

IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO.: CACE 15-016282 (14)

GRE PROPERTIES SHERIDAN
HILLS, LLC

Plaintiffs,

v.

BURKE CONSTRUCTION GROUP,
INC.

Defendants.

/

**DEFENDANT, BURKE CONSTRUCTION GROUP, INC.'S,
THIRD-PARTY COMPLAINT**

Defendant, Burke Construction Group, Inc. (“Burke”), hereby sues Third-Party Defendants, Crawford-Tracey Corp. (“Crawford-Tracey”), D&D Mobile Welding and Fabrication, Inc. (“D&D Welding”), Riteway Systems Inc (“Riteway”), US Shrink Wrap, Inc. (“US Shrink Wrap”), Daniel Massa (“Massa”), and Tony Stern (“Stern”), and alleges:

1. On or about September 10, 2015, Plaintiff, GRE Properties Sheridan Hills, LLC (“Plaintiff”), filed its initial Complaint, alleging property and related damages during the remodel of Plaintiff’s commercial building. A copy of the Plaintiff’s Complaint is attached as Exhibit “A” and is incorporated herein by reference solely to establish that Plaintiff made these allegations against Burke.

2. This Third-Party claim is an action for damages in excess of \$15,000.00, exclusive of interest, costs, and attorneys’ fees and is within the jurisdictional limits of

this Court.

3. Venue for this Third-Party Complaint is proper in Broward County, Florida, as that is where the causes of action alleged in the Complaint arose, and is where this action is currently venued.

4. Burke is a Florida for-profit corporation doing business in the State of Florida, with its principal place of business in Miami-Dade County, Florida.

5. Plaintiff engaged Burke to perform general contracting services for the remodel of a building known as Emerald Hills Executive Plaza located at 4601 Sheridan Street, Hollywood, Florida (the "Project") subject to the terms, conditions, provisions, and exclusions of a written agreement between Plaintiff and Burke, a copy of which is attached hereto as Exhibit "B".

6. Burke entered into written subcontract agreements with professional contractors, including Crawford-Tracey, D&D Welding, Riteway, and US Shrink Wrap to perform the physical construction of the remodel.

7. Massa guaranteed D&D Welding's subcontract.

8. Stern guaranteed Riteway's subcontract.

9. Crawford-Tracey is a Florida for-profit corporation doing business in the State of Florida, with its principal place of business in Broward County, Florida.

10. Crawford-Tracey, among other things, furnished and installed windows at the Project.

11. D&D Welding is a Florida for-profit corporation doing business in the State of Florida, with its principal place of business in Broward County, Florida.

12. D&D Welding, among other things, furnished and installed metal framing

at the Project.

13. Riteway is a Florida for-profit corporation doing business in the State of Florida, with its principal place of business in Broward County, Florida.

14. Riteway, among other things, furnished demolition services at the Project.

15. US Shrink Wrap is a Florida for-profit corporation doing business in the State of Florida, with its principal place of business in Jacksonville County, Florida.

16. US Shrink Wrap, among other things, furnished and installed shrink wrap protection and caulking at the Project.

17. Massa is an individual, *sui juris*, residing in Florida and doing business in Broward County, Florida.

18. Stern is an individual, *sui juris*, residing in Florida and doing business in Broward County, Florida.

19. For the purposes of this Third Party Complaint only, and without admitting the truth of the allegations contained in the Plaintiff's Complaint, the allegations of Plaintiff's Complaint are incorporated herein by reference solely to establish that Plaintiff made these allegations against Burke, including, without limitation, the allegations that Plaintiff was damaged by, among other things, the:

- a. failure to install proper temporary exterior safety and weather protection,
- b. failure to properly install and/or negligent installation of temporary exterior safety and weather protection walls,
- c. failure to properly install weather protection walls at the building perimeter,

- d. negligent installation of visqueen, tarps and poly vinyl sheeting,
- e. failure to repair temporary exterior safety and weather protection walls,
- f. failure to promptly correct the temporary exterior safety and weather protection walls,
- g. failure to install temporary exterior safety and weather protection walls at the building perimeter which were suitable to prevent water intrusion,
- h. failure to provide for the uninterrupted continuing Project use,
- i. failure to use commercially reasonable efforts not to unreasonably disturb the business operations of other occupants of the building and Project site or any continuing project use,
- j. failure to protect the Project site and stored materials from damage resulting from adverse weather conditions,
- k. failure to repair damage to the Project site to Plaintiff's satisfaction, and
- l. failure to timely complete substantial completion of the Project.

See Complaint, ¶¶ 18-20, 23, 26, 28, 30, 34, 36, 41, 47, 53, and 55.

