Corporation System, 1627 Quarrier Street, Charleston, West Virginia 25311, as its agent for service of process.
3. Plaintiff and Cross-claimant herein, MSPE restates, realleges, adopts, and incorporates the allegations set forth in its Complaint, as if the same were restated, and set forth verbatim herein.
4. The Smith/Packett Defendants, Smith/Packett, SP WV, and WV IL-AL Investors, the breaching parties, desired to construct a for profit and compensation independent living (IL) and assisted living (AL) facility, a four story, 194,800 SF independent living, assisted living, memory care facility, known as The Crossings at Southridge (the "Project" or the "Crossings Project"), and employed among others, the following design professionals to act as the Smith/Packett Defendants' agents, servants, employees, and representatives to prepare, draft, publish and issue the Smith/Packett Defendants' October 27, 2017 "Project Manual": Meyer Architects, Inc./Meyer Design, Inc. as an Architect, MacIntosh Engineering as Structural Engineer, BSEG, LLC as Fire-Protection Engineer, BSEG, LLC as Plumbing Engineer,

BSEG, LLC as HVAC Engineer, BSEG, LLC as Electrical Engineer, ECS Mid-Atlantic, LLC ("ECS") as geotechnical engineers, Terradon Corporation ("Terradon") as civil engineer, Jarrett Construction Services, Inc. ("JCSI") by separate contracts as contractor/constructor, and as construction manager at risk, and The Genesee Group, also, as Construction Manager to prepare "Civil Drawings and Specifications", to design the Project for pre-construction and construction phases, and to prepare plans, specifications, and bidding documents for said construction project, including, *inter alia*, Terradon's June 15, 2017 Hydrology Study for Smith/Packett – The Crossings at Southridge, and ECS's June 23, 2017 Report of Subsurface Exploration and Geotechnical Analysis including soil test borings, laboratory analysis, and geotechnical recommendations for this Project, all as identified in the Smith/Packett Defendants' October 27, 2017 "Project Manual".

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

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

7. Smith/Packett Defendants' Grading Plan, among other Civil Drawings and Specifications, specifically represented to MSPE, and detailed, identified, and showed on November 30, 2017 the respective Project contour elevation lines, structures, and locations as part the Smith/Packett Defendants' representations and existing Project design, including the required excavation, cut, and fill,

undercuts, and related placement of topsoil by MSPE in the Smith/Packett Defendants' Project design, for the designed elevations, and contours, prepared by the Smith/Packett Defendants' civil engineer, Terradon Corporation, including the exact locations, and elevations of Smith/Packett Defendants' building pads A, B, C, and D identified on the Grading Plan.

8. On or about March 25, 2017, by March 16, 2017 ECS Proposal No. 12:12683 addressed to Aubury Holmes, Development Manager, Smith/Packett Med-Com, LLC, the Owners, the Smith/Packett Defendants hired ECS to perform geotechnical design professional services as the Smith/Packett Defendants' geotechnical engineer, entering into a contract, *ECS Proposal No. 12:12683, Proposal for Subsurface Exploration and Geotechnical Analysis*, based upon "revised unit price and estimated total costs for providing subsurface exploration services for the" Crossings Projects.

9. ECS's scope of services under *ECS Proposal No. 12:12683* included preparing an engineering report, which included, among other things, ECS's professional services including "Slope Stability Analysis" and "Engineering, Drafting and Secretarial services necessary for report preparation" including information, evaluations, recommendations, descriptions, and final logs on the following items:

- a. *Information on site conditions including surface drainage, geologic information, and special site features.*
- b. *Description of the field exploration and laboratory tests performed.*
- c. *Final logs of the soil borings and records of the field exploration in accordance with the standard practice of geotechnical engineers. A boring location diagram will be included, and the results of the laboratory tests will be plotted on the final boring logs and/or included on separate test report sheets.*
- d. *Recommendations for allowable soil bearing pressure for conventional spread footing foundations and estimates of predicted foundation settlement. This will include specific project information and design loads provided by your office and/or the structural engineer.*
- e. *Recommendations for lateral earth pressures likely to develop on below-grade walls.*

- f. *Recommendations for perimeter and underdrainage systems for below-grade walls.*
- g. *Evaluation of the on-site soils' characteristics encountered in the soil test borings. Specifically, we will discuss the suitability of the on-site materials for reuse as engineered fill. We will also include compaction requirements and suitable material guidelines.*
- h. *Measurement of the surficial material (i.e. topsoil, asphalt, etc.) thickness at each boring location and notation of this information on the boring logs and in the body of the report.*
- i. *Recommendations for design of asphalt concrete pavements based on laboratory CBR values.*
- j. *Evaluation of Seismic Site Class in accordance with the 2012 International Building Code (IBC) based on the SPT N-value method.*
- k. *Slope stability analysis at discreet locations, if needed.*

10. Per the March 16, 2017 *ECS Proposal No. 12:12683*, ECS's subsurface exploration and geotechnical engineering services were to be provided on the Crossings Project in accordance with ECS's current *Master Services Agreement* with Smith/Packett Med-Com, LLC, noting ECS's "Scope of Work" as "Subsurface Exploration and Geotechnical Engineering Analysis" at the Crossings Project.

11. Defendant Smith/Packett Med-Com, LLC signed ECS's "Proposal Acceptance" May 2, 2017.

12. Consequently, ECS owed duties as a design professional for subsurface exploration and geotechnical engineering analysis, and was obligated to perform its design professional subsurface exploration and geotechnical engineering analysis at the Crossings Project in connection with the Smith/Packett Defendants' Crossings Project design, including as to subsurface exploration and geotechnical engineering, analysis, and design services.

13. ECS's Crossings Project subsurface exploration and geotechnical engineering design and analysis relied upon, incorporated, and included project information provided by the Smith/Packett Defendants, which included a master site concept plan, a building layout plan, and email correspondence detailing the new building layout, showing, among other things, a preliminary layout and existing

contours on the plan, along with approximate "fill" depths within the building pad and "cut" in the parking lot area of the proposed Crossings Project design.

14. The Smith/Packett Defendants, and Defendant JCS, and Cross-claim Defendant ECS conspired, and acting concurrently and conjointly, aiding and abetting each other as both coconspirators, agents, principals and partners, interchangeably for each other together at all material times and dates hereto in a conspiracy, in a general partnership, joint enterprise and joint venture activity for profit to wit: authorizing, entering into, and causing, among others, the Smith/Packett Defendants to enter into Contract(s) with MSPE, as more fully set forth in MSPE's Complaint, and for the reasons and purposes set forth herein too, as a joint venture, and as an implied partnership, for liability purposes, all together, agreeing to perform, and performing the duties alleged herein, and in MSPE's Complaint in connection with the construction and related construction and professional CM services, and design professional subsurface exploration and geotechnical engineering services rendered, and to be rendered as part of the Crossings Project, and in connection therewith making false misrepresentations to MSPE as more fully alleged in MSPE's Complaint, and herein, when in fact the Smith/Packett Defendants, Defendant JCS, and Cross-claim Defendant ECS, collectively and individually, had no intent to perform, and have failed and refused to pay MSPE for all amounts owing and due currently subtotalling, \$1,134,917.47, without excuse or justification, for which the Defendants in MSPE's Complaint, and Cross-claim Defendant ECS are rightly liable, and should be punished.

