

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ZURICH AMERICAN INSURANCE COMPANY,  
as subrogee of TURNER CONSTRUCTION  
COMPANY, TURNER CORPORATION, and  
TOMPKINS BUILDERS, INC.,

Plaintiffs,

v.

Civil Action No. 14-C-391-2  
The Honorable Thomas A. Bedell

THRASHER ENGINEERING, INC. d/b/a  
THRASHER ENGINEERING, and  
MASCARO CONSTRUCTION COMPANY, LP,

Defendants.

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**DEFENDANT THRASHER ENGINEERING, INC.'S:**

- **ANSWER TO FIRST AMENDED COMPLAINT;**
  - **COUNTERCLAIM AGAINST PLAINTIFF'S SUBROGOR TURNER CONSTRUCTION COMPANY;**
  - **CROSS-CLAIM AGAINST CO-DEFENDANT MASCARO CONSTRUCTION COMPANY, LP; and**
  - **THIRD-PARTY COMPLAINT AGAINST SKIDMORE, OWINGS & MERRILL, LLP, AND GEOCONCEPTS ENGINEERING, INC.**
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**I. ANSWER TO FIRST AMENDED COMPLAINT**

NOW COMES Defendant Thrasher Engineering, Inc. (now known as The Thrasher Group, Inc., and hereafter referred to simply as "Thrasher"), by and through counsel, and answers Plaintiffs' First Amended Complaint as follows:

**FIRST DEFENSE**

7. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 7 of the First Amended Complaint, and therefore denies the same.

8. Upon information and belief, Thrasher admits the allegations contained in paragraph no. 8 of the First Amended Complaint.

9. Thrasher admits that it entered into an "Agreement to Provide Professional Services" and "Addendum to Contract with Turner Construction Company" with Turner Construction Company made as of November 9, 2010, and executed on or about February 1, 2011. These contract documents are attached to Thrasher's Motion to Dismiss First Amended Complaint and speak for themselves. Thrasher agreed to serve as Turner's independent testing and inspection agency to perform certain services relative to the construction of phase two of the Biometric Technology Center at the FBI CJIS Division Complex in or near Clarksburg, West Virginia, which included certain soil testing. Thrasher denies all other allegations contained in paragraph no. 9 of the First Amended Complaint not specifically admitted herein.

10. Upon information and belief, Thrasher admits that Mascaro Construction Company, LP (hereafter "Mascaro") served as the general contractor for phase one of "the project", as defined in the First Amended Complaint. With respect to the allegations contained in paragraph no. 10 of the First Amended Complaint concerning Mascaro's specific construction responsibilities, Thrasher is without sufficient knowledge or information to admit or deny such allegations, and therefore denies the

7. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 7 of the First Amended Complaint, and therefore denies the same.

8. Upon information and belief, Thrasher admits the allegations contained in paragraph no. 8 of the First Amended Complaint.

9. Thrasher admits that it entered into an "Agreement to Provide Professional Services" and "Addendum to Contract with Turner Construction Company" with Turner Construction Company made as of November 9, 2010, and executed on or about February 1, 2011. These contract documents are attached to Thrasher's Motion to Dismiss First Amended Complaint and speak for themselves. Thrasher agreed to serve as Turner's independent testing and inspection agency to perform certain services relative to the construction of phase two of the Biometric Technology Center at the FBI CJIS Division Complex in or near Clarksburg, West Virginia, which included certain soil testing. Thrasher denies all other allegations contained in paragraph no. 9 of the First Amended Complaint not specifically admitted herein.

10. Upon information and belief, Thrasher admits that Mascaro Construction Company, LP (hereafter "Mascaro") served as the general contractor for phase one of "the project", as defined in the First Amended Complaint. With respect to the allegations contained in paragraph no. 10 of the First Amended Complaint concerning Mascaro's specific construction responsibilities, Thrasher is without sufficient knowledge or information to admit or deny such allegations, and therefore denies the

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**Count I - Negligence (Thrasher)**

17. Thrasher incorporates by reference its responses to paragraphs 1-16 of the First Amended Complaint as if restated herein.

18. Thrasher denies the allegations contained in paragraph no. 18 of the First Amended Complaint.

19. Thrasher denies the allegations contained in paragraph no. 19 of the First Amended Complaint.

20. Thrasher denies the allegations contained in paragraph no. 20 of the First Amended Complaint.

21. Thrasher denies the allegations contained in paragraph no. 21 of the First Amended Complaint.

22. Thrasher denies the allegations contained in paragraph no. 22 of the First Amended Complaint.

23. Thrasher denies the allegations contained in paragraph no. 23 of the First Amended Complaint.

24. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 24 of the First Amended Complaint, and therefore denies the same.