COUNT I
BREACH OF CONTRACT
(AGAINST CRAWFORD-TRACEY)

20. Burke adopts and re-alleges Paragraphs 1 through 19 above as if set forth fully herein.
21. Crawford-Tracey entered into a subcontract agreement with Burke to

furnish and install the curtain wall and related materials at the Project. A copy of the subcontract is attached as Exhibit “C” and is incorporated herein by reference.

22. Pursuant to the terms and conditions of the subcontract agreement, Crawford-Tracey agreed and was obligated, among other things and without limitation, to be bound by all provisions and requirements of the contract between Burke and Plaintiff, to prevent undo noise, obstacles and impediments to the building’s continued use, to use commercially reasonable efforts not to unreasonably disturb the business operations of other occupants of the building and Project site or any continuing Project use, to protect surrounding areas, to take necessary precautions to protect its work and the work of others, to not delay Burke, Plaintiff, or others in the completion of the Project, and to execute its work in strict accordance with the contract documents in the most sound, workmanlike and substantial manner. *See* Ex. C, Master Subcontract, Arts. 2.2, 3.1, 8.1, 8.2, 8.7, 8.8, 8.11, 9.2, Scope of Work, ¶ 15, Supplemental Provisions to Project Contract Agreement, ¶¶ 6, 16, and Ex. B, Supplementary Provisions to Standard Form of Agreement Between Owner and Contractor (AIA Document A102), § 3.

23. If it is determined by the trier of fact that Crawford-Tracey caused or contributed to the cause of the Plaintiff’s alleged damages by failing to comply with any or all of its contractual obligations set forth above or as otherwise set forth in Crawford-Tracey’s subcontract agreement for the Project, then Crawford-Tracey would have breached its subcontract with Burke and thereby caused Burke to suffer and incur damages, including, without limitation, attorney’s fees and costs incurred for the defense of this action and any and all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with Crawford-Tracey’s performance of its

work on the Project.

24. Pursuant to the terms and conditions of its subcontract agreement for the Project, Crawford-Tracey also agreed to indemnify and hold Burke harmless from any and all liability for damages, including reasonable attorney's fees and court costs, caused in whole or in part by an act, omission, or default of Crawford-Tracey or its sub-subcontractors, materialmen, or agents of any tier or their employees arising out of the contract or its performance. *See* Ex. C, Master Subcontract, Art. 12.1.

25. Crawford-Tracey also agreed to protect, defend and hold Burke harmless from and against any claims growing out of the performance of its subcontract agreement for the Project. *See* Ex. C, Supplemental Provisions to Project Agreement, ¶ 21.

26. Burke has been sued and is defending against claims caused by, arising out of, resulting from, or occurring in connection with Crawford-Tracey's performance of its work on the Project. As a result, Burke tendered its defense and demand for indemnity to Crawford-Tracey and is entitled to a defense and indemnity.

27. To date, Crawford-Tracey has failed to provide a defense for Burke or to agree to indemnify Burke as required, which is a breach of Crawford-Tracey's subcontract with Burke for the Project that has and will cause Burke to suffer and incur damages, including without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with Crawford-Tracey's performance of its work on the Project.

28. Additionally, pursuant to the terms and conditions of its subcontract agreement for the Project, Crawford-Tracey agreed to name Burke as an additional

insured under Crawford-Tracey's commercial general liability policy according to express coverage requirements. *See* Ex. C, Master Subcontract, Art. 13, Addendum 3, and Requirements, ¶ 8.

29. Burke has been sued and is defending against claims in connection with Crawford-Tracey's work on the Project. As a result, Burke tendered its defense and demand for coverage and indemnity to Crawford-Tracey and its insurance carrier.

30. To date, Crawford-Tracey and its insurance carrier have failed to provide a defense for Burke or to agree to cover or indemnify Burke as required, which is a breach of Crawford-Tracey's subcontract with Burke for the Project that has and will cause Burke to suffer and incur damages, including, without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke.

31. As a result of Crawford-Tracey's breaches, Burke has had to retain the services of undersigned counsel to defend Burke in this action and Burke is entitled to recovery of its attorneys' fees and costs incurred for Burke's defense of this action and for bringing and prosecuting this third party action.

WHEREFORE, Burke demands judgment for damages against Crawford-Tracey for breach of contract, to include costs, attorneys' fees, costs of defense, and any and all liability incurred by Burke, including, but not limited to, any caused by, arising out of, resulting from, or occurring in connection with Crawford-Tracey's performance of its work on the Project, liquidated damages, and all other available damages, remedies, and relief, plus interest.

