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September 30, 2020

Edythe Nash Gaiser
West Virginia Supreme Court of Appeals
Capitol Complex
Building 1, Room E-317
Charleston, WV 25305



RE: *Mountain State Pipeline v. Smith/Packett Med-Com, et al*
Kanawha County Civil Action No. 20-C-350

Dear Ms. Nash Gaiser:

Enclosed for filing in the above-styled matter please find an original and five copies of the following document:

- ***Plaintiff And Counterclaim Defendant Mountain State Pipeline And Excavating, LLS's Reply Memorandum In Opposition To Defendants' Motion To Refer Action To Business Court.***

Should you have any questions please do not hesitate to contact my office. Thank you.

Very truly yours,


Daniel J. Burns

DJB/smr

Enclosure(s)

cc: Hon. Todd J. Kaufman
Robert A. Lockhart, Esq.
Robert H. Sweeney, Jr., Esq.
Clifford F. Kinney, Jr., Esq.
Christopher A. Brumley, Esq./Evan S. Aldridge, Esq.

September 30, 2020
Edythe Nash Gaiser
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Cc: Carl C. Roncaglione, Esq.
Central Office of the Business Court Division

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,
Plaintiff/Counterclaim Defendant/
Crossclaimant;**

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/Counterclaimant;

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/Counterclaimant;

and

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

Defendant/Counterclaimant;

and

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

Defendant/Counterclaimant;

and

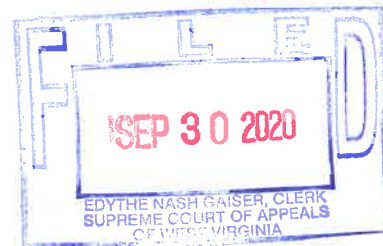
**CARTER BANK AND TRUST;
Defendant;**

and

JARRETT CONSTRUCTION SERVICES, INC.;
Third-Party Plaintiff,

v.

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



**PLAINTIFF AND COUNTERCLAIM DEFENDANT MOUNTAIN STATE PIPELINE
AND EXCAVATING, LLC'S REPLY MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO REFER ACTION TO BUSINESS COURT**

COMES NOW Plaintiff, Counterclaim Defendant and Crossclaimant, Mountain State Pipeline & Excavating, LLC (hereinafter "MSPE"), by and through counsel, Carl J. Roncaglione, Jr., Esq., J. Victor Flanagan, Daniel J. Burns, and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, and pursuant to Trial Court Rule 29.06(a)(4), hereby files its *Reply Memorandum in Oppsotiion to Defnedants' Motion to Refer Action to Business Court*. In futher support of the same, Plaintiff and Counterclaim Defendant MSPE states and avers as follows:

A. RELEVANT FACTS AND PROCEDURAL HISTORY

On or about May 1, 2020, Plaintiff, Counterclaim Defendant and Crossclaimant MSPE filed its Complaint in the Circuit Court of Kanawha County. *See generally* Movants' Ex. A. Briefly, Plaintiff, Counterclaim Defendant and Crossclaimant MSPE performed construction work pursuant one or more contracts as part of the construction of The Crossings at Southridge. *Id.* Generally, Plaintiff, Counterclaim Defendant and Crossclaimant MSPE seeks financial and other redress for the following causes of action: Breach of Contract; Breach of Warranty; Fraud, Deceit, Inducement and Misrepresentation; Professional Negligence as Construction Manager, at Risk (Jarrett Construction Services, Inc.); Tortious Interference by Jarrett Construction Services, Inc.; Oral Modification, Implied in Fact Contract; Quantum Meruit, Breach of Implied in Law (Quasi) Contract, Unjust Enrichment; Declaratory Judgment; Joint Venture, Civil Conspiracy Liability; Mechanic's Lien Enforcement, Smith/Packett Med-Com, LLC and Carter Bank & Trust; and, Punitive Damages and Attorneys' Fees and Costs. *Id.*