15. The Smith/Packett Defendants' Crossings Project's slope, and subsurface structures contained defects, inadequacies, and subsurface conditions, including a deep seated pre-existing slip and slip plane, neither noted, nor identified, nor depicted by ECS in ECS's reports, communications, or writings in connection with the Crossings Project site, and design.

16. As part of ECS's design professional geotechnical engineering services, and subsurface exploration and geotechnical analysis at the Crossings Project in connection with the Smith/Packetts' Crossings Project design responsibilities, ECS failed to perform, among other things, a slope stability

analysis for the Crossings Project design, or if performed, in whole and in part, was done negligently, inadequately, and deficiently by ECS, and ECS's agents, servants, employees, and representatives.

17. The Crossings Project contained in its subsurface a pre-existing subsurface slip, with a slip plane, neither noted, nor identified, nor depicted in ECS's reports, communications, analysis, and writings in connection ECS's Crossings Project design professional subsurface and geotechnical engineering design services, including during MSPE's performance.

18. ECS concealed, and suppressed a slope stability analysis and factor of safety if ever performed by ECS, and ECS failed to prepare, identify, calculate, and publish to, among others, MSPE, a factor safety, and the related ratio as part of ECS's slope stability analysis for the Crossings Project design, if ever performed by ECS, or anyone acting in furtherance of ECS and its design professional duties and responsibilities in connection with the Crossings Project site.

19. On or about January 8, 2019, the Smith/Packett Defendants' Crossings Project site's pre-existing subsurface slip, reactivated through no fault, or involvement of MSPE.

20. ECS's *Proposal No. 12:12683* stated, among other things, the "site is located on top of a ridge line with steep slopes on the east and south sides of the site. The proposed project site appears to be wooded, generally sloping downward on each side...Due to the steep embankments present at the site, some areas may not be directly accessible."

21. Cross-claim Defendant ECS thus knew, and had reason to know of the Crossings Project's site location, its steepness, the subsurface structure(s) and condition(s), and the Crossings' Project's "steep slopes" and anticipated building layout on the site thereon.

22. The Crossings Project slope ECS designed was part of the reports and design prepared by ECS Mid-Atlantic, Inc. (ECS), the geotechnical engineering firm hired by the Owners, the Smith/Packett Defendants, to provide subsurface exploration and geotechnical analysis, on the Crossings Project.

**COUNT I — GEOTECHNICAL ENGINEERING AND SUBSURFACE EXPLORATION
DESIGN PROFESSIONAL NEGLIGENCE BY ECS**

21. MSPE, the Plaintiff, and Cross-claimant herein restates and realleges all paragraphs above, and adopts, and incorporates all allegations set forth in MSPE's Complaint, as if fully restated verbatim herein.

22. In accordance with MSPE's Complaint allegations, and MSPE's Cross-claim herein, the Smith/Packett Defendants as Owners employed various design professionals for construction management services, and to prepare material portions of the Project Manual and contract and bidding documents, including the Civil Drawings and Specifications, along with Terradon Corporation's *Hydrology Study*, and ECS Mid-Atlantic, LLC's *Report of Subsurface Exploration and Geotechnical Analysis*.

23. Cross-claim Defendant ECS's *Report of Subsurface Exploration and Geotechnical Analysis*, failed to identify the Crossings' Project site's pre-existing, defective, and inadequate underlying subsurface structure, defects, and conditions, including a pre-existing slip and its related deep seated slip plane, and which site, and design instead contained unsuitable surface conditions, and unsuitable soil, unsuitable subsurface bedrock, and unsuitable subsurface water conditions, including the pre-existing slip, and the defective, deficient, and weakened subsurface slip plane.

24. ECS, as the Smith/Packett Defendants' design professional subsurface exploration analyst and geotechnical engineer, owed a duty of care to, among others, MSPE, as a prime contractor on the Crossings Project, which was employed by the same project owner as the design professionals, and which relied, and was justified in relying, upon the design professionals' services and work product in MSPE's bid preparation, bidding, and, in turn, entering into the site preparation contract between MSPE and the Smith/Packett Defendants, as Owners, and in performing the site prep contract between MSPE and the Smith/Packett Defendants as Owners.

25. ECS breached its design professional subsurface exploration analyst and geotechnical engineering duty of care by failing, and negligently failing, to render ECS's design professional, subsurface exploration analyst, and geotechnical engineering services with the ordinary skill, care, and diligence commensurate with that rendered by members of its profession in the same or similar circumstances in connection with the Crossings Project.

26. After, and because of ECS's negligence, and negligent supply of information in connection with the Crossings Project's defective and inadequate design, and subsurface and site deficiencies, neither suitable for construction, nor constructible as designed and as-bid, the Smith/Packett Defendants, as Owner admitted the construction of the Project has, and require additional engineering, architectural design and construction, and the surface and subsurface water conditions and the resulting slip prevented, blocked, and interfered with a portion of the Project's completion.

27. As a direct, proximate and foreseeable cause, and result of Cross-claim Defendant ECS's negligence and breaches of other duties owed as the Crossings Project's geotechnical engineer, Plaintiff and Cross-claimant, MSPE, has been damaged by being required to perform additional work and delay, by increased costs of performance due to EC's negligence, by out-of-sequence, unscheduled, and uncoordinated work caused by ECS's negligence, and by disruptions, and changes in MSPE's manner, method, time, and price of performance caused by ECS and its negligence, which caused increased time of performance, increased payroll costs, increased equipment costs, increased overhead costs, increased mobilization costs, increased home office and administrative costs, headache, frustration, consternation, annoyance, a loss of profit and a loss of interest upon amounts due, for which MSPE demands judgment against Cross-claim Defendant ECS as set forth below.

28. As a further direct, and proximate cause, and result of ECS's negligence, breach of design professional subsurface exploration analysis and geotechnical engineering duties, and breach of other duties owed in connection with the Crossings Project, MSPE has been forced to incur costs, expenses, and other damages, including attorney fees, and costs, for which ECS is, and should be, liable to ECS

for such costs, expenses, and other damages, including attorney fees, as a result of ECS's negligent acts and/or omissions as design professionals on the Crossings Project, for which MSPE demands judgment against Cross-claim Defendant ECS as set forth below.

COUNT II – ECS's BREACH OF WARRANTY

29. MSPE, the Plaintiff, and Cross-claimant herein restates and realleges all paragraphs above, and adopts, and incorporates all allegations set forth in MSPE's Complaint, as if fully restated verbatim herein.

30. ECS, as the Smith/Packett Defendants' chosen design professional for subsurface exploration and geotechnical engineering, providing plans and specifications that were relied upon by, among others, MSPE in connection with MSPE's preparing and submitting MSPE's bid, and entering into a site preparation contract with the Smith/Packett Defendants as Owners and in carrying out the site preparation contract duties of the Crossings Project, impliedly warranted to MSPE that such plans and specifications, were prepared by ECS, including all reports of both the Owners, and the Owners' design professionals incorporating and adopting information, reports, analysis, descriptions, recommendations, and evaluations prepared by ECS, with the ordinary skill, care, and diligence commensurate with that rendered by members of their respective professions, including by ECS as the Crossings Project's design professional for subsurface exploration and geotechnical engineering services.