COUNT II
COMMON LAW INDEMNITY
(AGAINST CRAWFORD-TRACEY)

32. Burke adopts and realleges Paragraphs 1 through 19 above as if set forth fully herein.

33. At all times material there existed a special relationship between Burke and Crawford-Tracey, by virtue of which, if the trier of fact believes Plaintiff's claims of liability and damages against Burke, then Burke can or will become liable solely based on the acts or omissions of Crawford-Tracey due to its performance of its work on the Project. This special relationship is formed by, among other things, the contractual relationship between the parties and Florida common law relating to non-delegable duties.

34. Burke is wholly without fault for Plaintiff's alleged damages and the only source of Burke's potential liability to the Plaintiff is its vicarious, constructive, technical, or derivative liability for the wrongful acts or omissions of Crawford-Tracey in the performance of its work on the Project.

35. If it is determined by the trier of fact that Burke is liable for any damages claimed by Plaintiff, then Burke would only be derivatively, technically, constructively or vicariously liable for the damages as a result of the negligent acts or omissions of Crawford-Tracey in its performance of its work on the Project that caused or contributed to the cause of the Plaintiff's damages, including without limitation, Crawford-Tracey's negligent or deficient installation of windows and glazing for the Project, failure to protect the building from water intrusion, and failure to prevent undue noise, dust, obstacles and impediments to the building's continued use and to not unreasonably

disturb the business operations of other occupants of the building and Project site.

36. Therefore, Burke is entitled to common law indemnification from Crawford-Tracey.

37. Burke has had to retain the services of undersigned counsel to defend Burke in this action and Burke is entitled to recovery of its attorneys' fees and costs incurred for Burke's defense of this action and for bringing and prosecuting this third party action.

WHEREFORE, Burke demands judgment for damages against Crawford-Tracey for common law indemnity, to include costs, attorneys' fees, costs of defense, and any and all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with Crawford-Tracey's performance of its work on the Project, and all other available damages, remedies, and relief, plus interest.

COUNT III
BREACH OF CONTRACT
(AGAINST D&D WELDING)

38. Burke adopts and re-alleges Paragraphs 1 through 19 above as if set forth fully herein.

39. D&D Welding entered into a written subcontract agreement with Burke to furnish and install metal framing at the Project. A copy of the subcontract is attached as Exhibit "D" and is incorporated herein by reference.

40. Pursuant to the terms and conditions of the subcontract agreement, D&D Welding agreed and was obligated, among other things and without limitation, to be bound by all provisions and requirements of the contract between Burke and Plaintiff, to prevent undo noise, obstacles and impediments to the building's continued use, to use

commercially reasonable efforts not to unreasonably disturb the business operations of other occupants of the building and Project site or any continuing Project use, to provide dust control, to take necessary precautions to properly protect its work and the work of others, to not delay Burke, Plaintiff, or others in the completion of the Project, and to execute its work in strict accordance with the contract documents in the most sound, workmanlike and substantial manner. *See* Ex. D, Master Subcontract, Arts. 2.2, 3.1, 8.1, 8.2, 8.7, 8.8, 8.11, 9.2, and Scope of Work ¶ 16, Supplemental Provisions to Project Contract Agreement, ¶ 16, and Ex. B, Supplementary Provisions to Standard Form of Agreement Between Owner and Contractor (AIA Document A102), § 3.

41. If it is determined by the trier of fact that D&D Welding caused or contributed to the cause of the Plaintiff's alleged damages by failing to comply with any or all of its contractual obligations set forth above or as otherwise set forth in D&D Welding's subcontract agreement for the Project, then D&D Welding would have breached its subcontract with Burke and thereby caused Burke to suffer and incur damages, including, without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with D&D Welding's performance of its work on the Project.

42. Pursuant to the terms and conditions of its subcontract agreement for the Project, D&D Welding also agreed to indemnify and hold Burke harmless from any and all liability for damages, including, reasonable attorney's fees and court costs caused in whole or in part by an act, omission, or default of D&D Welding or its sub-contractors, materialmen, or agents of any tier or their employees arising out of the

contract or its performance. *See* Ex. D, Master Subcontract, Art. 12.1.

43. D&D Welding also agreed to defend Burke from all claims growing out of the performance of its subcontract. *See* Ex. D, Supplemental Provisions to Project Contract Agreement, ¶ 21.

44. Burke has been sued and is defending against claims caused by, arising out of, resulting from, or occurring in connection with D&D Welding's performance of its work on the Project. As a result, Burke tendered its defense and demand for indemnity to D&D Welding and is entitled to a defense and indemnity.

45. To date, D&D Welding has failed to provide a defense for Burke or to agree to indemnify Burke as required, which is a breach of D&D Welding's subcontract with Burke for the Project that has and will cause Burke to suffer and incur damages, including without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with D&D Welding's performance of its work on the Project.