Specifically, The Crossings Project at Southridge is an 8.98 acre parcel of property, more or less, on which the Smith/Packett Defendants are constructing a 196 unit assisted living, independent living, and memory care facility. During construction, a pre-existing subsurface slip approximately 18.5' in the ground occurred along the site's subsurface slip plane not identified in the Project's design prior to construction, causing the cost of construction to increase, and thus interrupting and delaying construction of the Crossings Project, which is still not complete. In response to the Smith/Packett Defendants' bid solicitation, on November 30, 2017 MSPE submitted its bid to perform the site preparation work, and in response, the Smith/Packett Defendants accepted MSPE's bid, and entered into a contract with MSPE to perform the site preparation work on this Project. MSPE, having performed its site preparation work to ready the site for the following construction, was however not paid for its work, and extra work performed, and for delay in the construction, causing the costs of construction to increase. MSPE filed and recorded its Notice of Mechanic's Lien, the enforcement of which MSPE asserts as one of its causes of action in MSPE's Complaint.

In response to the Complaint, Defendant Jarrett Construction Services, Inc. filed its Answer, Counterclaim and Third-Party Complaint on or about June 18, 2020. *See* Movants' Ex. B. The crux of the counterclaim is Defendant Jarrett Construction alleges that, on or about January 8, 2019, a slip occurred below A Wing of The Crossings Project, which is alleged to have occurred due to the negligence of MSPE and others. *Id.* On or about June 22, 2020, Defendants WV IL-AL Investors, LLC, SP WV, LLC and Smith/Packett Med-Com, LLC, the collective owner of the subject project filed a similar Answer and Counterclaim against MSPE. *See* Movants' Ex. D. On or about June 24, 2020, Defendant Carter Bank & Trust filed an Answer to the Plaintiff's Complaint. *See* Movants' Ex. C. Finally, on or about July 27, 2020, Third-Party Defendant ECS Mid-Atlantic, LLC filed an

Answer to Jarrett Construction Services, Inc.'s Third-Party Complaint.

Since the filing of the Complaint, Counterclaims and Third-Party Complaint, the Defendants have engaged in a pattern and practice of intentional acts in an effort to thwart the attempts of the Plaintiff and Third-Party Defendant from pursuing their claims. For instance, there have been several requests made for an inspection of the property as well as discovery propounded on the named Defendants. This has resulted in countless Motions filed by the Plaintiff and Third-Party Defendant including a Motion to Compel a site inspection, which was recently granted in its totality by the Circuit Court of Kanawha County. In yet another attempt to delay this matter further, the Defendants are seeking, without sufficient grounds, to transfer this matter to the Business Court Division.

In support of their Motion, Defendants claim, without much support, that this matter meets the conditions for "Business Litigation" as defined by Trial Court Rule 29.04(a). In doing so, Defendants provide the follow bare bones assertions:

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 standards or party intent to determine obligations where contracts may be silent, ambiguous, or allegedly altered.

See Defendants' Motion, pgs. 4-5. Furthermore, Plaintiff claim the following baseless allegations in furtherance of their improper attempt to transfer this matter:

This matter involved 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.

Id at pg. 5.

Turning to discovery, Defendants claim that Business Court is the proper venue for this matter nature, type and extent of discovery that may be or is anticipated in this matter. Id. Finally, Defendants assert that transfer to the Business Court Division is warranted because discovery may later necessitate future third-party actions. Id. However, for the reasons set forth below, Plaintiff, Counterclaim Defendant and Crossclaimant MSPE submits that a transfer to the Business Court of West Virginia is not warranted in this case.

B. LEGAL STANDARD

Under the West Virginia Trial Court Rules, Rule 29.06 states as follows:

(a)(1) Any party or judge may seek a referral of Business Litigation to the Division by filing a Motion to Refer to the Business Court Division with the Clerk of the Supreme Court of Appeals of West Virginia. The motion shall identify the nature of the action(s) sought to be referred, the basis for the request, and, if known, whether additional related actions are pending or may be filed in the future. A copy of the complaint, answer, docket sheet and any other documents that support referral under Trial Court Rule 29.04(a) shall be attached to the motion.