31. ECS breached the implied warranty by failing to render ECS's professional services with the ordinary skill, care, and diligence commensurate with that rendered by members of its professions in the same or similar circumstances.

32. ECS breached the implied warranty by failing to render ECS's professional services with the ordinary skill, care, and diligence commensurate with that rendered by members of its professions in the same or similar circumstances, including by negligently providing and supplying information, reports, analysis, descriptions, recommendations, and evaluations prepared by ECS, including but not limited to, ECS's June 23, 2017 *Report of Subsurface Exploration and Geotechnical Analysis*, all of which were

inadequate, defective and deficient, and thus inadequate for purposes of the proposed, and later performed Crossings Project site, which was neither suitable for the proposed design and construction, nor constructible as-planned and as-bid, in connection therewith.

33. As a direct and proximate result of ECS's breach of warranty, negligent supply of information in connection with the Crossings Project design and site, and breach of other duties owed, Plaintiff and Cross-claimant, MSPE, has been damaged by being required to perform additional work and delay, by increased costs of performance due to EC's negligence, by out-of-sequence, unscheduled, and uncoordinated work caused by ECS's negligence, breaches of warranty, design and engineering services inadequacies, and by disruptions, and changes in MSPE's manner, method, time, and price of performance caused by ECS and its negligence, which caused increased time of performance, increased payroll costs, increased equipment costs, increased overhead costs, increased mobilization costs, increased home office and administrative costs, frustration, consternation, headache, annoyance, a loss of profit and a loss of interest upon amounts due, for which MSPE demands judgment against Cross-claim Defendant ECS as set forth below.

34. As a further direct, and proximate cause, and result of ECS's negligence, breach of design professional subsurface exploration and geotechnical engineering duties, breach of warranty and implied warranty, and breach of other duties owed in connection with the Crossings Project, MSPE has been forced to incur costs, expenses, and other damages, including attorney fees, and costs, for which ECS is, and should be, liable to ECS for such costs, expenses, and other damages, including attorney fees, as a result of ECS's negligent supply of information, and negligent acts and/or omissions as design professionals on the Crossings Project, for which MSPE demands judgment against Cross-claim Defendant ECS as set forth below.

COUNT III – DECLARATORY JUDGMENT RELIEF

35. MSPE, the Plaintiff, and Cross-claimant herein restates and realleges all paragraphs above, and adopts, and incorporates all allegations set forth in MSPE's Complaint, as if fully restated verbatim herein.

36. Pursuant to *W.Va. Code § 55-13-1, et seq.*, the West Virginia Uniform Declaratory Judgment Act, Plaintiff MSPE seeks all declaratory relief to which MSPE is entitled and which is available against all Defendants, including Cross-claim Defendant ECS, including, without limitation, a declaration of the parties' rights, status, and other legal relations arising out, and related to the subject matter of this case and controversy, including without limitation, *inter alia*, a judicial declaration that ECS was negligent, and breached duties owed to MSPE, and breached implied warranties in connection with the Crossings Project as more fully alleged herein, that the Smith/Packett Defendants' Project Manual and civil drawings, plans, and specifications, and contract documents on which MSPE was forced to, and obligated to rely, were defective and inadequate and breached the implied warranty of adequacy relative to ECS, that Cross-claim Defendant ECS negligently supplied information that defective and inadequate in connection with the Crossings Project, that ECS made false misrepresentations of material fact to MSPE on which MSPE detrimentally and justifiably relied including but not limited to those representations ECS made on, and in ECS's June 23, 2017 *Report of Subsurface Exploration and Geotechnical Analysis* published and provided to MSPE as part of MSPE's bid preparation and submission, and as a material inducement to enter into, and to perform the site preparation contract between MSPE and the Smith/Packett Defendants as Owners, that Defendants and Cross-claim Defendant, ECS, conspired together and acted conjointly, interchangeably together, as a joint enterprise activity for profit, that Defendants and Cross-Defendant, ECS, acted as each other's agents, servants, and representatives, that ECS was the Smith/Packett Defendants' design professional for subsurface exploration and geotechnical engineering analysis on the Crossings Project, that Cross-claim Defendant ECS destroyed, lost, and spoliated evidence, negligently, intentionally, and deliberately by failing and refusing to produce Crossings Project documents ECS mentioned, described, possessed, used, relied

upon, and implemented as part of ECS's design professional duties on the Crossings Project, and which MSPE and its counsel requested on multiple occasions, and that Cross-claim Defendant ECS breached other duties owed to MSPE, for which MSPE demands judgment against Defendants, and Cross-claim Defendant ECS, as set forth below.

COUNT IV PUNITIVE DAMAGES AND ATTORNEYS' FEES AND COSTS

37. MSPE, the Plaintiff, and Cross-claimant herein restates and realleges all paragraphs above, and adopts, and incorporates all allegations set forth in MSPE's Complaint, as if fully restated verbatim herein.

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

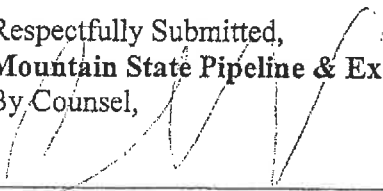
Ad Damnum - Prayer for Relief

WHEREFORE, Plaintiff, Mountain State Pipeline & Excavating, LLC demands judgment against Defendants, and against Cross-claim Defendant, ECS, jointly and severally, and in a principal amount not less than *One Million One Hundred Thirty Four Thousand Nine Hundred Seventeen Dollars and Forty-Seven Cents (\$1,134,917.47)*, for compensatory damages, or an amount which will fully and fairly compensate Plaintiff MSPE for all amounts Plaintiff expended and that Plaintiff has been damaged, and as a result of Defendants' and Cross-claim Defendant ECS's breach of contract, breach of warranty, negligence, fraud, deceit, misrepresentation, implied contract, spoliation of evidence, civil conspiracy to unjustly enrich themselves, and for Cross-claim Defendant ECS's breach of other duties

owed, including holding Defendant Smith/Packett, individually, liable for the debts and obligations of Defendants WV SP and WV Investors, LLC, whose company veils should be pierced and otherwise disregarded, along with imposing an implied partnership on Defendants and Cross-claim Defendant ECS for purposes of liability, including joint and several liability. Plaintiffs also seek a declaratory judgment from this Court of the parties' rights, plus an award of attorneys' fees under, *inter alia*, *W.Va. Code, § 55-13-1, et seq.* Plaintiffs also demand judgment against Defendants, and Cross-claim Defendant, ECS, jointly and severally, and for an unspecified amount of punitive damages to be determined by a jury, to punish and deter Defendants and Cross-claim Defendant, ECS, for their tortuous, malicious, and recklessly negligent conduct, along with all others so inclined for all amounts recoverable therefrom, plus an award of Plaintiff MSPE's costs, and reasonable attorney fees incurred in prosecuting this Complaint, along with prejudgment interest on all liquidated sums, post-judgment interest, and an award of any and all other relief this Court deems just and appropriate.

PLAINTIFF DEMANDS A TRIAL BY JURY.