46. Additionally, pursuant to the terms and conditions of its subcontract agreement for the Project, D&D Welding agreed to name Burke as an additional insured under D&D Welding's commercial general liability policy according to express coverage requirements. *See* Ex. D, Master Subcontract, Art. 13, and Addendum 3.

47. Burke has been sued and is defending against claims in connection with D&D Welding's work on the Project. As a result, Burke tendered its defense and demand for coverage and indemnity to D&D Welding.

48. To date, D&D Welding has failed to provide a defense for Burke or to

agree to cover or indemnify Burke as required, which is a breach of D&D Welding's subcontract with Burke for the Project that has and will cause Burke to suffer and incur damages, including, without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke.

49. As a result of D&D Welding's breaches, Burke has had to retain the services of undersigned counsel to defend Burke in this action and Burke is entitled to recovery of its attorneys' fees and costs incurred for Burke's defense of this action and for bringing and prosecuting this third party action.

WHEREFORE, Burke demands judgment for damages against D&D Welding for breach of contract and contractual indemnity, to include costs, attorneys' fees, costs of defense, and any and all liability incurred by Burke, including, but not limited to, any caused by, arising out of, resulting from, or occurring in connection with D&D Welding's performance of its work on the Project, liquidated damages, and all other available damages, remedies, and relief, plus interest.

COUNT IV
COMMON LAW INDEMNITY
(AGAINST D&D WELDING)

50. Burke adopts and realleges Paragraphs 1 through 19 above as if set forth fully herein.

51. At all times material there existed a special relationship between Burke and D&D Welding, by virtue of which, if the trier of fact believes Plaintiff's claims of liability and damages against Burke, then Burke can or will become liable solely based on the acts or omissions of D&D Welding due to its performance of its work on the Project. This special relationship is formed by, among other things, the contractual

relationship between the parties and Florida common law relating to non-delegable duties.

52. Burke is wholly without fault for Plaintiff's alleged damages and the only source of Burke's potential liability to the Plaintiff is its vicarious, constructive, technical, or derivative liability for the wrongful acts or omissions of D&D Welding in the performance of its work on the Project.

53. If it is determined by the trier of fact that Burke is liable for any damages claimed by Plaintiff, then Burke would only be derivatively, technically, constructively or vicariously liable for the damages as a result of the negligent acts or omissions of D&D Welding in its performance of its work on the Project that caused or contributed to the cause of the Plaintiff's damages, including without limitation, D&D Welding's negligent or deficient installation of the metal framing for the Project, penetration of the Project's protective barrier, failure to prevent undo noise, dust, obstacles and impediments to the building's continued use, and unreasonable disturbance of the business operations of other occupants of the building and Project site.

54. Therefore, Burke is entitled to common law indemnification from D&D Welding.

55. Burke has had to retain the services of undersigned counsel to defend Burke in this action and Burke is entitled to recovery of its attorneys' fees and costs incurred for Burke's defense of this action and for bringing and prosecuting this third party action.

WHEREFORE, Burke demands judgment for damages against D&D Welding for common law indemnity, to include costs, attorneys' fees, costs of defense, and any and

all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with D&D Welding's performance of its work on the Project, and all other available damages, remedies, and relief, plus interest.

COUNT V
BREACH OF CONTRACT
(AGAINST RITEWAY)

56. Burke adopts and re-alleges Paragraphs 1 through 19 above as if set forth fully herein.

57. Riteway entered into a written subcontract agreement with Burke to provide demolition services at the Project. A copy of the subcontract is attached as Exhibit "E" and is incorporated herein by reference.

58. Pursuant to the terms and conditions of the subcontract agreement, Riteway agreed and was obligated, among other things and without limitation, to be bound by all provisions and requirements of the contract between Burke and Plaintiff, to prevent undo noise, obstacles and impediments to the building's continued use, to use commercially reasonable efforts not to unreasonably disturb the business operations of other occupants of the building and Project site or any continuing Project use, to follow dust control practices, to provide protection of surrounding areas, to take necessary precautions to properly protect its work and the work of others, to not delay Burke, Plaintiff, or others in the completion of the Project, and to execute its work in strict accordance with the Contract Documents in the most sound, workmanlike and substantial manner. *See* Ex. E, Master Subcontract, Arts. 2.2, 3.1, 8.1, 8.2, 8.7, 8.8, 8.11, 9.2, and Scope of Work ¶¶ 6, 17, Supplemental Provisions to Project Contract Agreement, ¶ 16, and Ex. B, Supplementary Provisions to Standard Form of Agreement between Owner

and Contractor (AIA Document A102), § 3.

59. If it is determined by the trier of fact that Riteway caused or contributed to the cause of the Plaintiff's alleged damages by failing to comply with any or all of its contractual obligations set forth above or as otherwise set forth in Riteway's subcontract agreement for the Project, then Riteway would have breached its subcontract with Burke and thereby caused Burke to suffer and incur damages, including, without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with Riteway's performance of its work on the Project.