W. Va. T.C.R., Rule 29.06.

Whether or not a matter is appropriate for transfer rests upon Trial Court Rule 29.04(a). As to “business litigation” appropriate for handling by the Business Court, the rules states as follows:

- (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.

W. Va. T.C.R., Rule 29.04(a).

Shortly after the Business Court Division was established, Judge Christopher C. Wilkes, the current Chairman of the Business Court Division, wrote an article about the purpose and use of the Business Court Division. Hon. Christopher Wilkes, *West Virginia's New Business Court Division: An Overview of The Development and Operation of Trial Court Rule 29*, The West Virginia Lawyer, Jan-March 2013, at 40-43. Among other things, Judge Wilkes pointed out the following:

- The Business Court Division was adopted to establish a “process for efficiently managing and resolving litigation involving commercial issues and disputes between businesses that includes the establishment of a Business Court Division to handle a specialized court docket within the circuit courts.”
- The Business Court Division was “designed to handle complex commercial litigation cases between businesses.”
- Litigation between businesses is at the center of the Business Court Division’s purpose. Cases which have a high level of complexity, novel issues or other issues requiring specialized treatment are likely to land on the Business Court Docket if requested.

C. ARGUMENT

- a. The Business Court would have no more specialized knowledge of expertise to aid in resolving this case than the Circuit Court of Kanawha County.**

In support of their Motion, Defendants claim, without much support, that this matter meets the conditions for “Business Litigation” as defined by Trial Court Rule 29.04(a). In doing so, Defendants provide the following bare bones assertions:

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 standards or party intent to determine obligations where contracts may be silent, ambiguous, or allegedly altered.

See Defendants' Motion, pgs. 4-5. Furthermore, Plaintiff claims the following baseless allegations in furtherance of their improper attempt to transfer this matter:

This matter involved 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.

Id at pg. 5.

However, Defendants fail to show how either specialized knowledge of expertise is needed or how Judge Kaufman, who is the current presiding judge, is ill-equipped to handle this case. As generally stated in the Complaint, Plaintiff, Counterclaim Defendant and Crossclaimant MSPE seeks financial and other redress for the following causes of action: Breach of Contract; Breach of Warranty; Fraud, Deceit, Inducement and Misrepresentation; Professional Negligence as Construction Manager, at Risk (Jarrett Construction Services, Inc.); Tortious Interference by Jarrett Construction Services, Inc.; Oral Modification, Implied in Fact Contract; Quantum Merit, Breach of Implied in Law (Quasi) Contract, Unjust Enrichment; Declaratory Judgment; Joint Venture, Civil Conspiracy Liability; Mechanic's Lien Enforcement, Smith/Packett Med-Com, LLC and Carter Bank & Trust; and, Punitive Damages and Attorneys' Fees and Costs.

Defendants' apparent strategy here is, and has been since the inception of this case, to complicate and delay resolution of this matter. However, the issues and causes of action set forth by Plaintiff, Counterclaim Defendant and Crossclaimant MSPE are straightforward. None of these

causes of action pertain to any novel or complex rule of law. At their core, they involve interpretation of contracts, application of well-known, established industry standards, and general principles of contract law learned by most first-year law students. The contracts, themselves, are standard contracts for construction and are generated from standard American Institute of Architects (“AIA”) master-servant agreements and the like. The parties to this litigation, as well as their counsel, are fully aware of the contents of, and interpretation of, AIA master-servant agreements as the same is the very heart of their business.

The Defendants do not state what “specialized treatment” is needed to analyze the core causes of action of Plaintiff, Counterclaim Defendant and Crossclaimant MSPE. Nor do the Defendants show how the Business Court Division could provide “specialized treatment” that is not otherwise available to the assigned Circuit Court Judge. The Defendants do not identify, as the same does not exist, any known or unknown deficiency in Judge Kaufman’s knowledge or expertise in handling contract disputes involving one or more party. The Defendants also failed to explain that they view the Business Court Division as being better positioned to apply the basic tenets of West Virginia law.

