

**IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CIRCUIT CIVIL DIVISION

CASE NO.: 2021-015089-CA-01

Section: CA 43

JUDGE: Michael Hanzman

In re:

**Champlain Towers South Collapse
Litigation**

**DESIMONE CONSULTING ENGINEERS LLC'S MOTION TO DISMISS COUNTS
VII AND VIII OF THE CONSOLIDATED SECOND AMENDED CLASS ACTION
COMPLAINT WITH SUPPORTING MEMORANDUM OF LAW**

Defendant DeSimone Consulting Engineers LLC ("DeSimone"), by and through its undersigned attorneys and pursuant to Rules 1.110 and 1.140 of the Florida Rules of Civil Procedure and other applicable law, hereby moves this Court to dismiss with prejudice Counts VII (Negligence) and VIII (Strict Liability), asserted by Plaintiffs against DeSimone in the Consolidated Second Amended Class Action Complaint (the "Complaint"), and as grounds for the same states as follows:

PRELIMINARY STATEMENT

DeSimone is a world-renown structural engineering firm that performs the structural design for buildings throughout the world. As a professional engineer, DeSimone designs the structure of buildings. It does not construct buildings, nor does it oversee the construction of buildings. In its role as a professional engineer, DeSimone's duty is to the party that retains it by contract. A professional engineer does not owe a duty to the public under Florida law except for two limited circumstances: if it prepares defective plans that cause an injury, or if it assumes responsibility to

oversee construction contractually.

In this case, the collapse of the Champlain Towers South condominium (“CTS”) is a tragedy. The loss of life and property suffered is no doubt devastating. To recover for this loss, Plaintiffs assert various claims in this case against multiple parties under different theories. With respect to DeSimone, Plaintiffs assert claims for negligence and strict liability. To plead these claims, Plaintiffs must allege ultimate facts of a duty DeSimone owed to Plaintiffs resulting from its preparation of plans or its contractual oversight of construction.

Plaintiffs allege no such facts to establish a duty owed by DeSimone to Plaintiffs. Instead, Plaintiffs imply that DeSimone owed a duty to the public, and by extension Plaintiffs, solely by virtue of its role as the structural engineer of a neighboring building located at 8701 Collins Avenue (“87 Park”) that Plaintiffs claim may have damaged CTS or contributed to its collapse. Since Florida does not recognize a duty of care to third-parties arising merely from an entities’ status as a design professional, this does not state facts to plead a duty owed by DeSimone.

The Complaint makes no allegations concerning plans prepared by DeSimone. Nor does the Complaint allege that DeSimone performed or oversaw construction of 87 Park by contract. In fact, the Complaint alleges that others – not DeSimone – planned, performed, monitored and oversaw the activities that Plaintiffs claim may have contributed to the collapse: pile driving, excavation, compaction and dewatering at 87 Park.

Without these critical facts against DeSimone the Complaint fails to support Plaintiffs’ claims for negligence and strict liability and dismissal of the Complaint as to DeSimone is mandated as a matter of law pursuant to Fla. R. Civ. P. 1.110 (General Rules of Pleading).

STATEMENT OF FACTS

DeSimone was hired to provide structural engineering services for of 87 Park. (Complaint ¶19.) A copy of DeSimone's contract for professional structural engineering design services ("Engineering Contract") is annexed to this motion as Exhibit A. Contrary to the causes of action against DeSimone, the Complaint alleges that 8701 Collins Development, LLC ("8701 Collins"), Terra Group, LLC ("Terra Group"), Terra World Investments, LLC ("Terra World") (collectively, the "Terra Defendants") owned and/or developed the property (Complaint ¶13-15; 328) and hired consultants and contractors other than DeSimone to plan, perform, monitor, inspect or supervise the activities that Plaintiffs allege caused their injuries, which include: sheet pile installation, soil compaction, vibration monitoring and dewatering. In fact, Plaintiffs specifically allege that the *other parties* identified below performed and/or were responsible for performing these services:

1. Terra Defendants "owned, operated, constructed, managed, supervised, and/or developed" 87 Park (Complaint ¶¶ 13-15);
2. defendant John Moriarty and Associates of Florida, Inc. ("JMA") was hired to provide construction and/or construction management services, including pile driving, soil compaction and dewatering (Complaint ¶17, 123, 158, 159, 177, 353, 370, 437), which Plaintiffs allege JMA subcontracted to ASAP Installations, Inc. (Complaint ¶99);
3. defendant NV5, Inc. ("NV5") was hired to provide construction inspection services, geotechnical engineering services, a pre-construction survey of CTS and vibration monitoring with respect to CTS (Complaint ¶18, 72, 73, 102-106, 115, 117, 119, 126, 135, 159, 201, 204, 383, 404);
4. non-party Geosonics USA, Inc. was hired to perform vibration monitoring as subcontractor to NV5 (Complaint ¶103, 112, 113, 115, 116, 119, 124, 126, 135);

5. non-party Florida Civil, Inc. was hired to perform dewatering engineering services and to draft a dewatering plan (Complaint ¶173); and
6. non-party ASAP Installations, Inc. was hired to perform sheet-pile driving in support of excavation as a subcontractor to JMA (Complaint ¶¶99, 100, 121, 122, 124).

Plaintiffs include in the Complaint various communications and meeting notes between Terra Group, JMA, NV5 and Stantec Architecture, Inc. (“Stantec”, the architect of record for 87 Park), that purportedly bolster Plaintiffs’ allegations that the above parties planned, controlled, supervised and monitored the allegedly damaging activities. (Complaint ¶¶ 72, 103-104, 106, 121, 124, 126, 130, 134-136, 158-159, 173, 177.) **DeSimone is not included in a single email or meeting presented by Plaintiffs in the Complaint. The allegations in the Complaint demonstrate that DeSimone did not plan, perform, supervise or control the allegedly damaging activities.**

Further, the Engineering Contract imposes no obligation on DeSimone related to inspection, supervision or monitoring of conditions at CTS. (Ex. A.) The Engineering Contract specifically excludes any control over the means and methods of construction or responsibility for safety in performance of the construction work. (Ex. A ¶II(E)).

Plaintiffs do not allege that DeSimone was hired to perform engineering services related to inspection, planning, supervision or monitoring of installation of the sheet piles, vibrations caused by construction, soil compaction or dewatering of the 87 Park construction site. To the contrary, Plaintiffs brazenly and repeatedly allege that Terra Defendants hired NV5 and JMA to perform such services, including the preparation of a geotechnical investigation and planning, inspection of CTS and vibration monitoring, and that a dewatering plan was prepared and submitted to the Department of Environmental Resources by Florida Civil, Inc., a dewatering and environmental

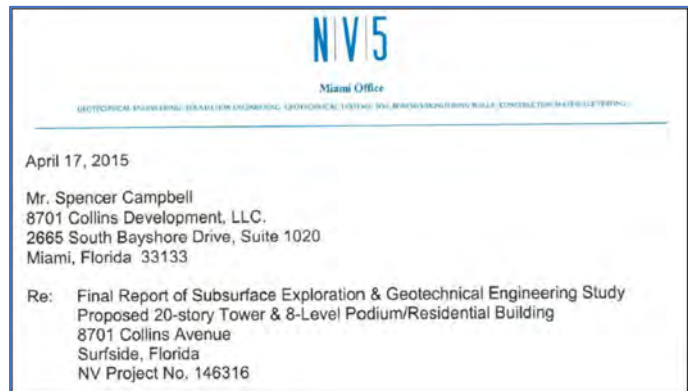
services firm. (Complaint ¶¶ 13-15, 17-18, 69, 72-73, 99, 102-106, 115, 117, 119, 121, 123-124, 126, 134-136, 158-159, 173, 177, 201, 204, 328, 341, 353, 370, 383, 404, 437.) Thus, within the four corners of the Complaint, Plaintiffs have acknowledged DeSimone's lack of connection to matters which form the basis of their allegations.

DeSimone did not design or select construction means and methods, excavation support or the sheet pile system or its design or installation. The Record Set of structural engineering drawings prepared by DeSimone, excerpts of which are annexed to this motion as Exhibit B, clearly provide that "[s]upport of excavation [is] by others". (Ex. B at S-102, 106, 107.) The Record Set also includes "General" and "Foundation Notes," which expressly disclaim any responsibility by DeSimone for support of excavation (e.g., sheet piles), dewatering, safety and protection of adjacent property because these activities were not in DeSimone's scope of services. (Ex. B at S-001.)

The four corners of the Complaint establish that DeSimone had nothing to do with excavation, sheet pile installation, soil compaction, vibration monitoring or inspection of adjacent properties. Specifically, despite conclusory assertions of law, Plaintiffs' allegations establish that DeSimone was not hired to plan, perform or oversee sheet pile installation, soil compaction, vibration monitoring or dewatering, did not recommend the subject activities and had no supervision or control over the subject activities:

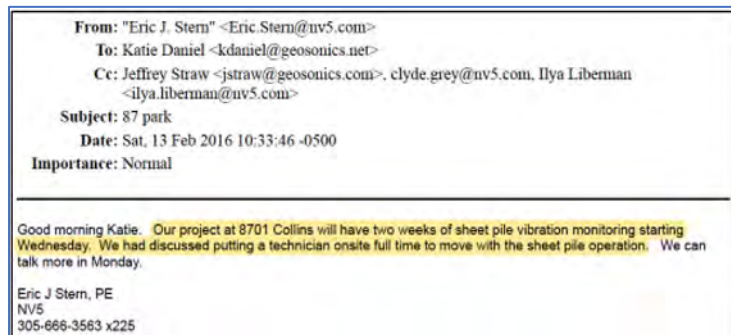
- Complaint ¶48: Communication from Terra Group to JMA (**not DeSimone**) about not letting "any neighbor delay us".
- Complaint ¶ 69: "applicable building code required Terra Defendants [**not DeSimone**] to conduct a geotechnical investigation".
- Complaint ¶72: "Terra Defendants retained NV5 [**not DeSimone**] to perform a geotechnical

study and render the report that section 1803 of the Florida Building Code required (the “NV5 Report”). A screenshot of the NV5 Report included in ¶72 of the Complaint shows the report is addressed to one of the Terra Defendants (**not DeSimone**):

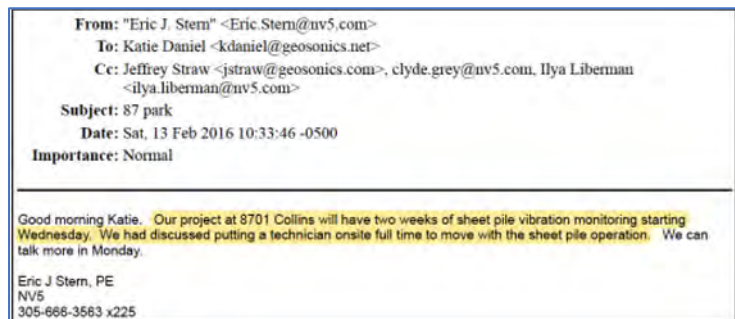


- Complaint ¶99: “JMA [**not DeSimone**] hired subcontractor ASAP Installations, LLC (‘ASAP’) [**not DeSimone**] to perform the sheet pile installation work”.
- Complaint ¶100: “ASAP [**not DeSimone**] performed vibratory sheet pile driving around the perimeter” of 87 Park.
- Complaint ¶102: “On February 13, 2016, JMA’s Frank Wiza [**not DeSimone**] asked the Terra Defendants’ Project Manager, Curt Wyborny, [**not DeSimone**] whether the Terra Defendants [**not DeSimone**] wanted NV5 [**not DeSimone**] to monitor vibrations during all sheet pile installations or only those that would be installed on the north side of the project”.
- Complaint ¶103: “Before receiving a response from Mr. Wyborny [**not DeSimone**], Eric Stern, a Professional Engineer for NV5 [**not DeSimone**], inquired how long the sheet pile installation would take. After learning it would take approximately two weeks, Stern [**not DeSimone**] reached out to Geosonics [**not DeSimone**], the subcontractor hired to perform vibration monitoring. Stern [**not DeSimone**] informed Geosonics [**not DeSimone**] that there would be two weeks of sheet pile installation at the Eighty-Seven Park project and that the plan was to

“put[] a technician onsite full time to move with the sheet pile operation” and monitor vibration levels for all sheet pile installations”. A screenshot is included in ¶103 of the Complaint that shows that DeSimone was not included as a recipient of the email:



- Complaint ¶104: “Eric Stern [not DeSimone] then informed the Terra Defendants and JMA [not DeSimone] that the ‘intent is to have a technician on site to monitor vibrations in real time as close to the adjacent property as possible’”. A screenshot is included in ¶104 of the Complaint that shows that DeSimone was not included as a recipient of the email:

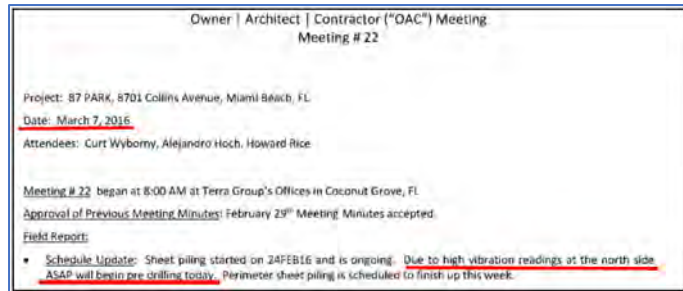


- Complaint ¶105: “Terra Defendants [not DeSimone] decided that instead of monitoring all sheet pile installations for dangerous vibrations, the installations would be selectively monitored—taking place on only some days and not continuously throughout those days”.
- Complaint ¶106: “Eric Stern asked JMA [not DeSimone] if the vibration monitoring was still needed the following day, when sheet pile installation was set to begin. In response, JMA informed Stern that the Terra Defendants’ Curt Wyborny [not DeSimone] had decided that

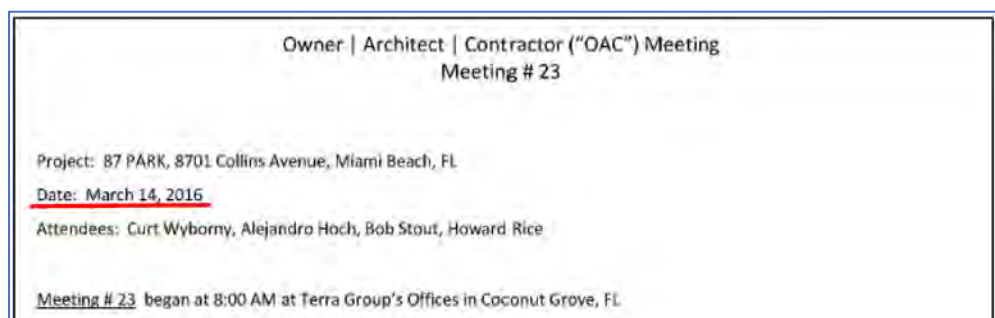
monitoring would occur only along the north line of the project”. A screenshot is included in ¶106 of the Complaint that shows that DeSimone was not included as a recipient of the email and, further, that NV5 (**not DeSimone**) was asked if NV5 “agreed” with Terra Defendants’ decision:



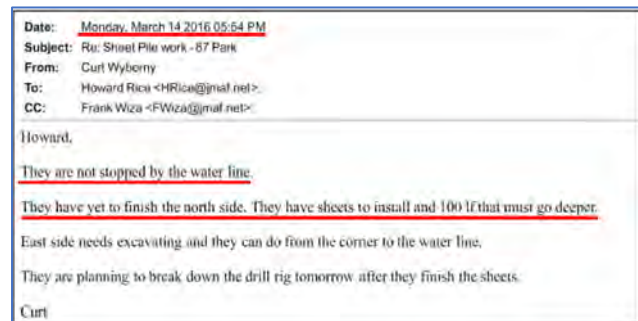
- Complaint ¶115: “Geosonics [**not DeSimone**] monitored vibrations intermittently on March 3, 7, 8, 9, 10, 11, and 14, 2016”.
- Complaint ¶117: NV5 (**not DeSimone**) prepared a “Vibration Summary Report”.
- Complaint ¶119: Data from Geosonics (**not DeSimone**) was incorporated into “NV5’s March 28, 2016, Vibration Summary Report”.
- Complaint ¶121: “At a weekly project meeting between the Terra Defendants and JMA [**not DeSimone**], it was noted that ‘[d]ue to high vibration readings at the north side ASAP [**not DeSimone**] will begin predrilling today’”. A screenshot is included in ¶121 of the Complaint that shows the title of this meeting was “Owner | Architect | Contractor (“OAC”) Meeting” and provides that the participants of the OAC meeting were “Curt Twombly, Alejandro Hoch, and Howard Rice” of Terra Defendants, Stantec, and JMA, respectively (**not DeSimone**):



- Complaint ¶123: “Even after the March 7, 2016, meeting at which the Terra Defendants and JMA [not DeSimone] explicitly acknowledged the high vibration readings, 28 vibration readings exceeded the allowable limit. But they [Terra Defendants and JMA] continued with vibratory pile driving anyway”.
- Complaint ¶124: “At the next weekly project meeting, on March 14, 2016, the Terra Defendants and JMA [not DeSimone] noted that ASAP’s pre-drilling, changes to the frequency setting on the power head, and changes to how the piles were driven “dropped the readings back to the 4 range.” However, data from Geosonics [not DeSimone] confirmed that the vibrations continued to exceed the safe and allowable threshold. . . The meeting minutes also reflected that the Terra Defendants and JMA [not DeSimone] received numerous complaints from CTS owners and residents regarding the construction activities.” As with prior meeting minutes presented by Plaintiffs in the Complaint, the title of this meeting is listed as “Owner | Architect | Contractor (“OAC”) Meeting” and the participants were “Curt Twombly, Alejandro Hoch, and Howard Rice” of Terra Defendants, Stantec and JMA, respectively (**not DeSimone**):



- Complaint ¶126: “The fact that sheet pile installation work continued after Geosonics [**not DeSimone**] took the final vibration reading on March 14 at 4:41 PM was confirmed through email communications between the Terra Defendants and JMA [**not DeSimone**]. At the end of the day on March 14, at 5:54 PM, the Terra Defendant Project Manager, Curt Wyborny, wrote to JMA and informed JMA [**not DeSimone**] that the sheet pile installers had not even reached the water line yet....” A screenshot included in ¶126 of the Complaint shows that DeSimone was not included as a recipient of the email:

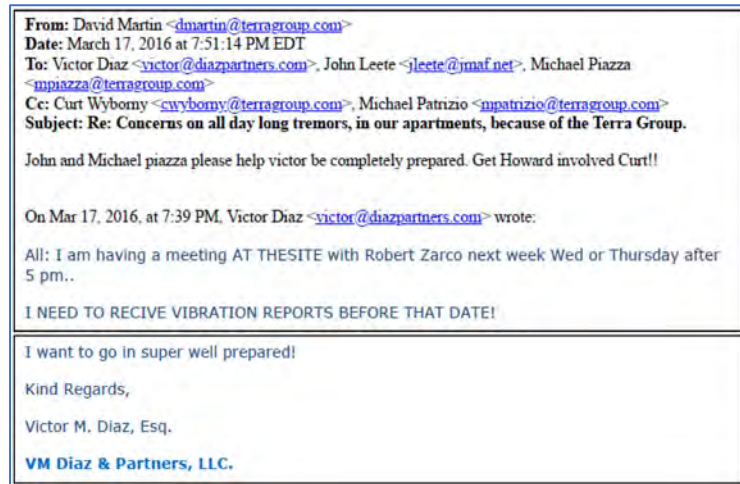


- Complaint ¶130: Terra Defendants (**not DeSimone**) received an email complaining of damage to CTS. A screenshot included in ¶130 of the Complaint shows that DeSimone was not included as a recipient of the email:

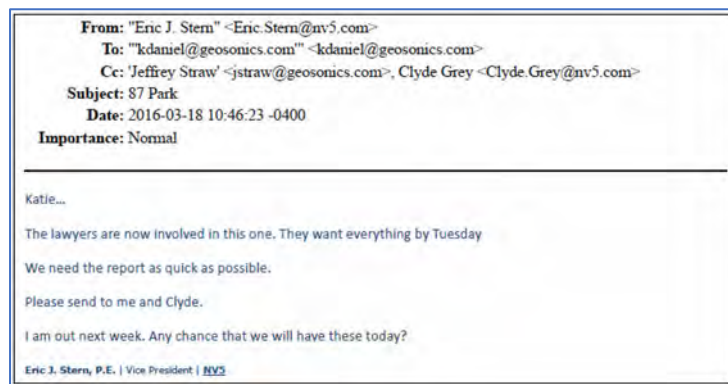


- Complaint ¶134: “in response to the alarming email the Terra Defendants [**not DeSimone**] received...the Terra Defendants immediately retained lawyers and looped in their counsel. That attorney informed the Terra Defendants and JMA [**not DeSimone**] that he has a meeting scheduled the following week at the site with CTS’s counsel... In response, David Martin, then-chief operating officer for Terra, instructed JMA [**not DeSimone**] and his subordinate, Michael

Piazza, to help Terra Defendants' counsel "be completely prepared". A screenshot included in ¶134 of the Complaint shows that DeSimone was not included as a recipient of the email:



- Complaint ¶135: "The Terra Defendants' Curt Wyborny [not DeSimone] then reached out to NV5's Eric Stern [not DeSimone] and requested the vibration reports. Stern immediately contacted Geosonics [not DeSimone] and asked that the vibration reports be provided as soon as possible . . ." A screenshot included in ¶135 of the Complaint shows that DeSimone was not included as a recipient of the email:

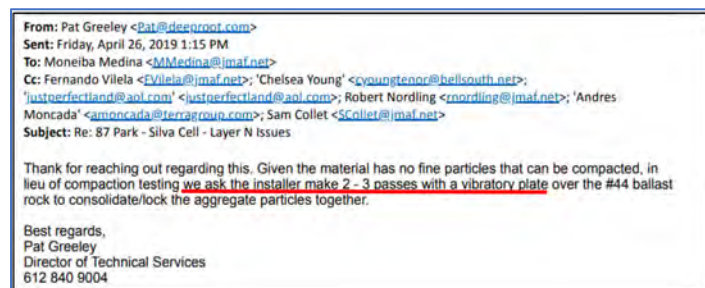


- Complaint ¶136: "Meeting minutes from the weekly March 21, 2016, project meeting also confirm that the Terra Defendants [not DeSimone] had scheduled a meeting with CTS". A screenshot from the referenced meeting minutes is incorporated into ¶136 of the Complaint. As with prior meeting minutes presented by Plaintiffs in the Complaint, the title of this meeting

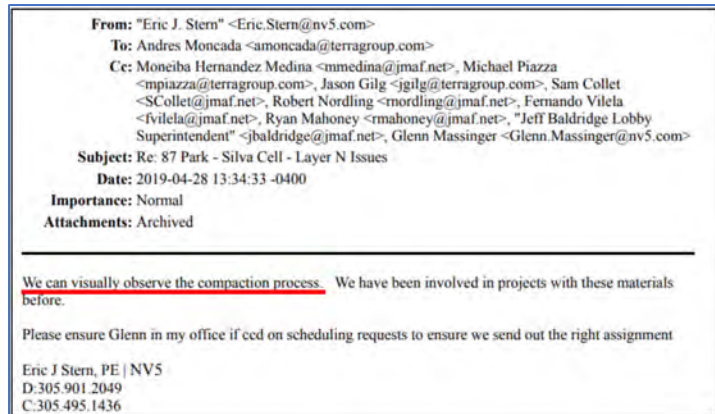
was “Owner |Architect |Contractor (“OAC”) Meeting” and the participants were “Curt Twombly, Alejandro Hoch, Bob Stout, Howard Rice and Michael Piazza” of Terra Defendants, Stantec, Terra Defendants, JMA and Terra Group, respectively (**not DeSimone**):



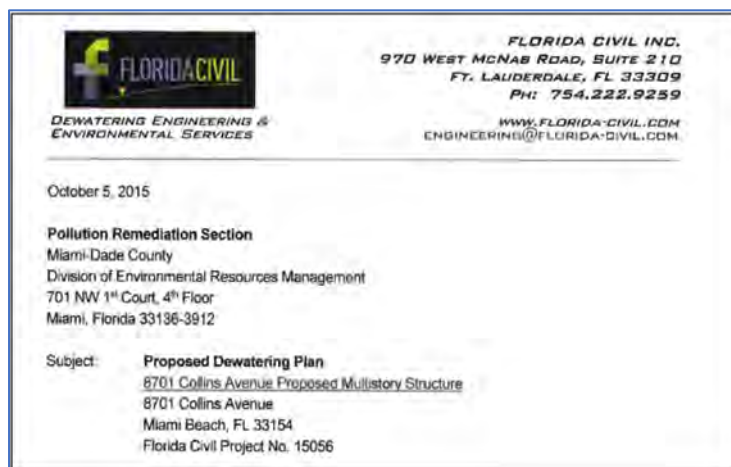
- Complaint ¶158: “On April 26, 2019, during the installation procedures for the Silva Cell system, the manufacturer of the Silva Cell system [**not DeSimone**] requested that the Terra Defendants and JMA [**not DeSimone**]” utilize a “vibratory plate”. A screenshot included in ¶158 of the Complaint shows that DeSimone was not included as a recipient of the email:



- Complaint ¶159: In response, a Project Manager for the Terra Defendants [**not DeSimone**], Andres Moncada, forwarded the email to NV5’s Eric Stern [**not DeSimone**], who responded that NV5 [**not DeSimone**] “can visually observe the compaction process”. A screenshot included in ¶159 of the Complaint shows that DeSimone was not a recipient of the email:

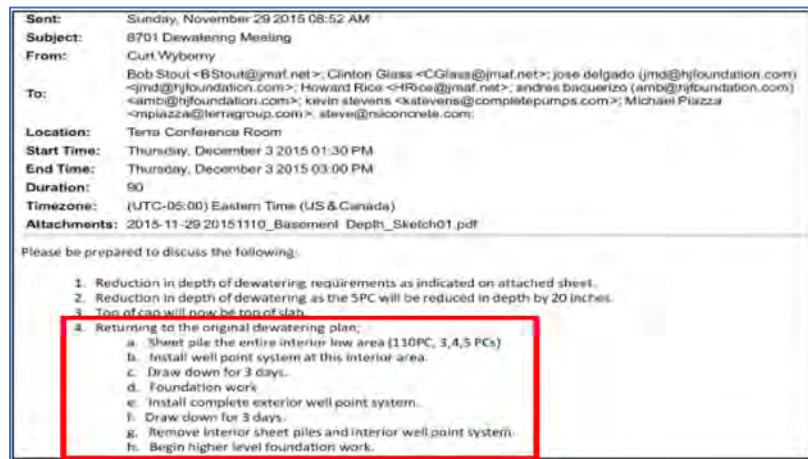


- Complaint ¶173: “An October 2015 Proposed Dewatering Plan submitted to the Miami-Dade County Division of Environmental Resources Management [not DeSimone] by Florida Civil, Inc. [not DeSimone] on behalf of the Terra Defendants [not DeSimone] noted that “[d]ue to the depth of excavation into the water table and other concerns, the contractor proposes the installation of two (2) continuous sheet pile cofferdams for support of excavation”. A screenshot of a cover page is incorporated into ¶173 of the Complaint, which clearly provides that the sender is Florida Civil, Inc. (not DeSimone), and the recipient is the Miami-Dade County Division of Environmental Resources Management (not DeSimone):



- Complaint ¶177: “On November 29, 2015, Terra Defendants’ Curt Wyborny [not DeSimone] sent an email to JMA, among others [not DeSimone], and laid out the step-by-step dewatering

plan”. A screenshot included in ¶177 of the Complaint shows that DeSimone was not included as a recipient of the email:



- Complaint ¶201: “Before any sheet pile driving, excavation, or dewatering activities at Eighty-Seven Park, the Terra Defendants **[not DeSimone]** enlisted NV5 **[not DeSimone]** to perform an extensive and thorough pre-construction survey of CTS”.
- Complaint ¶204: “On January 14, 2016, NV5 **[not DeSimone]** conducted an extensive survey of CTS and meticulously documented every area of pre-existing damage, including the smallest of hairline stucco fractures. Indeed, the very purpose of the pre-construction survey was to document every observable defect or area of damage at CTS, so that if a claim were made during or following the Eighty-Seven Park construction that the project had inflicted damage on CTS, the Terra Defendants **[not DeSimone]** could determine whether the claim related to pre-existing damage”.
- Complaint ¶328: “The Terra Defendants **[not DeSimone]** were the owners, developers, and managers of the Eighty-Seven Park construction/development project and had final supervisory authority over all decision making related to the project”.

- Complaint ¶341: “sheet pile driving was...done at the direction of an under the supervision of the Terra Defendants” (**not DeSimone**).
- Complaint ¶353: “JMA [**not DeSimone**] was the general contractor and/or construction manager Terra Defendants retained for the Eighty-Seven Park project”.
- Complaint ¶370: “sheet pile driving was...done at the direction of an under the supervision of JMA” (**not DeSimone**).
- Complaint ¶383: “Defendant NV5 [**not DeSimone**] was the geotechnical engineer and construction inspector Terra Defendants [**not DeSimone**] hired to work on the Eighty-Seven Park project”.
- Complaint ¶404: “sheet pile driving was ... done at the suggestion of and under the supervision of NV5” (**not DeSimone**).
- Complaint ¶417: “DeSimone was the structural engineer on for [sic] the Eighty-Seven Park project”.
- Complaint ¶437: “sheet pile driving was...done at the direction of an under the supervision of JMA” (**not DeSimone**).

ARGUMENT

POINT I: PLAINTIFFS’ NEGLIGENCE CLAIM AGAINST DESIMONE MUST BE DISMISSED BECAUSE IT FAILS TO PLEAD THE NECESSARY FACTS TO SUPPORT THE CLAIM

A. Standard of Review on a Motion to Dismiss

A motion to dismiss for failure to state a cause of action tests the legal sufficiency of the complaint to state a cause of action. McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas v. Weiss, 704 So. 2d 214, 2115 (Fla. 2d DCA 1998). Florida is a fact-pleading jurisdiction, not a notice-pleading jurisdiction. Horowitz v. Laske, 855 So. 2d 169, 173 (Fla. 5th DCA 2003). To

withstand dismissal, the Complaint must “sufficiently allege ultimate facts” that, if proven, would support judgment in Plaintiffs’ favor. Doyle v. Flex, 210 So. 2d 493, 494–95 (Fla. 4th DCA 1968). For a motion to dismiss, the court accepts all well-pleaded facts of the complaint as true and considers those allegations in the light most favorable to the claimant. Temples v. Florida Indus. Const. Co., Inc., 310 So. 2d 326, 327 (Fla. 2d DCA 1975). Legal conclusions asserted in a complaint are insufficient to avoid dismissal “unless substantiated by allegations of ultimate fact. Every fact essential to the cause of action must be stated distinctively, definitely and clearly.” Loving v. Viecegli, 164 So. 2d 560, 561 (Fla. 3rd DCA 1964). Here, as set forth below, Plaintiffs fail to allege ultimate facts necessary to state a claim sounding in negligence against DeSimone.

B. Plaintiffs’ Complaint Fails to Plead Negligence Against DeSimone

The elements of a negligence claim are well settled: (1) a duty running to Plaintiffs, (2) a breach of duty, (3) causation and (4) damages. Tieder v. Little, 502 So. 2d 923, 925 (Fla. 3rd DCA 1987). Thus, the existence of a duty is one of the necessary elements of a negligence claim. The existence of a duty of care is also question of law for the Court. McCain v. Fla. Power Corp., 593 So. 2d 500, 502 (Fla. 1992).

Absent privity of contract or third-party beneficiary status, Florida recognizes a duty of care owed by an engineer to an injured third-party only when the third-party is foreseeably injured by the engineer’s preparation of defective plans and specifications or if the engineer undertakes, by contract with another, supervision and control of construction activities and a third party is injured by those construction activities. Geer v. Bennett, 237 So. 2d 311, 316 (Fla. 4th DCA 1970) (analysis adopted by Conklin v. Cohen, 287 So. 2d 56, 61 (Fla. 1973)); A. R. Moyer, Inc. v. Graham, 285 So. 2d 397, 400 (Fla. 1973).

In either the design or supervision scenario, the law imposes a duty upon a design professional “to perform the requested services” in accordance with the ordinary standard of care. Moransais v. Heathman, 744 So. 2d 973, 975–76 (Fla. 1999); Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd., 552 So. 2d 228, 232 (Fla. 5th DCA 1989). Simply put, liability imposed upon a design professional is derived from the breach of a duty assumed by the design professional under its contract to perform services. Vorndran v. Wright, 367 So. 2d 1070 (Fla. 3rd DCA 1979); Swartz v. Ford, Bacon & Davis Const. Corp., 469 So. 2d 232, 233 (Fla. 1st 1985); Skow v. Dep't of Transp., 468 So. 2d 422, 424 (Fla. 1st DCA 1985); Shepard v. City of Palatka, 414 So. 2d 1077, 1078 (Fla. 5th DCA 1981) See also, 38 Fla. Jur 2d Negligence § 31 (duty element of negligence focuses on “defendant’s conduct”). A professional engineer, such as DeSimone, cannot be liable for something that it was not hired to do, be it planning or design or supervision and control of the subject activities. See e.g., Moransais, 744 So. 2d 973.

Critically, in Florida engineers and other design professionals are not liable as a matter of law where there is no duty. See Vorndran v. Wright, 367 So. 2d 1070, 1071 (Fla. 3rd DCA 1979) (Third District Court of Appeals held that an architect could not be liable for safety violations of the contractor where (a) the architect’s contract only obligated him to visit site periodically to verify that construction was in accordance with drawings, (b) did not provide the architect with control over method of construction utilized and (c) the architect made no attempt to exercise such control); McCain v. Fla. Power Corp. at 502 (establishment of a legal duty is a question of law and a “threshold legal requirement for opening the courthouse doors”). See also, Skow v. Dep't of Transp., 468 So. 2d 422 (owner not liable to injured worker caused by failure of owner’s independent contractor to follow safety regulations, despite actively engaging in inspection of work, where there was no obligation imposed on owner to undertake such responsibilities);

Recreational Design & Const., Inc. v. Wiss, Janney, Elstner Assocs., Inc., 820 F. Supp. 2d 1293, 1299 (S.D. Fla. 2011) (applying Florida law) (base allegations by the plaintiff that defendant engineering firm had a duty of care not sufficient to support a claim of negligence where plaintiff made no allegation of control by defendant or third-party beneficiary status of plaintiff and, instead, complaint pled opposing facts); Moradiellos v. Target Engineering Group, Inc., No. 2010-043079-CA-27, 2013 WL 12195888 (Fla. 11th Cir.Ct. Feb. 12, 2013) (defendant engineering inspections firm not liable as a matter of law where engineer not obligated by contract to ensure safety on the site); Fla. Stat. Ann. § 440.09(6) (“a construction design professional . . . is not liable for any injuries resulting from the employer's failure to comply with safety standards on the construction project for which compensation is recoverable under this chapter, unless responsibility for safety practices is specifically assumed by contracts”).

To plead negligence, a complaint must set out each element of the cause of action and the facts that support each element so that the court and the defendant can clearly determine what is being alleged. See Messana v. Maule Indus., 50 So.2d 874, 876 (Fla.1951) (a complainant must “plead [a] factual matter sufficient to apprise his adversary of what he is called upon to answer so that the court may, upon proper challenge, determine its legal effect.”).

A claim cannot be pled with opinions, theories, legal conclusions or argument. Barrett v. City of Margate, 743 So. 2d 1160, 1163 (Fla. 4th DCA 1999), citing Seaboard Air Line Ry. v. Rentz, 60 Fla. 429, 54 So. 13 (1910). Furthermore, the assertions in a complaint are to be stated simply and succinctly. Id. Pleadings should present precise points that are certain, clear and concise. Id.

Where a complaint asserts legal conclusions as to a duty owed, it is ripe for dismissal. In Horowitz v. Laske, 855 So. 2d 169 (Fla. 5th DCA 2003) the court dismissed a legal malpractice claim for failure to state a cause of action where the complaint alleged a duty as a conclusion

without factual allegations in support. The Horowitz plaintiff, who was not the party that retained the attorney, attempted to establish a duty by alleging that “he was among the ‘class’ of those intended to benefit” from the subject legal advice. Id. The court dismissed the complaint because the allegation was a conclusion of law, not a factual allegation entitled to deference on a motion to dismiss. As such, the complaint did not establish a duty of care owed to plaintiff. Id.

Similarly, in Cutler v. Bd. of Regents of State of Fla., 459 So. 2d 413, 415 (Fla. 1st DCA 1984), a complaint brought by a university student assaulted on campus was dismissed for failure state a cause of action for negligence. Cutler alleged that the university breached its duty to provide reasonable security from foreseeable criminal acts against student-tenants by third-party intruders. Id. at 414. The complaint alleged that university officials “were aware or should have been aware” that “other attacks” occurred requiring increased security by the university. However, the complaint lacked detailed allegations of fact with respect to these “other attacks” that would, if supported by evidence at trial, lead a court to reasonably conclude that the university had notice and, therefore, that plaintiff’s attack was foreseeable. Cutler also failed to plead reliance and the court could not infer, from the plaintiff’s allegation that the university represented that the campus was safe, that the plaintiff relied on such representations. Id. at 415.

Additionally, in Banta v. Rosier, 399 So. 2d 444, 445 (Fla. 5th DCA 1981), the court found a complaint alleging “breach of operational duties” deficient where the base elements of the claims were “only allege[d] in conclusory terms and not specifically.” The complaint did not plead sufficient operational facts that, if supported by evidence at trial, would support liability of the defendant. Id.