60. Pursuant to the terms and conditions of its subcontract agreement for the Project, Riteway also agreed to indemnify and hold Burke harmless from any and all liability for damages, including, reasonable attorney's fees and court costs caused in whole or in part by an act, omission, or default of Riteway or its sub-subcontractors, materialmen, or agents of any tier or their employees arising out of the contract or its performance. *See* Ex. E, Master Subcontract, Art. 12.1.

61. Riteway also agreed to defend Burke from all claims growing out of the performance of its subcontract. *See* Ex. E, Supplemental Provisions to Project Contract Agreement, ¶ 21.

62. Burke has been sued and is defending against claims caused by, arising out of, resulting from, or occurring in connection with Riteway's performance of its work on the Project. As a result, Burke tendered its defense and demand for indemnity to Riteway and is entitled to a defense and indemnity.

63. To date, Riteway has failed to provide a defense for Burke or to agree to

indemnify Burke as required, which is a breach of Riteway's subcontract with Burke for the Project that has and will cause Burke to suffer and incur damages, including without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with Riteway's performance of its work on the Project.

64. Additionally, pursuant to the terms and conditions of its subcontract agreement for the Project, Riteway agreed to name Burke as an additional insured under Riteway's commercial general liability policy according to express coverage requirements. *See* Ex. E, Master Subcontract, Art. 13, and Addendum 3.

65. Burke has been sued and is defending against claims in connection with Riteway's work on the Project. As a result, Burke tendered its defense and demand for coverage and indemnity to Riteway.

66. To date, Riteway has failed to provide a defense for Burke or to agree to cover or indemnify Burke as required, which is a breach of Riteway's subcontract with Burke for the Project that has and will cause Burke to suffer and incur damages, including, without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke.

67. As a result of Riteway's breaches, Burke has had to retain the services of undersigned counsel to defend Burke in this action and Burke is entitled to recovery of its attorneys' fees and costs incurred for Burke's defense of this action and for bringing and prosecuting this third party action.

WHEREFORE, Burke demands judgment for damages against Riteway for breach of contract and contractual indemnity, to include costs, attorneys' fees, costs of

defense, and any and all liability incurred by Burke, including, but not limited to, any caused by, arising out of, resulting from, or occurring in connection with Riteway's performance of its work on the Project, liquidated damages, and all other available damages, remedies, and relief, plus interest.

COUNT VI
COMMON LAW INDEMNITY
(AGAINST RITEWAY)

68. Burke adopts and realleges Paragraphs 1 through 19 above as if set forth fully herein.

69. At all times material there existed a special relationship between Burke and Riteway, by virtue of which, if the trier of fact believes Plaintiff's claims of liability and damages against Burke, then Burke can or will become liable solely based on the acts or omissions of Riteway due to its performance of its work on the Project. This special relationship is formed by, among other things, the contractual relationship between the parties and Florida common law relating to non-delegable duties.

70. Burke is wholly without fault for Plaintiff's alleged damages and the only source of Burke's potential liability to the Plaintiff is its vicarious, constructive, technical, or derivative liability for the wrongful acts or omissions of Riteway in the performance of its work on the Project.

71. If it is determined by the trier of fact that Burke is liable for any damages claimed by Plaintiff, then Burke would only be derivatively, technically, constructively or vicariously liable for the damages as a result of the negligent acts or omissions of Riteway in its performance of its work on the Project that caused or contributed to the cause of the Plaintiff's damages, including without limitation, Riteway's negligent

demolition for the Project, failure to prevent undo noise, dust, obstacles and impediments to the building's continued use, and unreasonable disturbance of the business operations of other occupants of the building and Project site.

72. Therefore, Burke is entitled to common law indemnification from Riteway.

73. Burke has had to retain the services of undersigned counsel to defend Burke in this action and Burke is entitled to recovery of its attorneys' fees and costs incurred for Burke's defense of this action and for bringing and prosecuting this third party action.

WHEREFORE, Burke demands judgment for damages against Riteway for common law indemnity, to include costs, attorneys' fees, costs of defense, and any and all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with Riteway's performance of its work on the Project, and all other available damages, remedies, and relief, plus interest.

COUNT VII
BREACH OF CONTRACT
(AGAINST US SHRINK WRAP)

74. Burke adopts and re-alleges Paragraphs 1 through 19 above as if set forth fully herein.

75. US Shrink Wrap entered into a written subcontract agreement with Burke to furnish a protective barrier at the Project. A copy of the subcontract is attached as Exhibit "F" and is incorporated herein by reference.