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



Carl J. Roncaglione, Jr., Esq. (W. Va. Bar #5723)
1018 Kanawha Boulevard East
Suite 401 Boulevard Tower
Charleston WV 25301
(304) 342-3945/(304)342-3947
carlroncaglionejr@yahoo.com

**Counsel for Plaintiff, Counterclaim Defendant and
Crossclaimant, Mountain State Pipeline & Excavating, LLC**

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,
Plaintiff/Counterclaim Defendant/
Crossclaimant,

v.

Civil Action No.: 20-C-350
Judge Kaufman

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

and

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

and

WV IL-AL INVESTORS, LLC,
a Virginia Member-Managed Limited Liability Company,
Defendant;

and

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

and

CARTER BANK & TRUST,
Defendant;

and

JARRETT CONSTRUCTION SERVICES, INC.,
Counterclaimant/Third-Party Plaintiff,

v.

ECS MID-ATLANTIC, LLC,
Third-Party Defendant/
Crossclaim Defendant

CERTIFICATE OF SERVICE

I, Carl J. Roncaglione, Jr., Counsel for Plaintiff and Counterclaim Defendant, do hereby certify that on the 8th day of July, 2020, I served the foregoing *Plaintiff, Counterclaim Defendant and Crossclaimant Mountain State Pipeline & Excavating, LLC's Crossclaim against Third-Party Defendant ECS Mid-Atlantic, LLC* upon parties of record, by placing a true and accurate copy thereof, U.S. Mail, postage prepaid, to the addresses that follow:

Robert A. Lockhart, Esquire

rlockhart@c-wlaw.com

CIPRIANI & WERNER

500 Lee Street, East, Suite 900

Charleston, WV 25301

*Counsel for Smith/Packett Med-Com, LLC, SP
WV, LLC, and WV IL-AL Investors, LLC*

Robert H. Sweeney, Jr., Esquire

rhs@jenkinsfenstermaker.com

JENKINS FENSTERMAKER, PLLC

P.O. Box 2688

Huntington, WV 25726

Counsel for Jarrett Construction Services, Inc.

Clifford F. Kinney, Jr., Esquire

ckinney@spilmanlaw.com

SPILMAN THOMAS & BATTLE

300 Kanawha Blvd., East

Charleston, WV 25301

Counsel for Carter Bank & Trust

Christopher A. Brumley, Esquire

cbrumley@flahertylegal.com

Evan Aldridge, Esquire

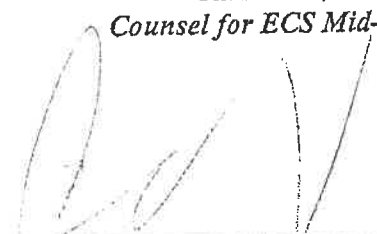
ealdridge@flahertylegal.com

FLAHERTY SENSABAUGH BONASSO PLLC

200 Capitol St.

Charleston, WV 25301

Counsel for ECS Mid-Atlantic, LLC



Carl J. Roncaglione, Jr., Esquire (W.Va. Bar #5723)

Suite 401, Boulevard Tower

1018 Kanawha Boulevard, East

Charleston, WV 25301

Ph: (304)-342-3945/Fax: (304)-342-3947

carlironcaglionejr@yahoo.com

*Counsel for Plaintiff, Counterclaim Defendant and
Crossclaimant*



FLAHERTY | SENSABAUGH | BONASSO PLLC

CHARLESTON
CLARKSBURG
MORGANTOWN
WHEELING

Evan S. Aldridge
ealdrige@flahertylegal.com
304-347-3798

July 27, 2020

Cathy Gatson, Clerk
Kanawha County Judicial Annex
111 Court Street
Charleston, WV 25301

**Re: Mountain State Pipeline & Excavating, LLC v. ECS Mid- Atlantic,
LLC, et al.
Civil Action No. 20-C-350**

Dear Ms. Gatson:

Enclosed please find **"Third- Party Defendant, ECS Mid-Atlantic, LLC's Answer to Jarrett Construction Services, Inc.'s Third Party Complaint"** in the above-referenced matter. Please file this document in your normal procedure. Counsel of record have been served a copy of same on this date.

Thank you for your assistance in this matter.

Sincerely,

Evan S. Aldridge

ESA/trj
Enclosure

cc: Robert H. Sweeney, Jr., Esq.
Carl J. Roncaglione, Jr., Esq.
J. Victor Flanagan, Esq.
Clifford F. Kinney, Jr., Esq.
Robert A. Lockhart, Esq.
5325-54537

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,

Plaintiff;

v.

Civil Action No. 20-C-350
Judge Kaufman

SMITH/PACKETT MED-COM, LLC,
a Virginia Limited Liability Company,

Defendant;

And

SP WV, LLC,
a Virginia Liability Company,

Defendant;

And

WV IL-AL INVESTORS, LLC,
a Virginia Limited Liability Company

Defendant;

And

CARTER BANK & TRUST,

Defendant;

And

JARRETT CONSTRUCTION SERVICES, INC.,

Counterclaimant/Third-Party Plaintiff;

v.

ECS MID-ATLANTIC, LLC

Third-Party Defendant.

**THIRD-PARTY DEFENDANT, ECS MID-ATLANTIC, LLC'S ANSWER TO
JARRETT CONSTRUCTION SERVICES, INC.'S THIRD-PARTY COMPLAINT**

Third-Party Defendant ECS Mid-Atlantic, LLC's (hereinafter "ECS"), by and through its counsel, files the following Answer and Defenses, and states as follows:

FIRST DEFENSE

In response to the specific claims alleged in Third-Party Plaintiff, Jarrett Construction Services, Inc. ("JCSI") Third-Party Complaint against ECS Mid-Atlantic, LLC, Defendant answers or avers as follows:

FACTUAL AND PROCEDURAL BACKGROUND

1. ECS admits, based upon information and belief, the allegations set forth in paragraph 1.
2. In response to paragraph 2, ECS is without present information or knowledge as to whether MSPE entered into a contract (or when) with the Owner. Upon information or knowledge, Defendant admits that MSPE performed site preparation work on the Crossings Project.¹
3. In response to paragraph 3, ECS is without present information or knowledge as to whether JCSI entered into contracts (or when) with the Owner. Upon information or knowledge, Defendant admits that JCSI worked on the Crossings Project but is without knowledge of the specific capacity JCSI worked.
4. In response to paragraph 4, ECS admits that a slip occurred in or on a slope below the A Wing of the Crossings Project on or about January 8, 2019. ECS further admits that the slip occurred on a slope prepared by MSPE. ECS is without knowledge or information about MSPE's obligations to prepare this slope under a contract with Owner. ECS is without knowledge or information regarding whether this slip caused a delay to JCSI or any damages to JCSI.

¹ ECS notes that JCSI's use of the term "Crossings Project" appears undefined. ECS's responsive incorporation of this term should not be deemed an adoption of any scope of work or project documents. ECS's understanding is that "Crossings Project" generally refers to work performed at The Crossings at Southridge.