Vague assertions that construction contract issues are “complex” does not sufficiently demonstrate that the Kanawha County Circuit Court is unable to reach a fair result. If the Plaintiff, Counterclaim Defendant and Crossclaimant MSPE were to list every similar case presented to, and ultimately decided by the Kanawha County Circuit Court pertaining to the causes of action set forth in the Complaint would require hundreds upon hundreds of man hours and would far and exceed any reasonable reply memorandum of this case. Interpreting a construction contract, or even several, can hardly be considered a “novel” issue and the remaining matters are relatively straightforward and

routine matters for an experienced Circuit Court Judge like Judge Kaufman.

The simple fact that this dispute involves a disagreement amongst multiple companies over the terms of several contracts, standing alone, is not a mandatory or even a compelling reason for referral to the Business Court Division. Even if, as the Defendant suggest, the issues raised in this lawsuit are slightly more complex than those presented in a “garden variety” construction case (which Plaintiff, Counterclaim Defendant and Crossclaimant MSPE disputes), they still do not require resourced beyond those of the Circuit Court of Kanawha County. In summation, because this lawsuit does not require “specialized treatment,” it does not qualify as “Business Litigation” under Trial Court Rule 29 and should not be referred to the Business Court Division.

b. The Business Court Division’s expedited docket is inappropriate under these circumstances.

In a self-serving attempt to refer this matter, the Defendants failed to make any mention of the Business Court Division’s ten (10) month anticipated adjudication goal and the reality of the time this case may take to move toward conclusion. Under the West Virginia Trial Court Rules, judges within the Business Court Division must “make all reasonable efforts to conclude Business Litigation within ten (10) months from the date the case management order was entered.” W.Va. Tr. Ct. R. 29.08. In their attempts to shift this case to the Business Court Division, Defendants demonstrate that there is no conceivable way to conclude this matter in ten (10) months.

As correctly indicated by the Defendants, this matter will include the following discovery: electronic discovery; traditional discovery such as written discovery and depositions; analysis of delay, costs, business finances, construction costs, and construction damages the detailed expert analysis; multiple experts of various types and quantities; and, countless expert depositions. To say

that this can all be accomplished, given the nature of the claims and the number as well as relationships of the parties involved, is laughable at best. This consideration is further marred by Defendants ongoing attempts to thwart any meaningful discovery in this case. To date, Plaintiff, Counterclaim Defendant and Crossclaimant MSPE has already been forced to file a Motion to Compel just to obtain access to the subject property to complete an initial inspection. With pending objections to written discovery, Plaintiff, Counterclaim Defendant and Crossclaimant MSPE anticipate having to file countless other discovery motions in this case just in an effort to prosecute its claims. That said, one of the main benefits of the Business Court Division would not be practical here.

Finally, this matter, although not under a current Scheduling Order, has already had significant developments with which the Circuit Court of Kanawha Court is intimately familiar. Namely, the actions of Defendant Jarrett Construction in purposefully evading its discovery obligations. Transferring this matter seeks only to allow Defendant Jarrett Construction additional time to delay in discovery obligations, at the direct cost to Plaintiff, Counterclaim Defendant and Crossclaimant MSPE. Keeping this matter before Judge Kaufman is the only way to ensure that the Defendants are not provided continued opportunities to shirk their discovery obligations without appropriate sanctions. Thus, this matter should not be referred to the Business Court Division.

c. The contacts between the parties do not provide for transfer.

In March 2018, Defendants WV IL-AL Investors, LLC and Jarrett Construction Services signed an AIA Document C132-2009 Standard Form Agreement between Owner and Construction Manager as Adviser. *See* Plaintiff's Exhibit A. In doing so, these parties agreed to be bound by the following provision:

§8.2.4 If the parties do not resolve a dispute through mediation pursuant to Section 8.2, the method of binding dispute resolution shall be the following:

(X) Litigation in a court of competent jurisdiction in West Virginia. The exclusive venue shall be the state courts embracing the project location, and the parties shall jointly seek referral to the West Virginia Business Court Division of all disputes within the Business Court's jurisdiction.