76. Pursuant to the terms and conditions of the subcontract agreement, US Shrink Wrap agreed and was obligated, among other things and without limitation, to

furnish all labor, material, equipment, supervision and tools to complete the installation of the interior shrink wrap containment, caulk the bottom of all temporary containment walls on exterior sides and caulk both sides of containment walls, and complete its work in a substantial workmanlike manner according to specifications summated per standard practices. *See* Ex. F, Scope of Work, and 3/3/14 Change Order.

77. If it is determined by the trier of fact that US Shrink Wrap caused or contributed to the cause of the Plaintiff's alleged damages by failing to comply with any or all of its contractual obligations set forth above or as otherwise set forth in US Shrink Wrap's subcontract agreement for the Project, then US Shrink Wrap would have breached its subcontract with Burke and thereby caused Burke to suffer and incur damages, including, without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with US Shrink Wrap's performance of its work on the Project.

78. Additionally, pursuant to the terms and conditions of its subcontract agreement for the Project, US Shrink Wrap agreed to name Burke as an additional insured under US Shrink Wrap's commercial general liability policy according to express coverage requirements. *See* Ex. F, Requirements, ¶ 8.

79. Burke has been sued and is defending against claims in connection with US Shrink Wrap's work on the Project. As a result, Burke tendered its defense and demand for coverage and indemnity to US Shrink Wrap.

80. To date, US Shrink Wrap has failed to provide a defense for Burke or to agree to cover or indemnify Burke as required, which is a breach of US Shrink Wrap's

subcontract with Burke for the Project that has and will cause Burke to suffer and incur damages, including, without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke.

81. As a result of US Shrink Wrap's breaches, Burke has had to retain the services of undersigned counsel to defend Burke in this action and Burke is entitled to recovery of its attorneys' fees and costs incurred for Burke's defense of this action.

WHEREFORE, Burke demands judgment for damages against US Shrink Wrap for breach of contract, to include costs, attorneys' fees, costs of defense, and any and all liability incurred by Burke, including, but not limited to, any caused by, arising out of, resulting from, or occurring in connection with US Shrink Wrap's performance of its work on the Project, liquidated damages, and all other available damages, remedies, and relief, plus interest.

COUNT VIII
COMMON LAW INDEMNITY
(AGAINST US SHRINK WRAP)

82. Burke adopts and realleges Paragraphs 1 through 19 above as if set forth fully herein.

83. At all times material there existed a special relationship between Burke and US Shrink Wrap, by virtue of which, if the trier of fact believes Plaintiff's claims of liability and damages against Burke, then Burke can or will become liable solely based on the acts or omissions of US Shrink Wrap due to its performance of its work on the Project. This special relationship is formed by, among other things, the contractual relationship between the parties and Florida common law relating to non-delegable duties.

84. Burke is wholly without fault for Plaintiff's alleged damages and the only source of Burke's potential liability to the Plaintiff is its vicarious, constructive, technical, or derivative liability for the wrongful acts or omissions of US Shrink Wrap in the performance of its work on the Project.

85. If it is determined by the trier of fact that Burke is liable for any damages claimed by Plaintiff, then Burke would only be derivatively, technically, constructively or vicariously liable for the damages as a result of the negligent acts or omissions of US Shrink Wrap in its performance of its work on the Project that caused or contributed to the cause of the Plaintiff's damages, including without limitation, US Shrink Wrap's negligent or deficient installation of a protective barrier for the Project, use of improper materials, installation of defective or deficient interior shrink wrap containment, caulking and related materials, and failure to prevent undo obstacles and impediments to the building's continued use.

86. Therefore, Burke is entitled to common law indemnification from US Shrink Wrap.

87. Burke has had to retain the services of undersigned counsel to defend Burke in this action and Burke is entitled to recovery of its attorneys' fees and costs incurred for Burke's defense of this action and for bringing and prosecuting this third party action.

WHEREFORE, Burke demands judgment for damages against US Shrink Wrap for common law indemnity, to include costs, attorneys' fees, costs of defense, and any and all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with US Shrink Wrap's performance of its work on the Project, and all

other available damages, remedies, and relief, plus interest.

COUNT IX
BREACH OF GUARANTY
(AGAINST MASSA)

88. Burke adopts and re-alleges Paragraphs 1 through 19 above as if set forth fully herein.

89. D&D Welding entered into a written subcontract agreement with Burke to furnish and install metal framing at the Project. A copy of the subcontract is attached as Exhibit “D” and is incorporated herein by reference.

90. Massa guaranteed that the subcontract agreement would be fully and punctually performed and that D&D Welding would comply with and perform all warranties and representations made within the subcontract agreement. *See* Ex. D, Art. 15.6.