25. Thrasher denies the allegations contained in paragraph no. 25 of the First Amended Complaint.

**Count II - Negligent Hire, Retention and Supervision (Thrasher)**

26. Thrasher incorporates by reference its responses to paragraphs 1-25 of the First Amended Complaint as if restated herein.

27. Thrasher denies the allegations contained in paragraph no. 27 of the First Amended Complaint.

28. Thrasher admits only that it assigned certain employees to the Turner job site to perform certain soil testing services per the design documents for the project. Thrasher denies all other allegations contained in paragraph no. 28 of the First Amended Complaint.

29. Thrasher denies the allegations contained in paragraph no. 29 of the First Amended Complaint.

30. Thrasher denies the allegations contained in paragraph no. 30 of the First Amended Complaint.

31. Thrasher denies the allegations contained in paragraph no. 31 of the First Amended Complaint.

32. Thrasher denies the allegations contained in paragraph no. 32 of the First Amended Complaint.

33. Thrasher denies the allegations contained in paragraph no. 33 of the First Amended Complaint.

34. Thrasher denies the allegations contained in paragraph no. 34 of the First Amended Complaint.

### **Count III - Breach of Contract (Thrasher)**

35. Thrasher incorporates by reference its responses to paragraphs 1-34 of the First Amended Complaint as if restated herein.

36. Thrasher admits that it contracted with Turner Construction Company. Thrasher denies all other allegations contained in paragraph no. 36 of the First Amended Complaint.

37. Thrasher submits that the Agreement in which it entered into with Turner Construction Company speaks for itself. Further, Thrasher states that its obligations with respect to soil testing was more limited than as described by the allegations contained in paragraph no. 37 of the First Amended Complaint. Accordingly, Thrasher denies the allegations of paragraph no. 37 of the First Amended Complaint as stated.

38. Thrasher denies the allegations contained in paragraph no. 38 of the First Amended Complaint.

### **Count IV - Breach of Warranty (Thrasher)**

39. Thrasher incorporates by reference its responses to paragraphs 1-38 of the First Amended Complaint as if restated herein.

40. Thrasher denies the allegations contained in paragraph no. 40 of the First Amended Complaint.

41. Thrasher denies the allegations contained in paragraph no. 41 of the First Amended Complaint.

42. Thrasher denies the allegations contained in paragraph no. 42 of the First

Amended Complaint.

43. Thrasher denies the allegations contained in paragraph no. 43 of the First Amended Complaint.

**Count V - Negligence (Mascaro)**

44. Thrasher incorporates by reference its responses to paragraphs 1-43 of the First Amended Complaint as if restated herein.

45. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 45 of the First Amended Complaint, and therefore denies the same.

46. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 46 of the First Amended Complaint, and therefore denies the same.

47. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 47 of the First Amended Complaint, and therefore denies the same.

48. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 48 of the First Amended Complaint, and therefore denies the same.

49. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 49 of the First Amended Complaint, and therefore denies the same.

## **Count VI - Contractual Indemnification (Thrasher)**

50. Thrasher incorporates by reference its responses to paragraphs 1-49 of the First Amended Complaint as if restated herein.

51. Thrasher admits that Article 8 of its Agreement with Turner Construction Company, entitled Indemnification, states that

"It is understood and agreed that [Thrasher] shall Hold Harmless Contractor and Turner Construction Company, Turner Corporation, [and] Tompkins Builders, Inc. from all claims, losses, expenses and damages, arising out of or resulting from the performance of its Services. Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of any other person or entity."

Thrasher denies that the subject indemnification provision provides that Thrasher shall provide for Turner's attorney's fees. Thrasher denies all other allegations contained in paragraph no. 51 of the First Amended Complaint not specifically admitted herein.

52. Thrasher is without sufficient knowledge or information to admit or deny the allegations that Zurich has been forced to issue payments, and may be required to issued additional payments in the future on behalf of the Turner entities, and therefore denies the same. In the event such payments have, or will, be made, Thrasher denies that such payments were the result of Thrasher's acts and omissions. Thrasher denies all other allegations contained in paragraph no. 52 of the First Amended Complaint not specifically admitted herein.