Id. In a subsequent iteration, the sole and exclusive venue for all litigation arising in connection with the Prime Contractor (Defendant Jarrett) shall be the state courts of Kanawha County, West Virginia. *See* Plaintiff's Exhibit B.

Absent from either agreement is any provision that binds Plaintiff, Counterclaim Defendant and Crossclaimant MSPE from contractually being required to consent to jurisdiction with the Business Court Division. Thus, it is clear that intent of the parties is that this matter is not to be transferred to the Business Court Division. As this Court is aware, in so far as a "contract" is involved, it is not the province of "a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." See, Syl. 3, Cotiga Dev. Co. v. Gas Co., 147 W.Va. 484, 128 S.E.2d 626 (1962). To require this matter to be heard in the Business Court Divisions seeks to engage in the exact contract-creating conduct expressly prohibited by Cotiga.

Finally, this case involves much more than contractual disputes between business entities. As stated in the Complaint, this case involves, *inter alia*, mechanic's lien claim, and design professional negligence, including that is predicated on Eastern Steel Constructors, Inc. v. City of Salem, 209 W. Va. 392, 549 S.E.2d 266 (2001); Aikens v. DeBow, 208 W. Va. 486, 541 S.E. 576 (2000), and of course, Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82 (1988) and PipeMasters, Inc. v. Putnam County Building Conmen., 218 W.Va. 512, 625 S.E.2d 274, 281 (2005). In those cases, the lack of

privity was, and still is, the express point under W.Va. law, thus defeating the purpose of the claimed referral.

d. Plaintiff, Counterclaim Defendant and Crossclaimant MSPE's Due Process Rights would be violated by the transfer sought by the Defendants.

West Virginia's equal protection principle is part of the due process clause contained in West Virginia Constitution Article III, Section 10. Gibson v. West Virginia Dep't of Hwys., 185 W.Va. 214, 406 S.E.2d 440 (1991). The concept of equal protection of the laws is inherent in this section and the scope and application of equal protection of laws in West Virginia is coextensive and broader than that of the Fourteenth Amendment to the United States Constitution. Payne v. Gundy, 196 W.Va. 82, 468 S.E.2d 335 (1996).

West Virginia Constitution Article VIM, Section 5 establishes the requirement that circuit judges be elected within their respective circuits. It further provides for all cases arising within those circuits to be heard by the circuit judge of the circuit unless the chief judge is disqualified or unable to serve. It does not authorize a Business Court Division within the circuit courts in which a judge not elected from within the circuit is assigned to hear a case. It does not allow a party to remove a case from an elected circuit judge. Article VIM, Section 5 clearly contemplates that circuit judges answer to the electorate within their circuit as part of the democratic process. Circuit judges are subject to the checks and balances of the electoral process and to remove a case from the elected circuit judge contrary to Article VIII, Section 5 defeats that purpose and disenfranchises the voters of that circuit.

In the present case, the voters of Kanawha County and would be disenfranchised by Rule 29 because a case which would otherwise be heard before their elected Circuit Judge would be arguably

unconstitutionally removed from their elected Circuit Judge and given to a judge who is not subject to the democratic process in their county and circuit. This completely defeats the purpose of the democratic election of circuit judges as provided for in Article VIM, Section 5. Surely, The Business Court Division was not created for the purpose of removing cases from the elected circuit judge that would otherwise have jurisdiction to decide the same. That not only frustrates the democratic process and the system of checks and balances, but erodes public confidence in our judicial system by removing the accountability of judges to the people in their respective circuits and promotes forum shopping by "business entities" contrary to the West Virginia Constitution and West Virginia Code Section 11-3-25.