91. Massa further agreed and is obligated to pay all of Burke’s attorney’s fees and court costs incurred by Burke in enforcing and protecting and/or obtaining the right to enforce or protect Burke’s rights, remedies and recourses under the terms and conditions of the subcontract agreement. *See* Ex. D, Art. 15.6.

92. Pursuant to the terms and conditions of the subcontract agreement, D&D Welding agreed and was obligated, among other things and without limitation, to be bound by all provisions and requirements of the contract between Burke and Plaintiff, to prevent undo noise, obstacles and impediments to the building’s continued use, to use commercially reasonable efforts not to unreasonably disturb the business operations of other occupants of the building and Project site or any continuing Project use, to provide dust control, to take necessary precautions to properly protect its work and the work of

others, to not delay Burke, Plaintiff, or others in the completion of the Project, and to execute its work in strict accordance with the contract documents in the most sound, workmanlike and substantial manner. *See* Ex. D, Master Subcontract, Arts. 2.2, 3.1, 8.1, 8.2, 8.7, 8.8, 8.11, 9.2, and Scope of Work ¶ 16, Supplemental Provisions to Project Contract Agreement, ¶ 16, and Ex. B, Supplementary Provisions to Standard Form of Agreement Between Owner and Contractor (AIA Document A102), § 3.

93. If it is determined by the trier of fact that D&D Welding caused or contributed to the cause of the Plaintiff's alleged damages by failing to comply with any or all of its contractual obligations set forth above or as otherwise set forth in D&D Welding's subcontract agreement for the Project, then D&D Welding and Massa would have breached their agreement with Burke and thereby caused Burke to suffer and incur damages, including, without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with D&D Welding's performance of its work on the Project.

94. Pursuant to the terms and conditions of its subcontract agreement for the Project, D&D Welding also agreed to indemnify and hold Burke harmless from any and all liability for damages, including, reasonable attorney's fees and court costs caused in whole or in part by an act, omission, or default of D&D Welding or its sub-subcontractors, materialmen, or agents of any tier or their employees arising out of the contract or its performance. *See* Ex. D, Master Subcontract, Art. 12.1.

95. D&D Welding also agreed to defend Burke from all claims growing out of the performance of its subcontract. *See* Ex. D, Supplemental Provisions to Project

Contract Agreement, ¶ 21.

96. Burke has been sued and is defending against claims caused by, arising out of, resulting from, or occurring in connection with D&D Welding's performance of its work on the Project. As a result, Burke tendered its defense and demand for indemnity to D&D Welding and Massa and Burke is entitled to a defense and indemnity.

97. To date, D&D Welding and Massa have failed to provide a defense for Burke or to agree to indemnify Burke as required, which is a breach of D&D Welding's subcontract with Burke for the Project and a breach of Massa's guaranty that has and will cause Burke to suffer and incur damages, including without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with D&D Welding's performance of its work on the Project.

98. Additionally, pursuant to the terms and conditions of its subcontract agreement for the Project, D&D Welding agreed to name Burke as an additional insured under D&D Welding's commercial general liability policy according to express coverage requirements. *See* Ex. D, Master Subcontract, Art. 13, and Addendum 3.

99. Burke has been sued and is defending against claims in connection with D&D Welding's work on the Project. As a result, Burke tendered its defense and demand for coverage and indemnity to D&D Welding and Massa.

100. To date, D&D Welding and Massa have failed to provide a defense for Burke or to agree to cover or indemnify Burke as required, which is a breach of D&D Welding's subcontract with Burke for the Project and Massa's guaranty that has and will cause Burke to suffer and incur damages, including, without limitation, attorney's fees

and costs incurred for the defense of this action and any and all liability incurred by Burke.

101. As a result of D&D Welding and Massa's breaches, Burke has had to retain the services of undersigned counsel to defend Burke in this action and Burke is entitled to recovery of its attorneys' fees and costs incurred for Burke's defense of this action and for bringing and prosecuting this third party action.

WHEREFORE, Burke demands judgment for damages against Massa for breach of contract and breach of guaranty, to include costs, attorneys' fees, costs of defense, and any and all liability incurred by Burke, including, but not limited to, any caused by, arising out of, resulting from, or occurring in connection with D&D Welding's performance of its work on the Project, liquidated damages, and all other available damages, remedies, and relief, plus interest.

COUNT X
BREACH OF GUARANTY
(AGAINST STERN)

102. Burke adopts and re-alleges Paragraphs 1 through 19 above as if set forth fully herein.

103. Riteway entered into a written subcontract agreement with Burke to provide demolition services at the Project. A copy of the subcontract is attached as Exhibit "E" and is incorporated herein by reference.