5. In response to paragraph 5, ECS admits it was hired by Smith/Packett Med-Com, LLC (“Smith/Packett”), who upon information and belief, is the parent company or otherwise affiliate of WV IL-AL Investors, LLC, who JCSI defines as Owner. ECS performed a geotechnical site evaluation and prepared reports and documents related to the design and construction of the slope *near* the A Wing based on information and designs provided to ECS by the Owner or other parties. ECS further notes that, based on information and belief, the slope design and location of the building – including the A Wing – was changed after ECS performed its work. ECS denies that its work applied to the slope as constructed by MSPE or JCSI due to subsequent project design changes barred by contractual and legal limitations upon ECS’s designs and representations. ECS further denies the application of its work to the design or construction of the slope by any individual other than Smith/Packett due such work performed for the sole benefit of client, and any third-party beneficiary was explicitly prohibited from relying on such reports. ECS denies any remaining allegations in paragraph 5.
6. In response to paragraph 6, ECS states that due to subsequent changes to the slope design and Crossings Project design, ECS is without information or belief as to whether JCSI designed the slope in question or prepared any drawings or specifications for the construction of the slope below the A Wing where the slip occurred.
7. ECS is without information or belief as to the allegations in paragraph 7.
8. In response to paragraph 8, ECS admits that one or more geotechnical engineers who examined the slip after January 8, 2019 opined that a pre-existing subsurface slip reactivated in the area of the project site. ECS denies the existence of any pre-existing subsurface slip and notes that the geotechnical engineers misrepresent an alluded to Landslide Study of 1976 which does not note any observed historical slip in the area. Such Landslide Study of 1976 itself states it

“should not be considered or used as a substitute for detailed on-site geological and engineering investigations” and the study’s own limitations prevented an analysis or observation of the area at issue here. ECS demands strict proof of all evidence supporting JCSI’s alleged pre-existing subsurface slip that was reactivated. ECS further notes that the area ECS was directed by the Owner to analyze was different than the area where MSPE performed site preparation work. ECS denies the remaining allegations of paragraph 8.

9. In response to paragraph 9, ECS admits that it concluded that slope stability issues arose from the failure of MSPE to properly daylight the toe drain on the slope that suffered the slip, as required by ECS’s report, drawings, and specifications. ECS denies this opinion in “in contravention of the other geotechnical engineers” who JCSI fails to cite or name.
10. ECS is without present information or knowledge as to the allegations contained in paragraph 10.
11. No response is needed to paragraph 11.
12. ECS is without present information or knowledge as to the allegations contained in paragraph 12.
13. ECS is without present information or knowledge as to the allegations contained in paragraph 13.
14. ECS is without present information or knowledge as to the allegations contained in paragraph 14.
15. ECS is without present information or knowledge as to the allegations contained in paragraph 15.
16. No response is needed to paragraph 16.

17. ECS is without present information or knowledge as to the allegations contained in paragraph 17.
18. ECS is without present information or knowledge as to the allegations contained in paragraph 18.
19. ECS is without present information or knowledge as to the allegations contained in paragraph 19.
20. ECS is without present information or knowledge as to the allegations contained in paragraph 20.
21. ECS is without present information or knowledge as to the allegations contained in paragraph 21.
22. ECS is without present information or knowledge as to the allegations contained in paragraph 22.
23. ECS is without present information or knowledge as to the allegations contained in paragraph 23.
24. ECS is without present information or knowledge as to the allegations contained in paragraph 24.
25. ECS is without present information or knowledge as to the allegations contained in paragraph 25.
26. No response is needed to paragraph 26.
27. ECS is without present information or knowledge as to the allegations contained in paragraph 27.
28. ECS is without present information or knowledge as to the allegations contained in paragraph 28.

29. ECS is without present information or knowledge as to the allegations contained in paragraph 29.
30. ECS is without present information or knowledge as to the allegations contained in paragraph 30.
31. No response is needed to paragraph 31.
32. Paragraph 32 references the Plaintiff's Complaint which speaks for itself. ECS denies any allegations that are not consistent with a plain reading of the Complaint.
33. Paragraph 33 references the Plaintiff's Complaint which speaks for itself. ECS denies all allegations against ECS in paragraph 33.
34. ECS denies the allegations in paragraph 34. ECS further notes that JCSI is contractually excluded from relying on ECS's services performed for Smith/Packett, and JCSI is contractually and lawfully prohibited from bringing a negligence claim against ECS.
35. ECS denies the allegations in paragraph 35.
36. ECS denies the allegations in paragraph 36.
37. ECS denies the allegation in paragraph 37.
38. No response is needed to paragraph 38.
39. ECS denies the allegations in paragraph 39. ECS further notes that ECS properly and timely disclaimed any express or implied warranty.
40. ECS denies the allegations in paragraph 40.
41. ECS denies the allegations in paragraph 41.
42. ECS denies the allegations in paragraph 42.
43. ECS denies the allegations set forth in the "WHEREFORE" paragraph of the JCSI's Third-Party Complaint.

SECOND DEFENSE

Any allegations contained in JCSI's Third-Party Complaint not expressly admitted in this Answer are expressly denied.

THIRD DEFENSE

Any allegations contained in Plaintiff, Mountain State Pipeline & Excavating, LLC's ("MSPE"), Complaint that were directed, implied, or otherwise could be construed against ECS are expressly denied.

FOURTH DEFENSE

JCSI's negligence claim is barred by the Economic Loss Doctrine.

FIFTH DEFENSE

JCSI, by its conduct, in its entirety, is estopped from asserting this cause of action.

SIXTH DEFENSE

JCSI, Plaintiff, and any other subsequently named parties are contractually prohibited by relying on any services ECS performed on this project and third-party claims are contractually excluded. Any third-party benefit, including such claim for an implied warranty, is purely incidental. Such disavowed relationship prevents any special relationship from existing between ECS and any party to this matter.

SEVENTH DEFENSE

JCSI's Third-Party Complaint fails to state a claim upon which relief may be granted.

EIGHTH DEFENSE

JCSI, MSPE, and all other parties to the Crossings Project did not justifiably or reasonably rely on any ECS direct or indirect statement or representation.

NINTH DEFENSE

JCSI, MSPE, and all other parties to the Crossings Project knew or should have known that material changes were made to the Crossings Project design subsequent to ECS's services performed. Such actual or constructive knowledge prohibits parties from claiming reliance upon inapplicable services and reports.

TENTH DEFENSE

ECS work was proper, performed in a workmanlike manner, and ECS exercised the skill of a member of its profession in the same or similar circumstances. ECS provided services under the information provided by Smith/Packett or other entities, and ECS's services were truthful, proper, and adequate based upon the services requested and the information provided.

ELEVENTH DEFENSE

JCSI, MSPE, and other non-ECS parties contributed to any injuries or damages incurred by any party to this litigation or the Crossings Project.

TWELFTH DEFENSE

JCSI's damages were not proximately caused by ECS.

THIRTEENTH DEFENSE

JCSI or other entities failed to properly give ECS notice of any alleged breach of implied warranties (if found to exist) and a reasonable time to respond to the notice, as required.

FOURTEENTH DEFENSE

JCSI failed to mitigate its damages. ECS denies any amounts owed to JCSI or any other party related to the Crossings Project.

FIFTEENTH DEFENSE

JCSI or other entities approved the final construction, designs, reports, measurements, and tests as existing.

SIXTEENTH DEFENSE

Such significant or material changes were made to the project design, location, and implementation of the project and construction that any attempt to rely on ECS's services relies on wholly out-of-scope reports generated for a project that did not resemble the final product.