53. Thrasher denies the allegations contained in paragraph no. 53 of the First Amended Complaint.



### **THIRD DEFENSE**

Thrasher denies all allegations contained in the First Amended Complaint not specifically admitted herein.

### **FOURTH DEFENSE**

Thrasher states that it expressly disclaimed all warranties with respect to its services for Turner, including warranty of merchantability and warranty of fitness for a particular purposes, pursuant to paragraph no. 2 of the Addendum to Contract with Turner Construction Company.

### **FIFTH DEFENSE**

Thrasher states that the services it provided with respect to the project giving rise to this action were consistent with the applicable standard of care.

### **SIXTH DEFENSE**

Thrasher denies that it has any liability for the damages complained of in Plaintiff's Complaint. Nevertheless, pursuant to paragraph no. 4 of the Addendum to Contract with Turner Construction Company, Thrasher states its total liability with respect to the subject project, if any, under any and all theories of liability, is limited to the total fee paid to Thrasher (not including consultants) for the project under its contract with Turner.

### **SEVENTH DEFENSE**

Thrasher states that pursuant to paragraph no. 4 of the Addendum to Contract with Turner Construction Company, Turner Construction Company waived all claims

for consequential damages arising out of the Agreement between Turner and Thrasher.

#### **EIGHTH DEFENSE**

Thrasher states that pursuant to paragraph no. 5.A.3 of the Addendum to Contract with Turner Construction Company, Thrasher had no duty to supervise, direct or control Turner's or other contractors' means, methods, techniques, sequences or procedures of construction selected by contractors. Further, Thrasher neither guaranteed the performance of the construction contracts by Turner or other contractors nor assumed the responsibility for contractors' failure to furnish and perform their work in accordance with the construction documents.

#### **NINTH DEFENSE**

Pursuant to paragraph no. 8.D. of the Addendum to Contract with Turner Construction Company, Turner specifically waived its right to a jury trial.

#### **TENTH DEFENSE**

Plaintiff's First Amended Complaint fails to state a claim against Thrasher upon which relief can be granted.

#### **ELEVENTH DEFENSE**

Plaintiff's claims may be barred, in whole or in part, by the applicable statute of limitations and/or laches.

#### **TWELVE DEFENSE**

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

### **THIRTEENTH DEFENSE**

Any injuries and damages that Plaintiff claims to have suffered were proximately caused or, in the alternative, were solely caused or brought about by acts, omissions and/or conduct of persons or entities other than Thrasher, and over whom Thrasher had no actual control, or right of control. Such other persons or entities who may have proximately caused Plaintiff's alleged damages, if any, include employees, agents, and subcontractors of Turner Construction Company, for whom Turner Construction Company is responsible.

### **FOURTEENTH DEFENSE**

The doctrine of comparative negligence may act as a total bar to Plaintiff's recovery from Thrasher.

### **FIFTEENTH DEFENSE**

All affirmative defenses available and envisioned by and through West Virginia law are hereby incorporated and reserved.

### **SIXTEENTH DEFENSE**

Plaintiff has waived, and/or is estopped from maintaining claims against Thrasher.

### **SEVENTEENTH DEFENSE**

Thrasher reserves the right to file additional affirmative defenses, cross-claims, and/or third party actions as become apparent and applicable during the discovery phase of this litigation.

### EIGHTEENTH DEFENSE

Plaintiff has failed to join all necessary and indispensable parties required for a full and just adjudication of the claims in this action. To the extent that there are other purported defendants or other persons who are responsible for Plaintiff's alleged damages, then those persons must be joined to ensure a fair and just adjudication without the risk multiple or inconsistent results.

### NINETEENTH DEFENSE

Thrasher incorporates by reference any defenses afforded, and/or privileges which may be available according to the "Agreement to Provide Professional Services" and "Addendum to Contract with Turner Construction Company" made as of November 9, 2010.

WHEREFORE, Thrasher respectfully requests that the Court enter judgment in its favor, dismiss Plaintiff's First Amended Complaint, with prejudice, and deny Plaintiff all relief sought against Thrasher in this matter.