Furthermore, as in the case here, Rule 29 allows liable Defendant "business entities" to shop for a specialized forum, but fails to provide that same right to an aggrieved party to do the same. The section gives special status to "business entities" in that "Business Litigation" is defined by Rule 29.04(a) as being "between business entities." In essence, "business entities" have been granted special protection under the law in that they can remove a case involving alleged complex from the elected judges of an appropriate circuit court to a court specially created for them at their whim and pleasure. Such disparity only encourages forum shopping by businesses with no rational basis other than to take the decision making power away from the local circuit judges who are elected by the people in their circuit for the purpose of hearing precisely this type of case. There has been no showing that the elected Judges of the Kanawha County Circuit Court do not have the expertise, knowledge or skill to hear this type of case. There is no rational basis for discriminating against aggrieved business entities, nor is there a rational basis for providing "business entities" such as the Defendants this preferential treatment. Moreover, Rule 29 denies Plaintiff, Counterclaim Defendant


and Crossclaimant MSPE its fundamental right to have this case heard by the elected judge of their circuit as contemplated and required by the West Virginia Constitution and West Virginia Code Section 11-3-25. For these reasons, the Motion for Referral should be denied and the matter properly kept in the Circuit Court of Kanawha County, West Virginia.

D. CONCLUSION

WHEREFORE, for the reasons stated herein, Plaintiff, Counterclaim Defendant and Crossclaimant MSPE respectfully requests that this Honorable Court enter an Order denying Defendants' Joint Motion to refer this matter to the Business Court Division. Instead, this Honorable Court should entered an appropriate Order allowing this matter to remain with Judge Kaufman in the Circuit Court of Kanawha County for decision, verdict and judgment together with such other relief as this Court may deem proper.

**PLAINTIFF MOUNTAIN STATE
PIPELINE & EXCAVATING, LLC**

By Counsel,


Carl J. Roncaglione, Jr., Esq.

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

**COUNTERCLAIM DEFENDANT
MOUNTAIN STATE PIPELINE &
EXCAVATING, LLC**

By Counsel,



J. Victor Flanagan, WV State Bar No. 5254

Daniel J. Burns, WV State Bar No. 11866

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC

252 George Street

Beckley, WV 25801

Telephone: (304) 254-9300

Facsimile: (304) 255-5519

AIA® Document C132™ - 2009

Standard Form of Agreement Between Owner and Construction Manager as Adviser

AGREEMENT made as of the 29th day of March in the year 2018
(In words, indicate day, month and year.)

BETWEEN the Owner:
(Name, legal status, address and other information)

WV IL-AL Investors LLC
4423 Pheasant Ridge Road, Suite 301
Roanoke, VA 24014

and the Construction Manager:
(Name, legal status, address and other information)

Jarrett Construction Services, Inc.
P.O. Box 5250
Charleston, WV 25361

for the following Project:
(Name, location and detailed description)

The Crossings at Southridge
500 Peyton Way
South Charleston, WV 25309

The Architect:
(Name, legal status, address and other information)

Meyer Architects, Inc.
227 East Lancaster Avenue
Ardmore, PA 19003

The Owner and Construction Manager agree as follows.

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An Additions and Deletions Report that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

This document is intended to be used in conjunction with AIA Documents A132™-2009, Standard Form of Agreement Between Owner and Contractor, Construction Manager as Adviser Edition; A232™-2009, General Conditions of the Contract for Construction, Construction Manager as Adviser Edition; and B132™-2009, Standard Form of Agreement Between Owner and Architect, Construction Manager as Adviser Edition.

AIA Document A232™-2009 is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

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ARTICLE 7 COPYRIGHTS AND LICENSES

The Construction Manager and the Construction Manager's consultants, if any, shall not own or claim a copyright in the Instruments of Service. The Construction Manager, the Construction Manager's consultants, if any, and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project. If the Owner and Construction Manager intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions.

ARTICLE 8 CLAIMS AND DISPUTES

§ 8.1 General

§ 8.1.1 The Owner and Construction Manager shall commence all claims and causes of action, whether in contract, tort, or otherwise, against the other arising out of or related to this Agreement in accordance with the requirements of the method of binding dispute resolution selected in this Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Construction Manager waive all claims and causes of action not commenced in accordance with this Section 8.1.1.