In the case at bar, the entirety of Plaintiffs’ allegations concerning DeSimone’s duty are predicated on one legal conclusion: that DeSimone owed a duty to Plaintiffs merely by virtue of

its role as the structural engineer for 87 Park. (Complaint ¶¶ 419, 422, 427, 438.) This legal conclusion fails to establish a duty owed by DeSimone as a matter of law. See e.g., Geer, 237 So.2d at 316 (liability of a design professional for personal injury requires negligence in the services which the professional has agreed to perform by contract).

Plaintiffs do not allege that DeSimone's preparation of plans and specifications caused their injury. Nor do Plaintiffs allege that DeSimone was charged by contract to supervise or control any construction activities. Indeed, Plaintiffs make no reference to DeSimone's responsibilities on the Project pursuant to its contract, which is the instrument that establishes its duty. Moransais, 744 So. 2d 973; Vorndran v. Wright, 367 So. 2d 1070; Swartz v. Ford, Bacon & Davis Const. Corp., 469 So. 2d 232; Skow v. Dep't of Transp., 468 So. 2d 422; Lochrane Eng'g, Inc., 552 So. 2d 228.

There are no factual allegations in the Complaint that support Plaintiff's unfounded legal conclusion that DeSimone, a structural engineering consultant, was involved in pile-driving, dewatering, soil compaction, vibration monitoring or inspection of neighboring properties. To the contrary, Plaintiffs specifically allege that other consultants and contractors performed these duties. According to the Complaint, JMA performed, directed and supervised pile driving (Complaint ¶¶ 17, 99-100, 102-104, 106, 124, 126, 158, 177, 353, 370, 437), NV5 provided geotechnical services that presented sheet piles as a viable method for support of excavation, and NV5 monitored vibrations caused by pile driving and soil compaction and their potential effect on CTS (Complaint ¶¶ 18, 72-73, 102-104, 106, 115, 117, 119, 124, 135, 159, 201, 204, 383, 404). The Complaint also alleges the involvement of a "dewatering engineering & environmental services firm", which submitted a "Proposed Dewatering Plan" "on behalf of the Terra Defendants". (Complaint ¶173.) Plaintiffs also specifically allege that Terra Defendants, JMA and

NV5 planned, controlled, inspected and supervised the work complained of. (Complaint ¶¶ 13-15, 17-18, 69, 72-73, 99, 102-106, 115, 117, 119, 121, 123-124, 126, 134-136, 158-159, 173, 177, 201, 204, 328, 341, 353, 370, 383 404, 437.)

The Complaint incorporates several communications and meeting minutes discussing construction activities, including emails between JMA, Terra Group and NV5. (Complaint ¶¶ 72, 103-104, 106, 121, 124, 126, 130, 134-136, 158-159, 173, 177.) The Complaint establishes, on its face, that DeSimone was not included in any of these communications or meetings. Within the four corners of the complaint, Plaintiffs' legal conclusions are implausible, contradictory and, as such, not entitled to deference on a motion to dismiss. Loving v. Viecelli, 164 So. 2d 560.

The Complaint also makes the legal conclusion that "DeSimone had extensive knowledge of all construction activities performed on site and was intimately involved with the construction activities primarily discussed herein". Complaint ¶ 417. However, again there exist no facts for this conclusion in the Complaint. Rather, Plaintiffs cite emails and meeting minutes referencing the sheet pile installation, vibration monitoring, inspection, soil compaction and dewatering of CTS that show DeSimone was not involved in these activities (Complaint ¶¶ 72, 103-104, 106, 121, 124, 126, 130, 134-136, 158-159, 173, 177).

The Complaint also concludes, without support, that it was foreseeable to DeSimone that CTS would be damaged by construction activities (Complaint ¶424) because Terra Defendants, JMA and NV5, among others, participated in meetings and corresponded with one another and with residents and representatives of CTS with respect to sheet pile driving, dewatering, soil compaction, potentially damaging vibrations, inspection of CTS and vibration monitoring. (Complaint ¶¶ 72, 103-104, 106, 121, 124, 126, 130, 134-136, 158-159, 173, 177.) Again, **not one** of the alleged 'facts' pled by Plaintiffs include DeSimone, yet Plaintiffs conclude, contrary to its

own documentary evidence, that DeSimone had knowledge or should have had knowledge of potential damage to CTS. Plaintiffs plead the following with respect to Terra Defendants, JMA, NV5 and non-parties, none of which establish notice to or knowledge by DeSimone:

- Complaint ¶72: “Terra Defendants retained NV5 **[not DeSimone]** to perform a geotechnical study and render the report that section 1803 of the Florida Building Code required (the “NV5 Report”). A screenshot of the NV5 Report included in ¶72 of the Complaint shows the report is addressed to one of the Terra Defendants (**not DeSimone**).
- Complaint ¶102: “On February 13, 2016, JMA’s Frank Wiza **[not DeSimone]** asked the Terra Defendants’ Project Manager, Curt Wyborny, **[not DeSimone]** whether the Terra Defendants **[not DeSimone]** wanted NV5 **[not DeSimone]** to monitor vibrations during all sheet pile installations or only those that would be installed on the north side of the project”.
- Complaint ¶104: “Eric Stern **[not DeSimone]** then informed the Terra Defendants and JMA **[not DeSimone]** that the ‘intent is to have a technician on site to monitor vibrations in real time as close to the adjacent property as possible’. A screenshot is included in ¶104 of the Complaint that shows that DeSimone was not included as a recipient of the email.
- Complaint ¶106: “Eric Stern asked JMA **[not DeSimone]** if the vibration monitoring was still needed the following day, when sheet pile installation was set to begin. In response, JMA informed Stern that the Terra Defendants’ Curt Wyborny **[not DeSimone]** had decided that monitoring would occur only along the north line of the project”. A screenshot is included in ¶106 of the Complaint that shows that DeSimone was not included as a recipient of the email and, further, that NV5 (**not DeSimone**) was asked if NV5 “agreed” with Terra Defendants’ decision.

- Complaint ¶106: “Eric Stern asked JMA [**not DeSimone**] if the vibration monitoring was still needed the following day, when sheet pile installation was set to begin. In response, JMA informed Stern that the Terra Defendants’ Curt Wyborny [**not DeSimone**] had decided that monitoring would occur only along the north line of the project”. A screenshot is included in ¶106 of the Complaint that shows that DeSimone was not included as a recipient of the email and, further, that NV5 (**not DeSimone**) was asked if NV5 “agreed” with Terra Defendants’ decision:
- Complaint ¶ 115: “Geosonics [**not DeSimone**] monitored vibrations intermittently on March 3, 7, 8, 9, 10, 11, and 14.”
- Complaint ¶ 117: “NV5 explained in its March 28, 2016, Vibration Summary Report that, although vibration limits were never formally established for the Eighty-Seven Park project, industry standards dictated that vibrations of 0.5 inches per second can cause property damage. Thus, the Terra Defendants, JMA, NV5, and DeSimone established a vibration limit of 0.5 inches per second for the sheet pile installation. The goal was to ensure that vibrations produced during sheet pile installation did not exceed that threshold.”
- Complaint ¶121: “At a weekly project meeting between the Terra Defendants and JMA [**not DeSimone**], it was noted that ‘[d]ue to high vibration readings at the north side ASAP [**not DeSimone**] will begin predrilling today’”. A screenshot is included in ¶121 of the Complaint that shows the title of this meeting was “Owner | Architect | Contractor (“OAC”) Meeting” and provides that the participants of the OAC meeting were “Curt Twombly, Alejandro Hoch, and Howard Rice” of Terra Defendants, Stantec, and JMA, respectively (**not DeSimone**).

- Complaint ¶123: “Even after the March 7, 2016, meeting at which the Terra Defendants and JMA explicitly acknowledged the high vibration readings, 28 vibration readings exceeded the allowable limit. But they continued with vibratory pile driving anyway.”
- Complaint ¶124: “At the next weekly project meeting, on March 14, 2016, the Terra Defendants and JMA **[not DeSimone]** noted that ASAP’s pre-drilling, changes to the frequency setting on the power head, and changes to how the piles were driven “dropped the readings back to the 4 range.” However, data from Geosonics **[not DeSimone]** confirmed that the vibrations continued to exceed the safe and allowable threshold. . . The meeting minutes also reflected that the Terra Defendants and JMA **[not DeSimone]** received numerous complaints from CTS owners and residents regarding the construction activities.” As with prior meeting minutes presented by Plaintiffs in the Complaint, the title of this meeting is listed as “Owner | Architect | Contractor (“OAC”) Meeting” and the participants were “Curt Twombly, Alejandro Hoch, and Howard Rice” of Terra Defendants, Stantec and JMA, respectively **(not DeSimone)**.
- Complaint ¶126: “The fact that sheet pile installation work continued after Geosonics **[not DeSimone]** took the final vibration reading on March 14 at 4:41 PM was confirmed through email communications between the Terra Defendants and JMA **[not DeSimone]**. At the end of the day on March 14, at 5:54 PM, the Terra Defendant Project Manager, Curt Wyborny, wrote to JMA and informed JMA **[not DeSimone]** that the sheet pile installers had not even reached the water line yet....” A screenshot included in ¶126 of the Complaint shows that DeSimone was not included as a recipient of the email:
- Complaint ¶130: Terra Defendants **(not DeSimone)** received an email complaining of damage to CTS. A screenshot included in ¶130 of the Complaint shows that DeSimone was not included as a recipient of the email.

- Complaint ¶134: “in response to the alarming email the Terra Defendants **[not DeSimone]** received...the Terra Defendants immediately retained lawyers and looped in their counsel. That attorney informed the Terra Defendants and JMA **[not DeSimone]** that he has a meeting scheduled the following week at the site with CTS’s counsel... In response, David Martin, then-chief operating officer for Terra, instructed JMA **[not DeSimone]** and his subordinate, Michael Piazza, to help Terra Defendants’ counsel “be completely prepared”. A screenshot included in ¶134 of the Complaint shows that DeSimone was not included as a recipient of the email.
- Complaint ¶135: “The Terra Defendants’ Curt Wyborny **[not DeSimone]** then reached out to NV5’s Eric Stern **[not DeSimone]** and requested the vibration reports. Stern immediately contacted Geosonics **[not DeSimone]** and asked that the vibration reports be provided as soon as possible . . .” A screenshot included in ¶135 of the Complaint shows that DeSimone was not included as a recipient of the email.
- Complaint ¶136: “Meeting minutes from the weekly March 21, 2016, project meeting also confirm that the Terra Defendants **[not DeSimone]** had scheduled a meeting with CTS”. A screenshot from the referenced meeting minutes is incorporated into ¶136 of the Complaint. As with prior meeting minutes presented by Plaintiffs in the Complaint, the title of this meeting was “Owner |Architect |Contractor (“OAC”) Meeting” and the participants were “Curt Twombly, Alejandro Hoch, Bob Stout, Howard Rice and Michael Piazza” of Terra Defendants, Stantec, Terra Defendants, JMA and Terra Group, respectively (**not DeSimone**).
- Complaint ¶173: “An October 2015 Proposed Dewatering Plan submitted to the Miami-Dade County Division of Environmental Resources Management **[not DeSimone]** by Florida Civil, Inc. **[not DeSimone]** on behalf of the Terra Defendants **[not DeSimone]** noted that ‘[d]ue to the depth of excavation into the water table and other concerns, the contractor proposes the

installation of two (2) continuous sheet pile cofferdams for support of excavation”. A screenshot of a cover page is incorporated into ¶173 of the Complaint, which clearly provides that the sender is Florida Civil, Inc. (**not DeSimone**), and the recipient is the Miami-Dade County Division of Environmental Resources Management (**not DeSimone**).

- Complaint ¶177: “On November 29, 2015, Terra Defendants’ Curt Wyborny [**not DeSimone**] sent an email to JMA, among others [**not DeSimone**], and laid out the step-by-step dewatering plan”. A screenshot included in ¶177 of the Complaint shows that DeSimone was not included as a recipient of the email.
- Complaint ¶201: “Before any sheet pile driving, excavation, or dewatering activities at Eighty-Seven Park, the Terra Defendants [**not DeSimone**] enlisted NV5 [**not DeSimone**] to perform an extensive and thorough pre-construction survey of CTS”.
- Complaint ¶202: “On January 6, 2016, the Terra Defendants’ [not DeSimone’s] attorney contacted the Association’s attorney and requested access to CTS to perform a “pre-existing conditions survey of CTS....”
- Complaint ¶203: “After the Terra Defendants [not DeSimone] scheduled the pre-construction survey and informed NV5 [not DeSimone] that they are “getting permission to survey the adjacent building....”