## **II. COUNTERCLAIM AGAINST PLAINTIFF'S SUBROGOR TURNER CONSTRUCTION COMPANY**

NOW COMES Defendant Thrasher Engineering, Inc. (now The Thrasher Group, Inc., and hereafter referred to simply as "Thrasher") and pursuant to Rule 13 of the West Virginia Rules of Civil Procedure, asserts this counterclaim against Plaintiff's subrogor Turner Construction Company. In support of this counterclaim, Thrasher states the following:

1. Defendant/Counterclaim Plaintiff Thrasher is a West Virginia Corporation with its principal place of business located at 600 White Oaks Boulevard, Bridgeport, West Virginia 26330.
2. Plaintiff/Counterclaim Defendant Turner Construction Company (hereafter "Turner") is, upon information and belief, a New York corporation with its principal place of business located at 375 Hudson Street, New York, New York 10014.
3. On or about February 1, 2011, Thrasher and Turner entered into an Agreement to Provide Professional Services (hereafter the Agreement), with Addendum, which the Agreement states was "made as of the 9<sup>th</sup> day of November, 2010."
4. Pursuant to this agreement, Thrasher agreed to serve as Turner's Independent Inspection and Testing Agency, as defined by the design documents for phase two of the construction of the Biometric Technology Center at the FBI CJIS Division Complex near Clarksburg, West Virginia.
5. This counterclaim seeks damages for violations of the common law of the

State of West Virginia, including breach of contract for Turner's failure to pay for services performed by Thrasher.

6. Thrasher's services for which it seeks payment were performed in Harrison County West Virginia as part of the same project giving rise to Plaintiff's First Amended Complaint.

7. Moreover, Turner's debt to Thrasher requires payment to be made in Harrison County, West Virginia, and the manifestation of Turner's breach of contract, and attendant damages, has occurred in Harrison County, West Virginia.

8. Per the Agreement, Thrasher's services were contemplated to last for a period of 20 months.

9. After the contract period, on or about March 17, 2013, Turner agreed to pay Thrasher for its services on a T&M (time and material) basis beginning on or about December 11, 2012, and continuing through the duration of the project.

10. Thrasher has continued to provide certain testing and/or inspection services for Turner on the project to present, but has not been fully paid for these services.

11. At present, Thrasher's invoiced time to Turner for services which remain due and owing total in excess of \$500,000.00.

12. Despite Thrasher's efforts to collect on this debt, Turner has failed to pay Thrasher for these services.

#### **COUNTERCLAIM COUNT ONE - BREACH OF CONTRACT**

13. Thrasher re-alleges each and every allegation contained in paragraphs 1-12 as if the same were restated herein.

14. As referenced above, Thrasher had a written contract with Turner for certain inspection services executed on or about February 1, 2011 (the Agreement).

15. Turner has breached this Agreement by failing to fully pay Thrasher for its services which were contracted for, as modified through subsequent change orders.

16. Additionally, following completion of Thrasher's services for the period of time contemplated by the February 1, 2011, Agreement, on or about March 17, 2013, Turner, by and through Senior Project Manager Lance Thesier, accepted Thrasher's demand that Turner begin paying Thrasher for its services on a time and material basis pursuant to Thrasher's fee schedule beginning December 11, 2012, and continuing for the remainder of the project. This agreement constituted an oral contract.

17. In reliance upon the February 1, 2011, Agreement, and subsequent oral contract, Thrasher performed substantial work on Turner's construction project, providing Turner with the benefit of the same.

18. Turner has breached its contracts with Thrasher by failing to remit payment for Thrasher's invoices, both under the original written Agreement and subsequent time & material oral contract, which total in excess of \$500,000.00.

19. Thrasher has suffered damages as a direct and proximate result of Turner's breach.

20. Thrasher is entitled to payment for its services performed for Turner, plus

interest.

## **COUNTERCLAIM COUNT TWO - QUANTUM MERUIT**

21. Thrasher re-alleges each and every allegation contained in paragraphs 1-20 as if the same were restated herein.

22. As an alternative theory to Counterclaim Count One, Thrasher alleges that it is entitled to payment in full for the services it performed for Turner by way of quantum meruit.

23. Thrasher performed its inspection and/or testing services for Turner in good faith and with the expectation that it would be paid for such services.

24. Turner requested, acknowledged, and acquiesced to Thrasher's performance of inspection and/or testing services and understood that Thrasher expected to be paid for its efforts.

25. By Thrasher's performed of inspection and/or testing services for Turner, and Turner's failure to pay for the same, Turner has been unjustly enriched.

26. Thrasher is entitled to recover the reasonable value of its services devoted to Turner's project, and such reasonable value totals in excess of \$500,000.00, plus interest.