§ 8.1.2 To the extent damages are covered by property insurance, the Owner and Construction Manager waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages, except such rights as they may have to the proceeds of such insurance as set forth in AIA Document A232-2009, General Conditions of the Contract for Construction. The Owner or the Construction Manager, as appropriate, shall require of the contractors, consultants, agents and employees of any of them similar waivers in favor of the other parties enumerated herein.

§ 8.1.3 The Construction Manager shall indemnify and hold the Owner and the Owner's officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Construction Manager, its employees and its consultants in the performance of professional services under this Agreement. The Construction Manager's duty to indemnify the Owner under this provision shall be limited to the available proceeds of insurance coverage.

§ 8.1.4 The Construction Manager and Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7.

§ 8.2 Mediation

§ 8.2.1 Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to binding dispute resolution. If such matter relates to or is the subject of a lien arising out of the Construction Manager's services, the Construction Manager may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by binding dispute resolution.

§ 8.2.2 The Owner and Construction Manager shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of a complaint or other appropriate demand for binding dispute resolution but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration proceeding is stayed pursuant to this section, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

§ 8.2.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 8.2.4 If the parties do not resolve a dispute through mediation pursuant to this Section 8.2, the method of binding dispute resolution shall be the following:

(X) Litigation in a court of competent jurisdiction in West Virginia. The exclusive venue for such disputes shall be the state courts embracing the project location, and the parties shall jointly seek referral to the West Virginia Business Court Division of all disputes within the Business Court's jurisdiction.

ARTICLE 9 TERMINATION OR SUSPENSION

§ 9.1 If the Owner fails to make payments to the Construction Manager in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Construction Manager's option, cause for suspension of performance of services under this Agreement. If the Construction Manager elects to suspend services, the Construction Manager shall give seven days' written notice to the Owner before suspending services. In the event of a suspension of services, the Construction Manager shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Construction Manager shall be paid all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Construction Manager's services. The Construction Manager's fees for the remaining services and the time schedules shall be equitably adjusted.

§ 9.2 If the Owner suspends the Project, the Construction Manager shall be compensated for services performed prior to the actual date of such suspension. When the Project is resumed, the Construction Manager shall be compensated for expenses incurred in the interruption and resumption of the Construction Manager's services. The Construction Manager's fees for the remaining services and the time schedules shall be equitably adjusted.

§ 9.3 If the Owner suspends the Project for more than 90 cumulative days for reasons other than the fault of the Construction Manager, the Construction Manager may terminate this Agreement by giving not less than seven days' written notice.

§ 9.4 Either party may terminate this Agreement upon not less than seven days' written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.

§ 9.5 The Owner may terminate this Agreement upon not less than seven days' written notice to the Construction Manager for the Owner's convenience and without cause.

§ 9.6 In the event of termination not the fault of the Construction Manager, the Construction Manager shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due and all Termination Expenses as defined in Section 9.7.

§ 9.7 Termination Expenses are in addition to compensation for the Construction Manager's services and include expenses directly attributable to termination for which the Construction Manager is not otherwise compensated, plus an amount for the Construction Manager's reasonable profit on the value of the services not performed by the Construction Manager, as set forth below.

§ 9.7.1 In the event of termination for the Owner's convenience prior to commencement of construction, the Construction Manager shall be entitled to receive payment for services performed, costs incurred by reason of such termination and reasonable overhead and profit on Preconstruction services not completed during the Preconstruction Phase.

§ 9.7.2 In the event of termination for the Owner's convenience after commencement of construction, the Construction Manager shall be entitled to receive payment for services performed and costs incurred by reason of such termination, along with reasonable overhead and profit on services not completed during the Construction Phase.

AIA® Document A101™ - 2017

Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum

AGREEMENT made as of the ~~29th~~ day of ~~March~~ in the year ~~2018~~
(In words, indicate day, month and year.)