Moreover, to the extent Plaintiffs claim that a duty should be imposed on DeSimone because soil compaction, pile driving, dewatering and excavation activities in the circumstances presented by this case were inherently dangerous, this argument similarly fails. Even if Plaintiffs could establish that these activities were inherently dangerous, which DeSimone vehemently disputes, absent factual allegations that DeSimone exercised some control over the allegedly inherently dangerous conduct, DeSimone cannot be liable. See Fla. Power & Light Co. v. Price,

170 So. 2d 293, 298 (Fla. 1964) (owner cannot be held liable for contractor's negligent performance of inherently dangerous activities absent any active participation on the part of the owner). Plaintiffs allege no facts to support that DeSimone exercised control over the soil compaction, pile driving, dewatering and excavation activities at the Project.

Here, where Plaintiffs' Complaint includes nothing more than blanket, conclusory allegations belied by the specific alleged facts as pled in the Complaint, DeSimone owed no duty to Plaintiff, nor is it alleged to have been hired to design or plan the activities allegedly causing harm (excavation, pile-driving, dewatering and soil compaction), Plaintiffs are unable to state a claim sounding in negligence against DeSimone. For the reasons stated above, Count VII (Negligence Against DeSimone) must be dismissed.

**POINT II: PLAINTIFFS CANNOT STATE A CLAIM FOR STRICT
LIABILITY AGAINST DESIMONE AS A MATTER OF LAW**

Plaintiffs fail to state a claim against DeSimone sounding in strict liability since they do not allege that DeSimone performed or carried on any abnormally dangerous activity, because it did not. Florida courts adopted the doctrine of strict liability for abnormally dangerous activity reformulated by the Restatement (Second) of Torts §§ 519, which provides that “*one who carries on*” an abnormally dangerous activity may be strictly liable. Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp., 460 So. 2d 510, 512 (Fla. 3rd DCA 1984) (emphasis added). Nothing in Great Lakes stands for the proposition that an engineer with no involvement in the subject activities is liable. The dearth of factual allegations of DeSimone's role and conduct on the 87 Park project is fatal to Plaintiffs' claim as Plaintiffs have failed to state ultimate facts that DeSimone “carried on” any abnormally dangerous activities.

Strict liability may attach to a property owner who “carries on” or permits abnormally dangerous activities to occur. Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp., 460 So. 2d 510. DeSimone was not an owner of the 87 Park project, nor did it carry on any such activities. Florida courts have held repeatedly that an engineer is not liable to third parties for personal injuries caused by construction activities unless the engineer has committed under contract to provide supervision and control of the allegedly dangerous work and the engineer negligently performed such duties. See Vorndran v. Wright, 367 So. 2d 1070 (architect not liable as a matter of law without responsibility to supervise or control the method of construction); Fla. Power & Light Co. v. Price, 170 So. 2d 293 (passive participant owner is not liable for inherently dangerous conduct of its independent contractor); Recreational Design & Const., Inc., 820 F. Supp. 2d 1293 (lack of allegation of control by defendant engineer was fatal to complaint). Such liability, when it attaches, is premised on a duty of care owed and breach of the same, not in strict liability. Geer v. Bennet, 237 So. 2d at 316.

While not binding on this Court, Splendorio v. Bilray Demolition Co., 682 A.2d 461, 466 (R.I. 1996), is illustrative of the how the abnormally dangerous conduct doctrine is reasonably applied to the bare facts pled in the Complaint against DeSimone. In Splendorio, the Supreme Court of Rhode Island granted summary judgment in favor of an asbestos inspection firm whose only involvement in the construction project was to inspect premises for the presence of asbestos. In examining, pursuant to Restatement §520, whether the asbestos inspector engaged in an abnormally dangerous activity, the court examined the defendant inspector’s conduct in performing inspections, not the construction activities performed by other parties over whom the inspector had no authority or control. Id. at 466. This approach is consistent with that of the Florida courts in determining whether a duty exists: it is the *defendant’s conduct* that gives rise to the

existence of a duty of care; not the conduct of others over whom the defendant has no authority or control. See e.g., Vorndran v. Wright, 367 So. 2d 1070.

In this case, Plaintiffs allege only that DeSimone provided engineering services. It is axiomatic that merely providing engineering services is not an abnormally dangerous activity for which one may be strictly liable. See Geer v. Bennett, 237 So. 2d 311 (liability of architect or engineer must be based upon the breach of a cognizable duty of care owing to plaintiff in the performance of their services). Plaintiffs do not allege facts to support a claim that DeSimone performed any abnormally dangerous activity or that DeSimone supervised and controlled the purportedly abnormally dangerous activities. To the contrary, the Complaint concedes that other parties were hired or did own, plan, supervise and control these activities.

As discussed above in Point I, Plaintiffs allege that (1) that DeSimone provided engineering services (Complaint ¶19) and (2) that abnormally dangerous activities were performed on behalf of or at the direction of parties **other than DeSimone** and that parties **other than DeSimone** were responsible to undertake or supervise the purportedly abnormally dangerous activities. (Complaint ¶¶ 13-15, 17-18, 69,72-73, 99, 102-106, 115, 117, 119, 121, 123-124, 126, 134-136, 158-159, 173, 177, 201, 204, 328, 341, 353, 370, 383 404, 437.) Specifically, the Complaint alleges the following as against DeSimone in support of its claim for strict liability:

437. As discussed hereinbefore, sheet pile driving was extensively performed on the Eighty-Seven Park project, and it was done at the direction and under the supervision of Defendant JMA.

438. As the structural engineer on the Eighty-Seven Park project, Defendant DeSimone was intimately involved in the performance and progress of the pile driving activities on the project and was extremely knowledgeable regarding the pile driving activities on site.

446. Damage to CTS's structural foundation that the ultrahazardous and abnormally dangerous pile driving activity on the Eighty-Seven Park project caused was foreseeable and within the scope of risk that pile driving presents.

(Complaint ¶¶ 437-438, 446.)

Plaintiffs allege that another party, JMA, directed and supervised pile driving (Complaint ¶437), not DeSimone. The Complaint incorporates several communications and meeting minutes where pile driving activities were discussed, including emails between JMA, Terra Group and NV5 discussing and planning these activities. (Complaint ¶¶ 72, 103-104, 106, 121, 124, 126, 130, 134-136, 158-159, 173, 177.) On the very face of the Complaint, it is apparent that DeSimone is absent from these emails and from meetings discussing pile driving and vibrations. Despite its own allegations in contradiction, the Complaint concludes, without any factual allegations in support, that DeSimone was “intimately involved” in pile driving activities. (Complaint ¶438.) There are no specific allegations with respect to DeSimone’s role on the 87 Park project and certainly none with respect to any contractual responsibility of DeSimone to participate in any way whatsoever with pile driving activities. Plaintiffs’ conclusions are contradictory, again, to Plaintiffs’ own allegations because the Complaint alleges that JMA performed and directed pile driving (Complaint ¶¶ 17, 99, 353, 370, 437), that NV5 provided geotechnical services and presented sheet piles as a viable method for support of excavation (Complaint ¶¶ 18, 72-73, 135, 383, 404), that NV5 monitored vibrations caused by pile driving and their potential effect on CTS (Complaint ¶¶ 102-104, 106, 115, 117, 119, 124, 159, 201, 204, 383, 404) and that Terra Defendants and JMA received complaints from CTS residents and hired attorneys to counter these complaints (Complaint ¶¶ 130, 134-136).

These allegations are insufficient, even if proven true, to state a cause of action against DeSimone for negligence or strict liability. See Loving v. Viecegli, 164 So. 2d 560 (legal conclusions asserted in the complaint are not sufficient to avoid dismissal “unless substantiated by allegations of ultimate fact.”) Further, multiple factual allegations in the Complaint, which if

accepted as true on a motion to dismiss, are counter to Plaintiffs' claims and flatly contradict any inference that might otherwise be drawn from general, commingled allegations made by Plaintiffs with respect to DeSimone. Defenses appearing on the face of a complaint warrant dismissal under Florida Rule of Civil Procedure 1.140(b). Lewis v. Morgan, 79 So. 3d 926, 928 (Fla.1st DCA 2012). In Lewis v. Morgan, plaintiff whose criminal charges were dismissed, subsequently brought an action against the arresting sheriff and deputy, alleging false imprisonment. The complaint and attached exhibits pleaded facts sufficient for a finding, as a matter of law, that the arresting officers had probable cause for the arrest, an affirmative defense. Id. at 928. As well-plead allegations of a Complaint are accepted as true for the purpose of a motion to dismiss, defendants were entitled to judgment on the pleadings and the complaint was dismissed. Id. at 929.

The Complaint in this action fails to allege any factual assertions with respect to any conduct by DeSimone that, if proven by evidence at trial, would support a finding of strict liability. In fact, taken as true, the allegations in the Complaint warrant dismissal of all claims against DeSimone, with prejudice, as Plaintiffs pled that other parties, not DeSimone, engaged in, planned, supervised and controlled conduct that Plaintiffs allege was dangerous and damaging to Plaintiffs. Therefore, the Complaint must be dismissed against DeSimone.

WHEREFORE, For the foregoing reasons and upon the foregoing authority, defendant DeSimone Consulting Engineers, LLC, hereby moves this Honorable Court for an Order dismissing with prejudice Counts VII and VIII of Plaintiffs' Complaint against DeSimone.

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to Complex Business Procedure 4.3, counsel for DeSimone Consulting Engineers, LLC, Rachel C. John and Douglas J. Kress, conferred with counsel for Plaintiffs, Rachel Furst and Curtis Miner, by videoconference on December 29, 2021, in a good faith effort to discuss the issues raised in this Motion, but were unable to reach an agreement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 30, 2021, a true and correct copy of the foregoing Motion to Dismiss Counts VII and VIII of the Consolidated Second Amended Class Action Complaint was filed with the Clerk of Court by using the ECF system which will send a notice of electronic filing to all parties appearing in this case.

ZETLIN & DE CHIARA LLP
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EXHIBIT A



Stantec Architecture Inc.
2 South Biscayne Boulevard
Miami FL 33131
Tel: (305) 482-8700
Fax: (305) 482-8770

21 January 2016

~~Vincent DeSimone~~ William O'Donnell
DeSimone Consulting Engineers
800 Brickell Avenue, 6th Floor
Miami, Florida 33131

Re: Consultant Letter of Acceptance and Consultant's Agreement
8701 Collins Development, LLC
Terra Group
3050 Biscayne Boulevard, Suite 301
Miami, Florida 33154

87 Park
8701 Collins Avenue
Miami Beach, Florida 33154

Project Number: 219420338
Note: Include ADD Inc's Project Number on all invoices

Dear Mr. ~~DeSimone~~ - O'Donnell

We are pleased to collaborate with DeSimone Consulting Engineers on the condominium project located at 8701 Collins Avenue, Miami Beach, Florida. This letter confirms that your previous Proposal as accepted by Terra Group has been accepted, "Proposal". Proposal is for structural engineering services.

Stantec is providing architectural services to 8701 Collins Development, LLC for 87 Park and has entered into an Owner-Architect Agreement dated 28 August 2015. The Consultants Terms & Conditions, and the Proposal shall become the "Consultant's Agreement" for this Project. This Consultant Agreement replaces all previous agreements.

Per your proposal, you will provide the remaining structural services on a fixed fee basis of \$202,065 with an additional \$20,000 in approved Additional Services (foundation redesigns) as detailed in Exhibit A attached. You agree not to exceed the fixed fee without ADD Inc's prior written authorization. Any consultant fee billed will be credited towards the final fixed fee amount.

Please sign and this letter as your acceptance of this Consultant Agreement. Include a copy of your Certificate of Insurance, naming ADD Inc and the Owner as Additional Insureds and include all coverages.



Page 2 of 3

We look forward to working with you on this exciting project.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Cardello".

Jonathan Cardello, AIA
Principal

A handwritten signature in black ink, appearing to read "William O'Donnell".

~~Vincent DeSimone~~ William O'Donnell
DeSimone Consulting Engineers

Attachments:

Exhibit A - Schedule of Values
Consultant Terms & Conditions

EXHIBIT A

Billing Phase	Consulting Fee	Stantec Task # (Reference for Invoicing)
Construction Documents	\$89,265	501.300
Bidding and Negotiating	\$18,800	501.400
Construction Administration	\$94,000	501.500
Additional Service #01	\$20,000	501.600

****Include Project Number (219420338) and Task Number on all invoices.***

Instructions for billing:

1. Invoices should be submitted to Mercy Guasch at mercy.guasch@stantec.com
2. Include the following information on the email subject line:
PROJECT NUMBER **219420338** followed by **8701 Collins Avenue**
3. Include the following information on each invoice or cover letter:
 - a. Project phase being invoiced
 - b. Approved total fee per phase
 - c. Previously invoiced amount
 - d. Current invoiced amount
 - e. Correlating Stantec Task Number (as noted above)
4. Any questions, please contact the Haven Peaden at haven.peaden@stantec.com

EXHIBIT B – Applicable Sections of Owner-Architect Agreement

8701 Collins | 219420338

Subconsultants

Date: March 14, 2017

8.3 REIMBURSABLE EXPENSES

8.3.1 Subconsultants shall be **billed at the actual direct expense** incurred by the Sub consultant (without mark-up or multiplier) and supported by evidence of the amounts thereof as reasonably required by Owner. Reimbursable Expenses are in addition to compensation for Basic and Additional Services and shall include the following expenses, without limitation: transportation; reproductions; additional insurance coverage or limits, including professional liability insurance, requested by Owner in-excess of those limits specified in Article 10; and if authorized in advance by Owner, expense of overtime work requiring higher than regular rates.