WHEREFORE, The Thrasher Group, Inc., demands judgment against Turner Construction Company for the due and outstanding balance of its invoices, plus all applicable interest, its reasonable attorneys' fees and costs incurred bringing this counterclaim, and any and all other damages allowed at law, in such sum as will fully



and adequately compensate Thrasher for its injuries and damages caused and/or contributed to by Turner, as well as such further and general relief as the Court deems necessary and proper.

**III. CROSS-CLAIM AGAINST MASCARO CONSTRUCTION COMPANY, LP**

NOW COMES DEFENDANT Thrasher Engineering, Inc. ("Thrasher"), by its counsel, and hereby asserts the following cross-claim against defendant Mascaro Construction Company, LP:

1. Thrasher hereby incorporates by reference the allegations of Plaintiff's First Amended Complaint as if restated herein, solely for the purpose of asserting this cross-claim and without admitting any of the allegations set forth in Plaintiff's First Amended Complaint not specifically admitted herein.

2. Thrasher submits that in the event judgment is entered against it in this matter in favor of the Plaintiff, Thrasher is entitled to indemnity and/or contribution for any such judgment by Defendant Mascaro Construction Company, LP.

3. Further, Thrasher submits that any liability found against it (which Thrasher expressly denies) must be apportioned among all other parties pursuant to West Virginia's principles of comparative fault.

WHEREFORE, in the event Plaintiff is entitled to damages by way of the allegations asserted in its First Amended Complaint against Thrasher, Thrasher respectfully requests that judgment be entered in its favor, and against Defendant Mascaro Construction Company, LP, for indemnity and/or contribution.

**IV. THIRD-PARTY COMPLAINT AGAINST SKIDMORE, OWINGS & MERRILL, LLP, AND GEOCONCEPTS ENGINEERING, INC.**

NOW COMES Defendant Thrasher Engineering, Inc. (now The Thrasher Group, Inc., and hereafter referred to simply as "Thrasher") and pursuant to Rule 14 of the West Virginia Rules of Civil Procedure, asserts this third-party complaint against Skidmore, Owings & Merrill, LLP, and GeoConcepts Engineering, Inc. In support of this third-party complaint, Thrasher states the following:

1. Defendant/Third-Party Plaintiff Thrasher is a West Virginia Corporation with its principal office address located at 600 White Oaks Boulevard, Bridgeport, West Virginia 26330.
2. Third-Party Defendant Skidmore, Owings & Merrill, LLP (hereafter "SOM") is, upon information and belief, a New York limited liability partnership with its principal office address located at 14 Wall Street, New York, New York 10005.
3. Third-Party Defendant GeoConcepts Engineering, Inc. (hereafter "GeoConcepts") is, upon information belief, a Virginia corporation with its principal office address located at 19955 Highland Vista Drive, Suite 170, Ashburn, Virginia, 20147.
4. On or about August 29, 2014, Plaintiff Zurich American Insurance Company ("Zurich"), as subrogee of Turner Construction Company, Turner Corporation, and Tompkins Builders, Inc., filed this action in the Circuit Court of Harrison County, West Virginia.
5. Zurich did not serve its initial complaint upon Thrasher.

6. On or about December 10, 2014, Zurich filed a First Amended Complaint, which is attached as Exhibit 1.

7. Thrasher hereby incorporates by reference the allegations of Zurich's First Amended Complaint as if restated herein, solely for the purpose of asserting this Third-Party Complaint and without admitting any of the allegation set forth in the First Amended Complaint not specifically admitted in Thrasher's Answer to the First Amended Complaint.

8. The genesis of Plaintiff's First Amended Complaint is the construction of a new office building (Biometric Technology Center) and attendant parking garage at the FBI CJIS (Criminal Justice Information Services) Complex in or near Clarksburg, West Virginia (the "project").

9. Upon Thrasher's information and belief, this project was comprised of two phases. Generally, phase one included the construction of a parking garage, and phase two included the construction of landscape retaining walls and the office building.

10. Thrasher performed services as a subcontractor to Mascaro Construction Company, LP, the general contractor for phase one of the project, and also performed services as a subcontractor to Turner Construction Company, the general contractor for phase two of the project.

11. In its six (6) count First Amended Complaint, Zurich has alleged that Thrasher's acts or omissions caused or contributed to its injuries and damages asserted. More specifically, Zurich alleges that Thrasher's conduct caused or contributed to

movement, shifting, cracking, settlement, drainage problems and damage to certain structures and property on the project site.

12. Thrasher denies that its conduct caused or contributed to Zurich's alleged injuries and damages. However, in the event Thrasher is found liable for Zurich's alleged damages, Thrasher is entitled to contribution and/or indemnification from SOM and GeoConcepts.