CONCLUSION

WHEREFORE, for the foregoing reasons, Third-party Defendant ECS respectfully request this Court to enter judgment in its favor and deny JCSI's claims against ECS, award attorney's fees and costs, and award such other relief as this Court deems proper and just.

**Third-party Defendant,
ECS MID-ATLANTIC, LLC,
By Counsel:**



Christopher A. Brumley (WV State Bar #7697)
Evan S. Aldridge (WV State Bar #13373)
Flaherty Sensabaugh Bonasso, PLLC
P.O. Box 3843
Charleston, WV 35338
Telephone: (304) 345-0200
Facsimile: (304) 345-0260
cbrumley@flahertylegal.com
ealdridge@flahertylegal.com

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,

Plaintiff;

v.

**Civil Action No. 20-C-350
Judge Kaufman**

**SMITH/PACKETT MED-COM, LLC,
a Virginia Limited Liability Company,**

Defendant;

And

**SP WV, LLC,
a Virginia Liability Company,**

Defendant;

And

**WV IL-AL INVESTORS, LLC,
a Virginia Limited Liability Company**

Defendant;

And

CARTER BANK & TRUST,

Defendant;

And

JARRETT CONSTRUCTION SERVICES, INC.,

Defendant/Counterclaimant/Third-Party Plaintiff;

v.

ECS MID-ATLANTIC, LLC

Third-Party Defendant.

CERTIFICATE OF SERVICE

I, the undersigned counsel for ECS Mid-Atlantic, LLC, do hereby certify that I have served the foregoing **Third-Party Defendant, ECS Mid-Atlantic, LLC's Answer to Jarrett Construction Services, Inc.'s Third-Party Complaint** upon counsel of record this 27th day of July 2020, via regular mail, addressed as follows:


Robert H. Sweeney, Jr.
JENKINS FENSTERMAKER, PLLC
PO Box 2688
Huntington, WV 25726
Counsel for Jarrett Construction Services, Inc.

Carl J. Roncaglione, Jr.
CARL J. RONCAGLIONE LAW OFFICE
1018 Kanawha Boulevard, East
Suite 401, Boulevard Tower
Charleston, WV 25301
Counsel for Plaintiff Mountain State Pipeline & Excavating, LLC

J. Victor Flanagan
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
901 Quarrier Street, James Mark Building
Charleston, WV 25301
Co-counsel for Plaintiff Mountain State Pipeline & Excavating, LLC

Clifford F. Kinney, Jr.
SPILMAN THOMAS & BATTLE, PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301
Counsel for Carter Bank & Trust

Robert A. Lockhart
CIPRIANI & WERNER, P.C.
500 Lee Street, East, Suite 900
Charleston, WV 25301
Counsel for Packett Med-Com, LLC, SP WV, LLC and WV IL-AL Investors, LLC



Evan S. Aldridge (WV State Bar #13373)



FLAHERTY | SENSABAUGH | BONASSO PLLC

CHARLESTON
CLARKSBURG
MORGANTOWN
WHEELING

Evan S. Aldridge
ealdrige@flahertylegal.com
304-347-3798

July 27, 2020

Cathy Gatson, Clerk
Kanawha County Judicial Annex
111 Court Street
Charleston, WV 25301

**Re: Mountain State Pipeline & Excavating, LLC v. ECS Mid- Atlantic,
LLC, et al.
Civil Action No. 20-C-350**

Dear Ms. Gatson:

Enclosed please find "ECS Mid-Atlantic, LLC's Answer to Mountain State Pipeline & Excavating, LLC's Crossclaim" in the above-referenced matter. Please file this document in your normal procedure. Counsel of record have been served a copy of same on this date.

Thank you for your assistance in this matter.

Sincerely,

Evan S. Aldridge

ESA/trj
Enclosure

cc: Robert H. Sweeney, Jr., Esq.
Carl J. Roncaglione, Jr., Esq.
J. Victor Flanagan, Esq.
Clifford F. Kinney, Jr., Esq.
Robert A. Lockhart, Esq.

5325-54537

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,

**Plaintiff/Counterclaim Defendant/
Cross-claimant;**

v.

**Civil Action No. 20-C-350
Judge Kaufman**

**SMITH/PACKETT MED-COM, LLC,
a Virginia Limited Liability Company,**

Defendant;

And

**SP WV, LLC,
a Virginia Liability Company,**

Defendant;

And

**WV IL-AL INVESTORS, LLC,
a Virginia Limited Liability Company**

Defendant;

And

CARTER BANK & TRUST,

Defendant;

And

JARRETT CONSTRUCTION SERVICES, INC.,

Defendant/Counterclaimant/Third-Party Plaintiff;

v.

ECS MID-ATLANTIC, LLC

Third-Party Defendant/Crossclaim Defendant.

**ECS MID-ATLANTIC, LLC'S ANSWER TO
MOUNTAIN STATE PIPELINE & EXCAVATING, LLC'S CROSSCLAIM**

Third-Party Defendant ECS Mid-Atlantic, LLC's (hereinafter "ECS"), by and through its counsel, files the following Answer and Defenses, and states as follows:

FIRST DEFENSE

In response to the specific claims alleged in Cross-claimant Mountain State Pipeline & Excavating, LLC's ("MSPE") Third-Party Complaint against ECS Mid-Atlantic, LLC, Defendant answers or avers as follows:

FACTUAL AND PROCEDURAL BACKGROUND

1. ECS admits, based upon information and belief, the allegations set forth in paragraph 1.
2. ECS admits the allegations set forth in paragraph 2.
3. No response is needed to paragraph 3. To the extent ECS must answer specific allegations or statements made in such Complaint, ECS denies all such allegations or statements.
4. In response to paragraph 4, ECS admits that Smith/Packett Med-Com, LLC ("Smith/Packett"); by, through, or individually with SP WV, LLC and WV IL-AL Investors, LLC¹; desired to construct a for-profit and independent living and assisted living facility of a certain size, known as The Crossings at Southridge (the "Project" or the "Crossings Project"). Upon information or belief, ECS admits that Smith/Packett employed certain entities to prepare, draft, publish, and issue a Smith/Packett project manual based upon services performed. ECS admits it performed services as a geotechnical engineer and that it provided a report of subsurface

¹ ECS contracted with Smith/Packett for services related to this Project. ECS is without knowledge or information about the role of the allegedly affiliated entities SP WV, LLC and WV IL-AL Investors, LLC. ECS limits its Answer to its knowledge and belief of Smith/Packett's role in the Project. ECS's statements regarding Smith/Packett should not be construed as inclusive or exclusive of SP WV, LLC or WV IL-AL Investors, LLC. To the extent a response is needed to any allegation in the Crossclaim regarding these two entities, ECS affirmatively states that it is without information, knowledge, or belief as to the allegations against these entities or their role in the Project. This footnote shall be a standing conditional statement to the entire pleading.

exploration and geotechnical analysis, which included certain tests such as soil test borings and laboratory analysis, and such report and analysis was provided based upon designs and information furnished to ECS. ECS denies serving as a design professional or acting as “the Smith/Packett Defendant’s agent, servant, employee, or representative.” To the extent such allegations refer to the contents of the “Project Manual,” ECS states that such written instrument speaks for itself. ECS is without present knowledge, information, or belief as to the other alleged design professionals’ role, agency, or performance of services in relation to said “Project Manual.” ECS denies the remaining allegations in paragraph 4.