10.1 ARCHITECT'S LIABILITY INSURANCE

Summary of Insurance Requirements Listed in Section 10.1

Worker's Comp/Employers Liability	\$1,000,000
Commercial General Liability	^{WP 1} \$2,000,000 per occurrence \$4,000,000 the general aggregate
Automobile Liability	^{WP 2} \$1,000,000 combined single limit for bodily injury and property damage coverage
Umbrella Liability	\$5,000,000 per occurrence \$5,000,000 in the annual aggregate excess of primary ins \$10,000 max self-insured retention or deductible/occurrence

10.1.4 Architect shall require all Subconsultants engaged or employed by or through Architect in connection with the performance of Services to carry and maintain the insurance set forth in Paragraph 10.1.1 above...

Subconsultants' professional liability insurance...

Professional Liability (Consultants)	\$1,000,000 each claim \$2,000,000 in annual aggregate \$50,000 max self-insured retention or deductible/occurrence
--------------------------------------	--

^{WP} \$200,000

^{WP}

April 16, 2015 (the "Effective Date")

8701 Collins Development, LLC
Attn: Michael Piazza
2665 South Bayshore Drive Suite 1020
Miami, Florida 33133

RE: Proposal (this "Proposal") for Structural Engineering Services for 8701 Collins Ave, Miami Beach, Florida

DeSimone Consulting Engineers, a Delaware limited liability company ("Engineer") hereby agrees to provide to 8701 Collins Development, LLC, a Delaware limited liability company ("Owner") the Services (as defined herein) for Owner's luxury condominium known as "8701 Collins," which consists of sixty-eight (68) residential condominium units, a pool, spa, gym, parking garage, and other related amenities (the "Project") located at 8701 Collins Avenue, Miami Beach, Florida 33154 (the "Site").

Engineer shall, at all times, coordinate its Services and Documents (as defined herein) with the services of and instruments of service prepared by Design Architect and Architect (both as defined in the Terms and Conditions).

I. ENGINEER'S SERVICES AND ENGINEER'S RESPONSIBILITIES

Engineer shall provide the Services to Owner in accordance with the Agreement and Owner's objectives for the complete structural engineering of the Project. Engineer's "Services" shall mean the complete structural engineering for the Project and other professional services furnished by Engineer or its Subconsultants (as defined in the Terms and Conditions), including the Basic Services (as defined herein) and any Additional Services (as defined in the Terms and Conditions) that may be required under Section 2.3 of the Terms and Conditions. Engineer's "Basic Services" consist of those professional engineering services described in this Proposal, the Terms and Conditions hereto, and shall include the following: (i) the complete structural engineering of the Project; (ii) the services described in each of the Phases (as defined and described herein); (iii) the preparation of the Documents and other documentation required in conjunction therewith for the structural engineering of the Project; (iv) those activities reasonably inferable as being a part of the Services; and (v) any other design activities normally or customarily furnished by structural engineers for similar projects under the Standard of Care (as defined in the Terms and Conditions). Engineer's "Documents" shall mean all documents and materials prepared by Engineer, and its Subconsultants in connection with the performance of the Services under the Agreement or which describe or relate to the Services performed or to be performed hereunder or the results thereof, including, without limitation, the Schematic Design Documents, Design Development Documents, the Construction Documents (each as defined in herein), all writings, drawings, specifications, plans, blueprints, pictures, recordings, computer or machine readable data, models, renderings, other design materials, reports, studies, documents, and all copies or reproductions thereof, and other tangible and intangible materials.

To the extent required by Owner in its pursuit of the best interest of the Project, Engineer shall engage with Owner, Design Architect, Architect and Contractor (as defined in the Terms and Conditions) in their value engineering analysis of the Project and design alternatives, and shall, with the written approval of Owner, incorporate any changes so identified in the design of the Project as part of the Basic Services, regardless of the origin of the value engineering proposed. The value engineering process shall be continuous throughout the Phases of the Basic Services. Engineer and its Subconsultants (as defined in

the Terms and Conditions) shall update all Documents to include all value engineering items accepted by Owner.

Engineer shall provide advice, assistance and documentation requested by Owner with regard to Owner's efforts to obtain, and/or maintain, all Approvals of Governmental Authorities (both as defined in the Terms and Conditions). Upon receipt of written notice from Owner that the Services (or Documents) provided by, or through, Engineer do not conform to the requirements and/or representations set forth in the Agreement, Engineer shall (as part of the scope of the Services to be performed hereunder) expeditiously perform such corrective services as may be required to bring the Services (including the Documents) into conformance with the Agreement, all at no additional charge to Owner.

In addition, Engineer hereby acknowledges and agrees that Engineer and all of its Subconsultants have been paid in full for any and all services performed prior to the date of this Agreement for Owner and/or in connection with the Project, and represents and warrants that no sums are, or shall become, due and payable on account of any services performed in connection with the Project except as may be expressly provided in the Agreement. All payments made by Owner to Engineer prior to the Effective Date shall be deemed payments hereunder and shall be credited against and reduce Engineer's Fee. The Parties acknowledge and agree that if Engineer has provided any work or services for the Project prior to the Effective Date, then all such labor, materials and services shall be considered part of the scope of the Services hereunder and shall comply with, and conform to, the requirements of the Agreement.

Engineer is not responsible for any errors or omissions contained in the instruments of service prepared by consultants or design professionals contracted directly by Owner; however, Engineer shall be expected to review all such instruments of service carefully and to notify Owner immediately if Engineer observes, discovers or knows of any discrepancies, errors or omissions in such instruments of service that would render same unsuitable or unreliable for proper use as a basis for the Services and/or Documents to be provided by, or through, Engineer.

II. PHASES OF THE BASIC SERVICES

Engineer shall perform its Basic Services in phases (each a "**Phase**," and collectively, the "**Phases**") as follows: (i) the Schematic Design Phase; (ii) the Design Development Phase; (iii) the Construction Documents Phase; (iv) the Bidding and Approval Phase; and (v) the Construction Administration Phase. Engineer shall not commence work on any Phase until Engineer receives from Owner written notice to proceed with such Phase. Engineer acknowledges that there may be, at times, some overlapping of the Basic Services performed by Engineer.

A. SCHEMATIC DESIGN PHASE

During the Schematic Design Phase, Engineer shall prepare schematic design documents that establish and provide for loading criteria, the preliminary design calculations to develop the basic structural load carrying system and detailing for the components of the Project, and preliminary column grids, column sizes, and lateral system component locations (the "**Schematic Design Documents**"). Additionally, Engineer shall consult with the geotechnical engineer for the Project to determine appropriate foundation systems, and attend design and coordination meetings with Owner, Design Architect, Architect, and/or Owner's other design professionals/consultants for the Project.

At all times during the Schematic Design Phase, Engineer shall coordinate its Services and Documents with the services performed, and instruments of service prepared, by Design Architect, Architect, and Owner's other design professionals/consultants. Notwithstanding anything contained herein to the contrary, Engineer acknowledges and agrees that changes to the Project may be required during the preparation of the Schematic Design Documents, and that Engineer shall execute such changes as part of its Basic Services.

B. DESIGN DEVELOPMENT PHASE

Following approval of the Schematic Design Documents, Engineer will promptly begin the Design Development Phase. During the Design Development Phase, Engineer shall prepare, for Owner's approval, design development documents that include the layout of foundation system with major dimensions and sections, load calculations, typical details for the foundation and superstructure, CAD plans indicating primary gravity and lateral load member sizes (at a scale matching the instruments of service prepared by Architect), and detailed Project specifications (the "**Design Development Documents**"). Additionally, Engineer shall attend design and coordination meetings with Owner, Design Architect, Architect, and/or Owner's other design professionals/consultants for the Project. Engineer shall prepare the Design Development Documents in accordance with all Approvals and Governmental Requirements.

At all times during the Design Development Phase, Engineer shall coordinate its Services and Documents with the services performed, and instruments of service prepared, by Design Architect, Architect, and Owner's other design professionals/consultants. Notwithstanding anything contained herein to the contrary, Engineer acknowledges and agrees that changes to the Project may be required during the preparation of the Design Development Documents, and that Engineer shall execute such changes as part of its Basic Services.

C. CONSTRUCTION DOCUMENTS PHASE

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Upon approval of the Design Development Documents, Engineer will promptly begin the Construction Documents Phase. During the Construction Documents Phase, Engineer shall prepare, for Owner's approval, construction documents that set forth in detail the structural requirements for the construction of the Project (the "**Construction Documents**"). Engineer's Construction Documents shall include, without limitation, final structural drawings and specifications, complete structural engineering calculations in support of the Construction Documents and in a form sufficient for submission to the building department, and the design for landscape Site walls and pool enclosures. Further, Engineer's Construction Documents shall be fully coordinated with the instruments of service of Design Architect, Architect and all other design professionals/consultants performing services for the Project. Engineer shall prepare the Construction Documents in accordance with all Approvals and Governmental Requirements. The Construction Documents shall be signed and sealed, as required by the Governmental Authorities.

Additionally, Engineer shall attend design and coordination meetings with Owner, Design Architect, Architect, and/or Owner's other design professionals/consultants for the Project. At all times during the Construction Documents Phase, Engineer shall coordinate its Services and Documents with the services performed, and instruments of service prepared, by Design Architect, Architect, and Owner's other design professionals/consultants. Notwithstanding anything contained herein to the contrary, Engineer acknowledges and agrees that changes to the Project may be required during the preparation of the Construction Documents, and that Engineer shall execute such changes as part of its Basic Services.

D. BIDDING AND APPROVALS PHASE

Upon approval of the Construction Documents, Engineer will promptly begin the Bidding and Approvals Phase. During the Bidding and Negotiating Phase, Engineer shall assist Owner in reviewing bid submissions and budgets for the construction of the Project and shall respond to requests for information (RFIs), clarifications as needed by bidders, and questions from the building department in a prompt manner and so as to not delay the performance of the Work or the services provided by Design Architect, Architect, or Owner's other design professionals/consultants.

E. CONSTRUCTION ADMINISTRATION PHASE

Engineer shall assist Owner in providing administration of the Construction Contract (as defined in the Terms and Conditions) as set forth below and in the Construction Contract. During the Construction Administration Phase, Engineer shall visit the Site with its Subconsultants to (1) become familiar with, and

to keep Owner informed about, the progress and quality of the Work completed, (2) use its diligent, professional efforts to guard Owner against defects and deficiencies in the Work, and (3) determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Construction Documents. However, Engineer shall not be required to make exhaustive or continuous on-Site inspections to check the quality or quantity of the Work. Engineer shall keep Owner informed of the progress and quality of the Work, and shall promptly advise Owner of any defects and deficiencies in the Work discovered by Engineer. Engineer shall submit to Owner a written report subsequent to each such on-Site visit and shall participate in conference calls as often as necessary to review construction activities and respond to Contractor's questions regarding the Project, including questions regarding design issues and visit the Site as directed by Owner to monitor Contractor's workmanship. Additionally, Engineer shall prepare and deliver to Owner, on a weekly basis, a report describing the progress of the Work.

Engineer shall not have control over or charge of, and shall not be responsible for, construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work.

Engineer shall, at reasonable times, have reasonable access to the Work wherever it is in preparation or progress. In the sole discretion of Owner, Owner may require Engineer and Engineer's Subconsultants to come to the Site where Work may be disrupted or delayed by what appears to be insufficiency in design details or a failure to coordinate the design effort. The cost to Engineer (and its Subconsultants) is part of Basic Services and shall not be considered Additional Services herein. Engineer has no authority to make changes to approved Construction Documents, and shall not do so without Owner's written approval. Engineer shall reject Work that does not conform to the Construction Documents, Approvals, or Governmental Requirements. Owner reserves the right to communicate directly with Engineer's Subconsultants.