13. Upon Thrasher's information and belief, before construction began, GeoConcepts performed a geotechnical investigation of the site and issued a report on or about July 14, 2009.

14. Upon information and belief, SOM prepared the designs for the project, with the assistance and in cooperation with GeoConcepts concerning the geotechnical aspects of the project.

15. Upon information and belief, SOM and GeoConcepts were both hired to perform services on this project by the project owner, the Federal Bureau of Investigation (FBI).

### **THIRD-PARTY COMPLAINT COUNT ONE - NEGLIGENCE**

16. Thrasher re-alleges each and every allegation contained in paragraphs 1-15 as if the same were restated herein.

17. In preparing the plans and designs for the subject project, it was foreseeable to SOM and GeoConcepts that a contractor or subcontractor would rely on such plans in performing its services relative to the construction of the project.

18. Similarly, in preparing the plans and designs for the subject project, it was foreseeable to SOM and GeoConcepts that harm of the kind alleged in the First Amended Complaint may result if they failed to prepare the project designs in accordance with the appropriate standard of care.

19. In performing its services relative to the project at issue, Thrasher justifiably relied upon project designs prepared by SOM and/or GeoConcepts. More specifically, Thrasher's reliance upon the project designs included, but was not necessarily limited to, testing the compaction of fill soils utilized on the project based upon the recommended compaction requirements set forth in the project designs.

20. The project designs were deficient and defective. These deficiencies include, but may not be limited to, the fact that the recommended compaction requirements for fill soil were too low for the application and the designs did not provide for a "rest period" to allow for the post-construction consolidation of the compacted fill soil under self-mass to be completed.

21. As design professionals, SOM and GeoConcepts owed Thrasher a duty of care due to the special relationship that exists between a design professional and a foreseeable contractor who relies upon the design professional's work product in performing its services.

22. SOM and GeoConcepts breached their duty of care owed to Thrasher by failing to render their professional services with the ordinary skill, care and diligence commensurate with that rendered by members of their profession under the same or

similar circumstances.

23. In the event Thrasher is found liable for the damages sought by Zurich in its First Amended Complaint, such damages were sustained as a proximate result of SOM and GeoConcepts' breach of their duty of care owed to Thrasher, and Thrasher is entitled to contribution and/or indemnification from SOM and GeoConcepts.

**THIRD-PARTY COMPLAINT COUNT TWO - BREACH OF IMPLIED WARRANTY OF PLANS AND SPECIFICATIONS**

24. Thrasher re-alleges each and every allegation contained in paragraphs 1-23 as if the same were restated herein.

25. As design professionals, SOM and GeoConcepts knew that contractors would rely upon their designs and could be financially harmed if such designs were inadequate for purposes of constructing the subject project.

26. Due the special relationship between SOM and GeoConcepts and Thrasher, as a foreseeable user of their designs, SOM and GeoConcepts impliedly warranted to Thrasher that such designs were prepared with the ordinary skill, care, and diligence commensurate with that rendered by members of their profession under the same or similar circumstances.

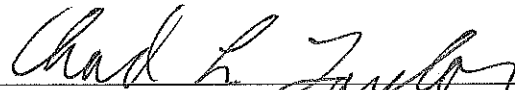
27. SOM and GeoConcepts breached this implied warranty with respect to their plans and specifications which were defective and deficient. These deficiencies include, but may not be limited to, the fact that the recommended compaction requirements for fill soil were too low for the application and the designs did not provide for a "rest period" to allow for the post-construction consolidation of the

compacted fill soil under self-mass to be completed.

28. In the event Thrasher is found liable for the damages sought by Zurich in its First Amended Complaint, such damages were sustained as a proximate result of SOM and GeoConcepts' breach of their implied warranty of plans and specifications owed to Thrasher, and Thrasher is entitled to contribution and/or indemnification from SOM and GeoConcepts.

WHEREFORE, Defendant/Third-Party Plaintiff Thrasher Engineering, Inc., respectfully requests that the Court grant it an award of indemnity and/or contribution from SOM and GeoConcepts for the full extent of any damages found against Thrasher, and award such other relief as the Court deems just and proper.

Respectfully submitted,  
The Thrasher Group, Inc.,  
By Counsel:



Frank E. Simmerman, Jr. (WVSB# 3403)

Chad L. Taylor (WVSB# 10564)

Frank E. Simmerman, III (WVSB# 11589)

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