104. Stern guaranteed that the subcontract agreement would be fully and punctually performed and that Riteway would comply with and perform all warranties and representations made within the subcontract agreement. *See Ex. D., Art. 15.6.*

105. Stern further agreed and is obligated to pay all of Burke's attorney's fees

and court costs incurred by Burke in enforcing and protecting and/or obtaining the right to enforce or protect any of Burke's rights, remedies or recourses under the terms and conditions of the subcontract agreement. *See* Ex. D., Art. 15.6.

106. Pursuant to the terms and conditions of the subcontract agreement, Riteway agreed and was obligated, among other things and without limitation, to be bound by all provisions and requirements of the contract between Burke and Plaintiff, to prevent undo noise, obstacles and impediments to the building's continued use, to use commercially reasonable efforts not to unreasonably disturb the business operations of other occupants of the building and Project site or any continuing Project use, to follow dust control practices, to provide protection of surrounding areas, to take necessary precautions to properly protect its work and the work of others, to not delay Burke, Plaintiff, or others in the completion of the Project, and to execute its work in strict accordance with the contract documents in the most sound, workmanlike and substantial manner. *See* Ex. E, Master Subcontract, Arts. 2.2, 3.1, 8.1, 8.2, 8.7, 8.8, 8.11, 9.2, and Scope of Work ¶¶ 6, 17, Supplemental Provisions to Project Contract Agreement, ¶ 16, and Ex. B, Supplementary Provisions to Standard Form of Agreement between Owner and Contractor (AIA Document A102), § 3.

107. If it is determined by the trier of fact that Riteway caused or contributed to the cause of the Plaintiff's alleged damages by failing to comply with any or all of its contractual obligations set forth above or as otherwise set forth in Riteway's subcontract agreement for the Project, then Riteway and Stern would have breached their agreement with Burke and thereby caused Burke to suffer and incur damages, including, without limitation, attorney's fees and costs incurred for the defense of this action and any and all

liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with Riteway's performance of its work in the Project.

108. Pursuant to the terms and conditions of its subcontract agreement for the Project, Riteway also agreed to indemnify and hold Burke harmless from any and all liability for damages, including, reasonable attorney's fees and court costs caused in whole or in part by an act, omission, or default of Riteway or its sub-subcontractors, materialmen, or agents of any tier or their employees arising out of the contract or its performance. *See* Ex. E, Master Subcontract, Art. 12.1.

109. Riteway also agreed to defend Burke from all claims growing out of the performance of its subcontract. *See* Ex. E, Supplemental Provisions to Project Contract Agreement, ¶ 21.

110. Burke has been sued and is defending against claims caused by, arising out of, resulting from, or occurring in connection with Riteway's performance of its work on the Project. As a result, Burke tendered its defense and demand for indemnity to Riteway and Stern and Burke is entitled to a defense and indemnity.

111. To date, Riteway and Stern have failed to provide a defense for Burke or to agree to indemnify Burke as required, which is a breach of Riteway's subcontract with Burke for the Project and a breach of Stern's guaranty that has and will cause Burke to suffer and incur damages, including without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke caused by, arising out of, resulting from, or occurring in connection with Riteway's performance of its work on the Project.

112. Additionally, pursuant to the terms and conditions of its subcontract

agreement for the Project, Riteway agreed to name Burke as an additional insured under Riteway's commercial general liability policy according to express coverage requirements. *See* Ex. E, Master Subcontract, Art. 13, and Addendum 3.

113. Burke has been sued and is defending against claims in connection with Riteway's work on the Project. As a result, Burke tendered its defense and demand for coverage and indemnity to Riteway and Stern.

114. To date, Riteway and Stern have failed to provide a defense for Burke or to agree to cover or indemnify Burke as required, which is a breach of Riteway's subcontract with Burke for the Project and a breach of Stern's guaranty that has and will cause Burke to suffer and incur damages, including, without limitation, attorney's fees and costs incurred for the defense of this action and any and all liability incurred by Burke.

115. As a result of Riteway and Stern's breaches, Burke has had to retain the services of undersigned counsel to defend Burke in this action and Burke is entitled to recovery of its attorneys' fees and costs incurred for Burke's defense of this action and for bringing and prosecuting this third party action.

WHEREFORE, Burke demands judgment for damages against Stern for breach of contract and breach of guaranty, to include costs, attorneys' fees, costs of defense, and any and all liability incurred by Burke, including, but not limited to, any caused by, arising out of, resulting from, or occurring in connection with Riteway's performance of its work on the Project, liquidated damages, and all other available damages, remedies, and relief, plus interest.

DEMAND FOR JURY TRIAL

Burke demands trial by jury on all issues so triable as a matter of right.

Dated this 23rd day of November, 2015

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was furnished via Electronic Mail through the Florida Court's eFiling Portal to all counsel of record on the attached service list on November 23, 2015.

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