Engineer shall review and approve, or take other appropriate action upon, Contractor's submittals such as shop drawings, product data and samples, for the purpose of: (1) assuring compliance with Governmental Requirements and Approvals; (2) assuring that the Work affected and represented by such submittals is in compliance with the requirements of the Construction Documents; and (3) confirming that such shop drawings provide for a design product that is functionally usable for the original design intent and standards. For each such submittal, Engineer shall either (a) accept and approve such submittal, or (b) reject such submittal (with or without requirements for modifications). Engineer's action with regard to submittals shall be taken with such reasonable promptness so as to not cause delay in the Work or in the construction of Owner's own forces or of Owner's separate contractors, while allowing sufficient time to permit adequate review of the submittals, but in no event more than ~~three (3)~~ ^{ten (10)} business days after Engineer's receipt of the submittals.

Engineer shall review and respond to RFIs from Contractor. When applicable, Engineer shall prepare supplemental Documents, including drawings, details and specifications, in response to RFIs. Engineer shall respond to RFIs promptly as not to delay the Work or other aspects of construction of the Project, but in no event later than three (3) business days after Engineer's receipt of an RFI. Engineer shall have no authority to bind Owner or to accept or execute changes to the Construction Contract or any other contracts executed by Owner with regard to the Project.

~~Engineer shall review as-built information prepared by Contractor and complete reproducible as-built documents as described in this paragraph. Upon Substantial Completion (as defined in the Construction Contract) of the Work by Contractor, Engineer shall also prepare a set of reproducible record "as-built" Construction Documents, showing all changes in the Work made during construction, including those changes set forth on marked-up prints and other data furnished by Contractor to Owner, all of which shall be coordinated to a common CAD background for the Project for its instruments of service and all instruments of service developed by its Subconsultants and Contractors for the Project. All such changes shall be actually incorporated into a revised set of reproducible record "as-built" Construction Documents rather than highlighted as notations with "clouding" or other markings. In other words, the as-built Construction Documents shall be prepared in such a manner so as to illustrate the actual, as-built~~

~~conditions of the Work rather than comparing the Work as designed to the Work as constructed. In doing so, Engineer shall also provide the final, record "as-built" Construction Documents in electronic format (e.g., plot files on CD-ROM media). Engineer may, acting in a commercially reasonable manner, rely on information provided by others for the preparation of the record "as-built" Construction Documents and shall not be responsible for errors in such information, provided that Engineer exercises proper precautions relating to the review thereof (e.g., the coordination of that information with its records regarding changes, field orders, etc.).~~

III. SCHEDULE

Engineer at all times shall proceed diligently to complete the Services, including any authorized Additional Services, as expeditiously as is consistent with the Standard of Care and the orderly progress of such Services. Engineer shall at all times provide sufficient personnel to perform its Services in accordance with the Schedule of Performance attached hereto as **Exhibit "A."** Engineer's Services shall be performed in a timely manner so as not to cause any delay in starting construction of the Project. Engineer agrees to complete each portion or Phase of the Services on or before the deadlines established in the Schedule of Performance attached hereto as **Exhibit "A."** No act or default by Engineer and/or any other Subconsultants shall constitute a cause for delay or stoppage of Engineer's Services or for an extension of time to complete such Services.

Performance of the Services shall commence on the date provided for in **Exhibit "A,"** and shall continue until Engineer satisfactorily performs the Services, and Owner duly accepts the same as complete. Engineer acknowledges that TIME IS OF THE ESSENCE and that Owner's business interests may suffer substantial losses if the Services are not completed in a timely manner. In this regard, Engineer hereby accepts and confirms that the Schedule of Performance, including milestone dates, set forth in **Exhibit "A,"** is a reasonable time to complete the Services with professional skill and care and the Standard of Care. Owner and Engineer hereby acknowledge and agree that due to the nature and timing of the development of the Project, there may be extended periods of time between each Phase of the Basic Services and/or pauses in the schedule from time to time at Owner's election, in Owner's sole discretion, without effect on Engineer's Fee and/or other obligations herein.

IV. COMPENSATION FOR BASIC SERVICES

As consideration for Engineer's complete, proper and timely performance of the Basic Services, Owner shall pay Engineer Engineer's Fee (as defined in the Terms and Conditions) in the amount of Three Hundred Seventy-Six Thousand and 00/100 Dollars (\$376,000.00), which is payable as follows:

Schematic Design Phase	\$ 37,600.00
Design Development Phase	\$ 75,200.00
Construction Documents Phase	\$ 150,400.00
Bidding and Approvals Phase	\$ 18,800.00
Construction Administration Phase	\$ 94,000.00
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Total Engineer's Fee	\$ 376,000.00

Engineer's Fee includes the costs of all Subconsultants necessary to furnish the Services.

V. ENGINEER'S KEY PERSONNEL

Vincent J. DeSimone shall serve as Engineer's key personnel overseeing, and shall be primarily responsible for, the performance of the Services (the "**Key Personnel**"). Engineer shall supplement its support staff as required; provided, however, Engineer represents and warrants that it has the project capacity to commit to the Project and shall not take on any additional projects that would interfere with the ability of the Key Personnel to devote the time necessary to complete the Project and meet the Schedule of Performance. Engineer shall not change or reassign the Key Personnel without the prior written approval of Owner (unless requested by Owner), or unless any of the Key Personnel cease to be employed by Engineer.

VI. TERMS AND CONDITIONS

The Terms and Conditions attached hereto are an integral part of this Proposal and are incorporated herein by this reference.

VII. THE AGREEMENT

The term "**Agreement**" shall mean this Proposal (and all exhibits hereto) and the Terms and Conditions, all as attached hereto.

The Agreement may be executed in several counterparts, and/or by the execution of counterpart signature pages which may be attached to one or more counterparts of the Agreement, and all so executed shall constitute one Agreement binding on all of the Parties hereto, notwithstanding that all of the Parties are not signatories to the original or the same counterpart. In addition, any counterpart signature page may be executed by any Party wherever such Party is located, and may be delivered by telephone facsimile transmission or electronic mail, and any such facsimile or electronic mail transmitted signature pages may be attached to one or more counterparts of the Agreement, and such faxed or e-mailed signature(s) shall have the same force and effect, and be as binding, as if original signatures executed and delivered in person.

The Agreement represents the entire and integrated agreement between Owner and Engineer and supersedes all prior negotiations, representations, or agreements, either written or oral. The Agreement may be amended only by written instrument signed by both Owner and Engineer. If there is any inconsistency between this Proposal and the Terms and Conditions, then Engineer shall (i) provide the better quality or greater quantity of Services or (ii) comply with the more stringent requirement, in Owner's sole discretion. Capitalized terms in the Terms and Conditions not otherwise defined shall have the meanings ascribed to them in the Proposal.

WHEREFORE, Owner and Engineer hereby enter into the Agreement as of the Effective Date set forth above and agree to the terms and conditions set forth herein.

ENGINEER:

DeSimone Consulting Engineers, a Delaware limited liability company,

By: 
Vincent J. DeSimone, its chairman

OWNER:

8701 Collins Development, LLC, a Delaware limited liability company,

By: _____
David Martin, its

EXHIBIT "A"

SCHEDULE OF PERFORMANCE

Design Development Documents - 100%	April 30, 2015
Construction Documents - 30%	May 21, 2015
Construction Documents - 60%	June 18, 2015
Construction Documents - 95%	July 24, 2015
Construction Documents - 100%	August 22, 2015

EXHIBIT "B"

ENGINEER'S HOURLY RATES

Senior Principals	\$405.00/ hour
Principals	\$340.00/ hour
Senior Associate Principals	\$310.00/ hour
Associate Principals	\$305.00/ hour
Senior Associates	\$280.00/ hour
Associates	\$275.00/ hour
Field Operations Managers	\$260.00/ hour
Senior Project Managers	\$240.00/ hour
Project Managers	\$230.00/ hour
Senior Project Engineers	\$210.00/ hour
Project Engineers	\$190.00/ hour
Engineers	\$175.00/ hour
Construction Administration Managers	\$210.00/ hour
Inspectors	\$170.00/ hour
Engineering Computer Time	\$0
BIM/CAD Managers	\$270.00/ hour
BIM Coordinators	\$250.00/ hour
CAD Supervisors	\$240.00/ hour
Senior Designers	\$240.00/ hour
BIM Technicians	\$220.00/ hour
Senior CAD Drafters	\$210.00/ hour
CAD Drafters	\$170.00/ hour
CAD/BIM Computer Time	\$0
Clerical	\$0
Principals - Court Time or Deposition Time	\$545.00/ hour

TERMS AND CONDITIONS

Article 1 - Definitions

- 1.1 **Additional Services.** Professional services that may be provided in addition to Basic Services and rendered only if Owner authorizes them in writing, consistent with Section 2.3 of these Terms and Conditions.
- 1.2 **Approvals.** Any and all approvals, concessions, permits or other such authorizations required of third parties with regard to the Project, including any and all Governmental Authorities (as defined herein).
- 1.3 **Architect.** The architect of record for the Project retained by Owner to design the Project.
- 1.4 **Construction Contract.** The written agreement between Owner and Contractor (as defined herein) for the construction of the Project.
- 1.5 **Contractor.** The licensed general contractor retained by Owner to construct the Project.
- 1.6 **Days or Time.** Time periods refer to calendar days, unless otherwise stated.
- 1.7 **Design Architect.** The design architect retained by Owner to design the Project.
- 1.8 **Documents.** As defined in the Proposal.
- 1.9 **Effective Date.** As defined in the Proposal.
- 1.10 **Engineer.** As defined in the Proposal.
- 1.11 **Engineer's Fee.** Subject to the terms and conditions of the Agreement, the total compensation that Owner shall pay Engineer for the proper and timely performance of the Basic Services. Engineer's Fee includes any and all profits, costs and expenses payable to Engineer as a result of the Basic Services to be performed hereunder, all applicable sales taxes and other charges properly imposed by Governmental Authorities.
- 1.12 **Engineer's Representative.** Vincent J. DeSimone, who is the authorized representative of Engineer and has the express authority to bind Engineer with respect to all matters requiring Engineer's approval or authorization.
- 1.13 **Force Majeure Delays.** Delays in the performance/completion of Engineer's Services and obligations hereunder that are caused by acts of God, severe weather, such as a hurricane or tropical storm, or by strikes, lockouts, acts of public utilities or public bodies beyond the reasonable control of Engineer.
- 1.14 **Governmental Authority(ies).** The United States of America, the State of Florida, the county and city, if any, wherein the Project is located, any political subdivision thereof, and any

other agency, authority, or court having jurisdiction over the Project, Engineer, Contractor, the Services or the Work.

- 1.15 **Governmental Requirements.** Any law, statute, rule, regulation, ordinance, code or lawful order of any Governmental Authority that is applicable to the Services, Engineer, the Work or the Project.
- 1.16 **Indemnitee(s).** Owner, Owner's Representatives, the lender for the Project, and all of their respective officers, directors, partners, affiliates, partners, shareholders, managers, members, agents, and employees.
- 1.17 **Owner.** As defined in the Proposal.
- 1.18 **Owner's Representative.** Michael Piazza is an authorized representative of Owner and has the express authority to bind Owner with respect to all matters requiring Owner's approval or authorization.
- 1.19 **Parties.** Owner and Engineer are collectively referred to herein as the "Parties" and each, individually, as a "Party."
- 1.20 **Project.** As defined in the Proposal.
- 1.21 **Services.** As defined in the Proposal.
- 1.22 **Standard of Care.** The standard of care applicable to the provision of engineering services similar to those Services furnished by Engineer for comparable projects in Florida.
- 1.23 **Subconsultants.** The qualified, licensed design professionals retained by Engineer to furnish a portion of the Services described herein or other necessary design services for the Project, as well as all of Engineer's agents and other persons and entities working for, or through, Engineer, at all tiers.
- 1.24 **Work.** The entire construction of the Project, including without limitation, the furnishing and installation of all materials, furniture, fixtures and equipment to be incorporated into the Project.

Article 2 - Engineer and Engineer's Services

- 2.1 **Engineer.** Engineer represents that it possesses the requisite skill, education, expertise, and licenses to perform the Services. Engineer represents that it is knowledgeable of all Governmental Requirements and Approvals and agrees to comply with and conform all Services and Documents to all Governmental Requirements and Approvals. If Engineer fails to perform its Services or prepare the Documents in accordance with Governmental Requirements or Approvals, then Engineer shall bear and be responsible to pay all costs, damages and expenses resulting therefrom.
- 2.2 **Services.** Engineer shall perform all of its Services in a proper and adequate manner and in accordance with the Standard of Care. As a material inducement for entering into the Agreement, Owner is relying upon Engineer's particular

TERMS AND CONDITIONS

knowledge, experience, licensure and expertise, which Engineer has affirmatively represented to Owner that it has with respect to rendering the Services. Engineer shall at all times faithfully, industriously and to the best of the ability, experience and talents of Engineer and its employees and representatives, perform the Services required of and from it pursuant to the terms hereof, all to the reasonable satisfaction of Owner. Upon receipt of written notice from Owner that the Services (or Documents) provided by, or through, Engineer do not conform to the requirements of the Agreement, Engineer shall (as part of the scope of the Services) expeditiously perform such corrective services as may be required to bring the Services (including the Documents) into conformance with the Agreement, all at no additional charge to Owner. Owner may reduce the scope of Services, with or without cause, upon written notice to Engineer at any time, without the effect of terminating the Agreement or relieving Engineer of its obligations to perform the Services with respect to the other Services. In the event that Owner reduces the scope of the Services (i) Engineer's Fee shall be reduced accordingly in proportion to the reduced scope of Services, and (ii) Engineer shall immediately deliver to Owner all Documents prepared relating to the scope of Services that has been reduced.