BETWEEN the Owner:
(Name, legal status, address and other information)

WV IL AL Investors, LLC
4423 Pleasant Ridge Road, Suite 301
Roanoke, VA 24014

and the Contractor:
(Name, legal status, address and other information)

Jarrett Construction Services, Inc.
P.O. Box 5250
Charleston, WV 25361

for the following Project:
(Name, location and detailed description)

The Crossings at Southridge
500 Peyton Way
South Charleston, WV 25309

The Architect:
(Name, legal status, address and other information)

Meyer Architects, Inc.
227 East Lancaster Avenue
Ardmore, PA 19003

The Construction Manager:
(Name, legal status, address and other information)

Jarrett Construction Services, Inc.
P.O. Box 5250
Charleston, WV 25361

The Owner and Contractor agree as follows.

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An Additions and Deletions Report that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

The parties should complete A101™-2017, Exhibit A, Insurance and Bonds, contemporaneously with this Agreement. AIA Document A201™-2017, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

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ARTICLE 6 DISPUTE RESOLUTION

§ 6.1 Initial Decision Maker

The Architect will serve as the Initial Decision Maker pursuant to Article 15 of AIA Document A201-2017, unless the parties appoint below another individual, not a party to this Agreement, to serve as the Initial Decision Maker. *(If the parties mutually agree, insert the name, address and other contact information of the Initial Decision Maker, if other than the Architect.)*

§ 6.2 Binding Dispute Resolution

For any Claim subject to, but not resolved by, mediation pursuant to Article 15 of AIA Document A201-2017, the method of binding dispute resolution shall be as follows:

(Check the appropriate box.)

☐ Arbitration pursuant to Section 15.4 of AIA Document A201-2017

☒ Litigation in a court of competent jurisdiction. The sole and exclusive venue for all litigation arising in connection with this Agreement or the Prime Contractor's Work shall be the state courts of Kanawha County, West Virginia. The parties shall jointly apply to be heard in the West Virginia Business Court Division for all disputes within the jurisdiction of that court.

☐ Other *(Specify)*

☐

If the Owner and Contractor do not select a method of binding dispute resolution, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.

ARTICLE 7 TERMINATION OR SUSPENSION

§ 7.1 The Contract may be terminated by the Owner or the Contractor as provided in Article 14 of AIA Document A201-2017.

§ 7.1.1 If the Contract is terminated for the Owner's convenience in accordance with Article 14 of AIA Document A201-2017, then the Owner shall pay the Contractor a termination fee as follows:

(Insert the amount of, or method for determining, the fee, if any, payable to the Contractor following a termination for the Owner's convenience.)

N/A

N/A

§ 7.2 The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201-2017.

ARTICLE 8 MISCELLANEOUS PROVISIONS

§ 8.1 Where reference is made in this Agreement to a provision of AIA Document A201-2017 or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

§ 8.2 The Owner's representative:

(Name, address, email address, and other information)

Winn Bishop

Smith-Packer Med-Com, LLC

4423 Pheasant Ridge Road, Suite 301

Roanoke, VA 24014

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,
Plaintiff/Counterclaim Defendant/
Crossclaimant;**

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/Counterclaimant;

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/Counterclaimant;

and

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

Defendant/Counterclaimant;

and

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

Defendant/Counterclaimant;

and

CARTER BANK AND TRUST;

Defendant;

and

JARRETT CONSTRUCTION SERVICES, INC.;
Third-Party Plaintiff,

v.

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

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Plaintiff and Counterclaim Defendants, does hereby certify on this 30th day of September, 2020, that a true copy of the foregoing "**PLAINTIFF AND COUNTERCLAIM DEFENDANT MOUNTAIN STATE PIPELINE AND EXCAVATING, LLC'S REPLY MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO REFER ACTION TO BUSINESS COURT**" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

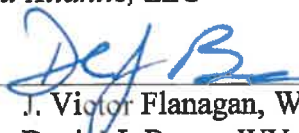
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Counsel for Carter Bank & Trust

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Charleston, WV 25301
Counsel for ECS Mid-Atlantic, LLC


Carl J. Roncaglione, Jr., Esq.


J. Victor Flanagan, WV State Bar No. 5254
Daniel J. Burns, WV State Bar No. 11866