5. In response to paragraph 5, ECS admits it performed services as a geotechnical engineer and that it provided a report of subsurface exploration and geotechnical analysis, which included certain tests such as soil test borings and laboratory analysis, and such report and analysis was provided based upon designs and information furnished to ECS. ECS denies serving as a design professional or acting as “the Smith/Packett Defendant’s agent, servant, employee, or representative.” To the extent such allegations refer to the contents of the “Project Manual,” ECS states that such written instrument speaks for itself. ECS is without present knowledge, information, or belief as to the other alleged design professionals’ role, agency, or performance of services in relation to said “Project Manual.” ECS denies the remaining allegations in paragraph 5.
6. In response to paragraph 6, ECS states that such Project Manual and Civil Drawings and Specifications are written instrument(s) which speak for themselves. ECS denies such remaining assertions to the extent they are inconsistent with law or the pertinent documents.

7. In response to paragraph 7, ECS states that such Grading Plan and Civil Drawings and Specifications are written instrument(s) which speak for themselves. ECS denies such remaining assertions to the extent they are inconsistent with law or the pertinent documents.
8. In response to paragraph 8, ECS notes that such proposal was inconsistently denoted "ECS Proposal No.: 12:12683-P" and "ECS Proposal No. 12:12683" within the subject document. ECS is presently unaware of any significance of the suffix "P" but reserves the rights to supplement its answer after it is able to conduct discovery. For said reason, ECS is without knowledge or belief as to if such contract was entered into under "ECS Proposal No.: 12:12683-P" or "ECS Proposal No. 12:12683." ECS denies that the term "revised" was italicized or otherwise emphasized. ECS denies that such services were "design professional services." ECS states that such document is a written instrument which speak for itself. ECS denies such remaining assertions to the extent they are inconsistent with law or the pertinent documents. By way of further response, ECS states that such proposal for services noted that it "will be performed in accordance with our current Master Services Agreement ["MSA"] with Smith Packett Med-Com, LLC" and thus incorporates the parties' MSA as the contract.
9. In response to paragraph 9, ECS states that such document is a written instrument which speak for itself. ECS denies such remaining assertions to the extent they are inconsistent with law or the pertinent documents.
10. In response to paragraph 10, ECS states that such document is a written instrument which speak for itself. ECS denies such remaining assertions to the extent they are inconsistent with law or the pertinent documents.
11. ECS admits paragraph 11.
12. ECS denies paragraph 12.

13. In response to paragraph 13, ECS admits it relied upon, incorporated, and included project information provided by Smith/Packett. The remaining allegations in paragraph 13 reference written instrument(s) which speak for itself/themselves. ECS denies such remaining assertions to the extent they are inconsistent with law or the pertinent documents.
14. ECS denies the allegations in paragraph 14. ECS notes that MSPE's allegations in paragraph 14 are intentionally flamboyant in nature and woefully unsupported by law or fact, but are rather intended as mere puffery of its claims. ECS likewise rejects MSPE's statement that ECS or any other defendant "should be punished." Such statement is unprofessional and unnecessary, especially in light of West Virginia's well-established economic loss doctrine which prohibits such claims related MSPE's claimed economic loss.
15. ECS denies the allegations in paragraph 15.
16. ECS denies the allegations in paragraph 16.
17. ECS denies the allegations in paragraph 17.
18. ECS denies the allegations in paragraph 18.
19. ECS admits that on or about January 8, 2019, the Project experienced a slip. ECS denies all other allegations in paragraph 19.
20. In response to paragraph 20, ECS states that such document is a written instrument which speak for itself. ECS denies such remaining assertions to the extent they are inconsistent with law or the pertinent documents.
21. In response to paragraph 21, ECS admits that it observed conditions in the vicinity of the Project denoted in paragraph 20's quote, as well as other conditions noted through its proposal documents, site inspection, and other analysis. ECS further notes that MSPE's use of the phrase "anticipated building layout on the site thereon" is undefined and because the building layout

and location were changed after ECS performed its analysis, ECS cannot determine which layout or site is being referenced. Thus, ECS is without information, knowledge, or belief as to what is alleged in MSPE's Crossclaim. ECS denies such remaining allegations.

22. In response to paragraph 22, ECS states that such referenced documents are written instruments which speak for themselves. ECS denies such remaining assertions to the extent they are inconsistent with law or the pertinent documents.

23. No response is needed to what MSPE mistakenly labeled its second paragraph 21.²

24. In response to what MSPE mistakenly labeled as its second paragraph 22, ECS admits that it contracted with Smith/Packett to perform certain services. ECS is without information or belief as to the remaining allegations in what MSPE mistakenly labeled as its second paragraph 22.

25. ECS denies the allegations in the paragraph numbered 23.

26. ECS denies the allegations in the paragraph numbered 24.

27. ECS denies the allegations in the paragraph numbered 25.

28. ECS denies the allegations in the paragraph numbered 26.

29. ECS denies the allegations in the paragraph numbered 27.

30. ECS denies the allegations in the paragraph numbered 28.

31. No response is needed to the paragraph numbered 29.

32. ECS denies the allegations in the paragraph numbered 30.

33. ECS denies the allegations in the paragraph numbered 31.

34. ECS denies the allegations in the paragraph numbered 32.

35. ECS denies the allegations in the paragraph numbered 33.

² ECS is answering such paragraphs in a good faith attempt to respond to the pleading's apparent scrivener's error. If such responses become misaligned, such answers shall not be construed as an admission and the party relying on any statement shall use best efforts to determine the intent of the parties. In the absence of clarity, all answers shall be declared denied by ECS.

36. ECS denies the allegations in the paragraph numbered 34.
37. No response is needed to the paragraph numbered 35.
38. The paragraph numbered 36 appears to state a legal conclusion through the application of law to its allegations. ECS denies all allegations contained in the paragraph numbered 36. ECS further notes that ECS has no obligation to produce the requested documents to MSPE or its counsel regardless of MSPE's request. Such documents may be requested through discovery requests but ECS has no obligation to give proprietary information to MSPE as such work performed by ECS explicitly excluded any third-party beneficiary from relying on the documents MSPE requests. ECS demands strict identification and proof of such "other duties" owed to MSPE that the pleading vaguely references.
39. No response is needed to the paragraph numbered 37.
40. ECS denies the allegations in the paragraph numbered 38.
41. ECS denies the allegations set forth in the "WHEREFORE" paragraph of the MSPE's Crossclaim.

SECOND DEFENSE

Any allegations contained in MSPE's Crossclaim not expressly admitted in this Answer are expressly denied.

THIRD DEFENSE

Any allegations contained in Plaintiff MSPE's Complaint that were directed, implied, or otherwise could be construed against ECS are expressly denied.

FOURTH DEFENSE

MSPE's negligence claim is barred by the Economic Loss Doctrine.

FIFTH DEFENSE

MSPE, by its conduct, in its entirety, is estopped from asserting this cause of action.

SIXTH DEFENSE

MSPE, JCSI, and any other subsequently named parties are contractually prohibited by relying on any services ECS performed on this project and third-party claims are contractually excluded. Any third-party benefit, including such claim for an implied warranty, is purely incidental. Such disavowed relationship prevents any special relationship from existing between ECS and any party to this matter.

SEVENTH DEFENSE

MSPE's Crossclaim fails to state a claim upon which relief may be granted.

EIGHTH DEFENSE

JCSI, MSPE, and all other parties to the Crossings Project did not justifiably or reasonably rely on any ECS direct or indirect statement or representation.

NINTH DEFENSE

JCSI, MSPE, and all other parties to the Crossings Project knew or should have known that material changes were made to the Crossings Project design subsequent to ECS's services performed. Such actual or constructive knowledge prohibits parties from claiming reliance upon inapplicable services and reports.

TENTH DEFENSE

ECS work was proper, performed in a workmanlike manner, and ECS exercised the skill of a member of its profession in the same or similar circumstances. ECS provided services under the information provided by Smith/Packett or other entities, and ECS's services were truthful, proper, and adequate based upon the services requested and the information provided.

ELEVENTH DEFENSE

JCSI, MSPE, and other non-ECS parties contributed to any injuries or damages incurred by any party to this litigation or the Crossings Project.

TWELFTH DEFENSE

MSPE's damages were not proximately caused by ECS.

THIRTEENTH DEFENSE

MSPE or other entities failed to properly give ECS notice of any alleged breach of implied warranties (if found to exist) and a reasonable time to respond to the notice, as required.

FOURTEENTH DEFENSE

MSPE failed to mitigate its damages. ECS denies any amounts owed to MSPE or any other party related to the Crossings Project.

FIFTEENTH DEFENSE

MSPE or other entities approved the final construction, designs, reports, measurements, and tests as existing.

SIXTEENTH DEFENSE

Such significant or material changes were made to the project design, location, and implementation of the project and construction that any attempt to rely on ECS's services relies on wholly out-of-scope reports generated for a project that did not resemble the final product.

SEVENTEENTH DEFENSE

MSPE's request for declaratory relief under West Virginia's Uniform Declaratory Judgment Act is an improper use of said act because any declaratory judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings.

EIGHTEENTH DEFENSE

MSPE has no grounds to pursue punitive damages or attorneys' fees and costs.

NINETEENTH DEFENSE

Certain averments are so vague or ambiguous that ECS could not frame a response to such statements or allegations.

TWENTYTH DEFENSE

MSPE fails to plead fraud or mistake with the necessarily particularity.

CONCLUSION

WHEREFORE, for the foregoing reasons, Third-party Defendant ECS respectfully request this Court to enter judgment in its favor and deny JCSI's claims against ECS, award attorney's fees and costs, and award such other relief as this Court deems proper and just.

**Third-party Defendant,
ECS MID-ATLANTIC, LLC,
By Counsel:**



Christopher A. Brumley (WV State Bar #7697)
Evan S. Aldridge (WV State Bar #13373)
Flaherty Sensabaugh Bonasso, PLLC
P.O. Box 3843
Charleston, WV 35338
Telephone: (304) 345-0200
Facsimile: (304) 345-0260
cbrumley@flahertylegal.com
ealdrige@flahertylegal.com

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,

**Plaintiff/Counterclaim Defendant/
Crossclaimant;**

v.

**Civil Action No. 20-C-350
Judge Kaufman**

**SMITH/PACKETT MED-COM, LLC,
a Virginia Limited Liability Company,**

Defendant;

And

**SP WV, LLC,
a Virginia Liability Company,**

Defendant;

And

**WV IL-AL INVESTORS, LLC,
a Virginia Limited Liability Company**

Defendant;

And

CARTER BANK & TRUST,

Defendant;

And

JARRETT CONSTRUCTION SERVICES, INC.,

Defendant/Counterclaimant/Third-Party Plaintiff;

v.

ECS MID-ATLANTIC, LLC

Third-Party Defendant/Crossclaim Defendant.

CERTIFICATE OF SERVICE

I, the undersigned counsel for Third-Party and Crossclaim Defendant, ECS Mid-Atlantic, LLC, do hereby certify that I have served the foregoing **Crossclaim Defendant, ECS Mid-Atlantic, LLC's Answer to Mountain State Pipeline & Excavating, LLC's Crossclaim** upon counsel of record this 27th day of July 2020, via regular mail, addressed as follows:

Robert H. Sweeney, Jr.
JENKINS FENSTERMAKER, PLLC
PO Box 2688
Huntington, WV 25726
Counsel for Jarrett Construction Services, Inc.

Carl J. Roncaglione, Jr.
CARL J. RONCAGLIONE LAW OFFICE
1018 Kanawha Boulevard, East
Suite 401, Boulevard Tower
Charleston, WV 25301
Counsel for Plaintiff Mountain State Pipeline & Excavating, LLC

J. Victor Flanagan
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
901 Quarrier Street, James Mark Building
Charleston, WV 25301
Co-counsel for Plaintiff Mountain State Pipeline & Excavating, LLC

Clifford F. Kinney, Jr.
SPILMAN THOMAS & BATTLE, PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301
Counsel for Carter Bank & Trust

Robert A. Lockhart
CIPRIANI & WERNER, P.C.
500 Lee Street, East, Suite 900
Charleston, WV 25301
Counsel for Packett Med-Com, LLC, SP WV, LLC and WV IL-AL Investors, LLC



Evan S. Aldridge (WV State Bar #13373)

TO: The Honorable Chief Justice Tim Armstead

CERTIFICATE OF SERVICE

I, the undersigned counsel for ECS Mid-Atlantic, LLC, do hereby certify that I have served the foregoing **Joint Motion to Refer Action to the Business Court Division** upon counsel of record this 8th day of September 2020, via regular mail, addressed as follows:

The Honorable Tod Kaufman
Clerk, Cathy S. Gatson
KANAWHA COUNTY CIRCUIT COURT
111 Court Street
Charleston, WV 25301
Presiding Circuit Court Judge

Robert H. Sweeney, Jr.
JENKINS FENSTERMAKER, PLLC
PO Box 2688
Huntington, WV 25726
Counsel for Jarrett Construction Services, Inc.

Carl J. Roncaglione, Jr.
CARL J. RONCAGLIONE LAW OFFICE
1018 Kanawha Boulevard, East
Suite 401, Boulevard Tower
Charleston, WV 25301
Counsel for Mountain State Pipeline & Excavating, LLC

J. Victor Flanagan
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
901 Quarrier Street, James Mark Building
Charleston, WV 25301
Co-counsel for Mountain State Pipeline & Excavating, LLC

Daniel J. Burns
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
252 George Street
Beckley, WV 25801
Co-counsel for Mountain State Pipeline & Excavating, LLC

Clifford F. Kinney, Jr.
SPILMAN THOMAS & BATTLE, PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301
Counsel for Carter Bank & Trust

Robert A. Lockhart
CIPRIANI & WERNER, P.C.
500 Lee Street, East, Suite 900
Charleston, WV 25301

Counsel for Packett Med-Com, LLC, SP WV, LLC and WV IL-AL Investors, LLC

Business Court Division
Berkeley County Judicial Center
Suite 2100
380 W. South Street
Martinsburg, WV 25401



Evan S. Aldridge (WV State Bar #13373)