2.3 Additional Services. When approved, in writing, by Owner, Engineer shall provide services that are in addition to the Services provided hereunder. When Owner has approved Engineer's performance of Additional Services, all terms of the Agreement pertaining to the Services shall apply to such Additional Services, or deleted or modified Services, except as expressly provided otherwise by Owner in writing. Engineer shall promptly notify Owner in writing when Engineer deems it necessary or appropriate to perform any Additional Services, and such Additional Services shall be provided by Engineer only if such Additional Services and the cost thereof are authorized in writing by Owner, in its sole and absolute discretion, prior to Engineer commencing such Additional Services. If Engineer proceeds with any Additional Services prior to its receipt of Owner's express written approval of the request for Additional Services, Engineer shall be deemed to have waived any claim for an increase in the amount of compensation to be paid to Engineer pursuant to the Agreement with respect to such Additional Services. Payment for Additional Services shall be computed on either of the following bases (at Owner's election in Owner's sole discretion): (i) a time and expense basis measured by the hourly rates listed in **Exhibit "B"** (without mark-up), plus Reimbursable Expenses; or (ii) a lump sum basis subject to the Parties' prior written agreement. Payments for Engineer's Additional Services and for Reimbursable Expenses shall be made monthly upon presentation of Engineer's statement of Services rendered or expenses incurred, together with any supporting documentation reasonably requested by Owner.

2.4 Independent Contractor. Engineer is and shall perform its Services under the Agreement as an independent contractor, and shall not act as nor be deemed an agent, employee, partner, joint venturer or legal representative of Owner. Engineer has no authority to assume or create any commitment or obligation on behalf of Owner or bind Owner in any respect whatsoever.

2.5 Coordination. Engineer shall, in all aspects of its performance of the Services, coordinate with its Subconsultants, Design Architect, Architect, Owner, Owner's Representative and all other design professionals/consultants that Owner may engage to perform Work or services related to the Project, including Contractor. It is understood that Engineer is not responsible for any errors or omissions contained in the instruments of service prepared by consultants or design professionals contracted directly by Owner. It is also understood, however, that Engineer shall be expected to review all such instruments of service carefully and to notify Owner immediately if Engineer observes, discovers or knows of any discrepancies, errors or omissions in such instruments of service that would render same unsuitable or unreliable for proper use as a basis for the Services and/or Documents to be provided by, and through, Engineer. Engineer shall be responsible for the completeness and accuracy of all Documents submitted by, or through, Engineer and for their compliance with all Governmental Requirements and Approvals.

Article 3 - Owner's Responsibilities

3.1 Information. Owner shall provide to Engineer necessary information regarding requirements for the Project and the Services, (other than Governmental Requirements and Approvals, which are the sole responsibility of Engineer) and Owner's budgets, plans, schedules, constraints, criteria, and objectives for the Project.

3.2 Surveys. Owner shall furnish surveys fully describing physical characteristics, legal limitations, and utility locations for the Project.

3.3 Owner's Engineers. Owner shall furnish the services of other consultants, if required, when such services are reasonably required by the scope of the Project, in Owner's sole discretion, and are not otherwise to be provided as part of the Services.

3.4 Tests. Owner shall furnish structural, mechanical, chemical, air, and water pollution and hazardous materials tests, and other laboratory and environmental tests, inspections, and reports required by Governmental Requirements or Governmental Authorities.

3.5 Owner's Services and Information. Engineer shall be entitled to rely upon the accuracy and completeness of the services, information, surveys, and reports provided by Owner, Contractor, or any of their subcontractors or consultants, except that Engineer shall promptly review and verify such services, information, surveys, and reports and notify Owner of any error, inconsistency, or omission therein discovered by Engineer.

Article 4 - Documents.

4.1 Ownership of Documents. All Documents, including the Schematic Design Documents, the Design Development Documents and the Construction Documents, and all intellectual property rights, copyrights, rights of reproduction and other interests relating to, and in, the Documents, as well as the Documents as physical property, are and shall remain the property

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of Owner (and its affiliates), shall be considered "works made for hire" under 17 U.S.C. § 101, and shall be delivered to Owner, without charge, upon request. Engineer grants, assigns, transfers and forever conveys to Owner (and its affiliates) all rights, title and interests in the Documents, including, without limitation, moral rights. Owner (and its affiliates) shall be entitled to the exclusive use of all the Documents and no use thereof shall be made by Engineer for any purpose other than in connection with the Project. No articles, papers or treatises related to, or in any way associated with the Services performed pursuant to the Agreement shall be submitted for publication without the prior written consent of Owner. In those instances where a public agency or official requires information, Engineer may, with the prior written consent of Owner's Representative, provide such results or information as is necessary to perform the Services pursuant to the Agreement. The results of Engineer's Services under the Agreement, including the Documents, shall be the exclusive property of Owner and Engineer shall not disclose such results to any third party or use the same for the benefit of any third party other than Owner. Any reuse of the Documents by Owner for purposes other than the Project shall be at Owner's sole risk.

4.2 The provisions of this Article 4 shall survive completion of the Services, final payment hereunder or any earlier termination of the Agreement.

Article 5 - Dispute Resolution

5.1 **Litigation.** Any and all claims and disputes arising out of, relating to, or in any way connected with the Agreement, the Project or the Services shall be resolved by litigation in a court of competent jurisdiction. Owner and Engineer expressly consent to, and agree that, the exclusive jurisdiction and venue for any lawsuit arising out of, relating to, or in any way connected with the Agreement, shall be of the State and Federal Courts in and for Miami-Dade County, Florida, and Owner and Engineer waive any objection to such jurisdiction and venue.

5.2 **THE PARTIES HERETO EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THE RIGHT EACH MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THE AGREEMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF EITHER PARTY TO THE AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR OWNER AND ENGINEER TO ENTER INTO THE AGREEMENT.**

5.3 **Prevailing Party Attorneys' Fees and Costs.** The prevailing Party in any lawsuit arising out of, relating to, or connected with, the Agreement, the Services, or the Project, shall be entitled to recover its reasonable attorneys' fees and costs, whether incurred before suit, during suit, during mediation, or at the appellate level. The prevailing Party shall also be entitled to recover all attorneys' fees and costs incurred in litigating entitlement to attorneys' fees and costs, as well as in determining or quantifying the amount of recoverable attorneys' fees and costs.

The reasonable costs to which the prevailing Party is entitled shall include costs that are taxable under any applicable statute, rule or guideline, as well as non-taxable costs, including, but not limited to, costs of investigation, copying costs, electronic discovery costs, telephone charges, mailing and delivery charges, information technology support charges, consultant and expert witness fees, travel expenses, electronic research costs, court reporter fees and mediator fees, regardless of whether such costs are otherwise taxable.

5.4 Engineer shall continue to perform the Services, without interruption or delay, pending the resolution of any dispute, claim or controversy between Owner and Engineer arising out of, relating to, or connected with the Agreement, the Services, or the Project.

5.5 In the event of any legal proceeding between Owner and any third party arising out of or relating to the Project, Engineer agrees that Owner may join Engineer in any such proceedings and that Owner may consolidate any such proceedings with any proceeding between Engineer and Owner under the Agreement. Owner may make persons other than Owner and Engineer parties to any legal proceeding hereunder with respect to any claim, dispute or other matter in question arising out of or relating to the Project.

Article 6 - Termination

6.1 **Termination by Owner.** The Agreement may be terminated by Owner with or without cause upon written notice to Engineer at any time. In the event of termination not the fault of Engineer, Owner shall pay Engineer for the Services properly and fully performed prior to termination, together with Reimbursable Expenses then due.

6.2 **Termination by Engineer for Cause.** Repeated failure of Owner to make payments to Engineer in accordance with the Agreement that are properly due and undisputed shall be considered substantial non-performance and cause for termination upon written notice to Owner that it has failed to pay such amounts, but only if Owner then fails to cure its breach within thirty (30) days after receipt of such written notice. In the event that Engineer properly terminates the Agreement pursuant to this Section 6.2, then Owner shall pay Engineer for the Services properly, fully, and timely performed prior to termination, together with Reimbursable Expenses then due.

6.3 Upon termination for any reason, all Documents prepared by, through, or for, Engineer and/or its Subconsultants pursuant to the Agreement shall be promptly delivered to Owner.

Article 7 - Payments to Engineer

7.1 **Payments to Engineer.** Engineer shall submit invoices monthly to Owner based upon the percent complete of Services performed in the prior month. Engineer shall submit to Owner invoices (together with proper back-up documentation) on a monthly basis for Services rendered and Reimbursable Expenses incurred. Such invoices shall reflect Engineer's estimate of the

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total Services performed to date, less all payments previously made by Owner to Engineer. Subject to the terms herein, Owner shall pay the undisputed portion of Engineer's invoices no later thirty (30) days after Owner's receipt thereof. If Owner objects to Engineer's invoice or any portion thereof, then Owner shall endeavor to notify Engineer of such objection within thirty (30) days after Owner's receipt of such invoice; however, Owner's failure to provide such notice within such time frame shall not result in a waiver of any claims by Owner or Owner's right to object to Engineer's invoice. Owner may withhold the amount of such invoice in dispute and Owner shall pay the undisputed portion of such invoice as set forth herein. Undisputed payments due which are not timely paid by Owner shall bear interest in accordance with Paragraph 10.14 hereof, provided that Owner's refusal to pay disputed amounts of Engineer's invoices shall not constitute a payment default and, as a result, such disputed amounts shall not accrue interest unless or until the day that such dispute is resolved in favor of Engineer. Engineer may not suspend the performance of its Services on account of amounts of its invoices that Owner disputes and withholds payment and Engineer shall continue to perform its Services pending the resolution of any such payment dispute between Owner and Engineer. Engineer shall also provide with each invoice the back-up information in support of the invoice that is reasonably requested by Owner, including, without limitation, the weekly time sheets of Engineer's personnel which have been previously approved in writing by Owner on a weekly basis. As a condition precedent to Owner's obligation to make progress payments, it is expressly agreed that Engineer shall furnish to Owner the following: (a) a conditional waiver and release of claims from Engineer and each of its Subconsultants that have performed any of the Services described in the invoices submitted in support of such progress payment in the total amount of the payment being requested, conditioned only on the receipt of payment of such amount; (b) for Engineer and each Subconsultant who performed Services which were described in the invoices previously paid for by Owner, an executed Waiver and Release of Lien Upon Progress Payment in the form prescribed in Section 713.20, Florida Statutes, for all Services performed which were included in the invoices previously paid for by Owner; and (c) releases of liens, if any claims of liens have been recorded. As a condition precedent to Owner's obligation to make final payment to Engineer for all Services properly performed under the Agreement, it is expressly agreed that Engineer shall furnish to Owner, for Engineer, and for each of its Subconsultants who furnished Services: (i) conditional waivers and releases upon final payment and within ten (10) days after receipt of payment, Engineer shall deliver an executed Unconditional Waiver and Release of Lien Upon Final Payment in the form prescribed in Section 713.20, Florida Statutes, and (ii) final satisfactions of all liens and claims arising out of the Agreement.

7.2 Reimbursable Expenses. Reimbursable Expenses are in addition to Engineer's Fee for Services and include actual, reasonable out-of-pocket expenses incurred by Engineer and Engineer's consultants in the interest of the Project, including, but not limited to the following:

- (a) Data communications, telecommunications, reproduction, shipping, handling, and delivery;

- (b) Mileage, tolls, cab fares, and parking;
- (c) Renderings, models, computer modeling mock-ups, and photography;
- (d) Sales tax and other transactional taxes, and fees paid for securing approval of Governmental Authorities;
- (e) Authorized out-of-town travel, including travel time, out-of-town living expenses, and long-distance communications; and,
- (f) Additional insurance coverage or limits requested by Owner in excess of that normally provided by Engineer and Engineer's Subconsultants.

Article 8 - Insurance

8.1 Types and Limits of Insurance. Engineer shall purchase and maintain the following types and minimum amounts of insurance:

1 Workers' Compensation/Employers Liability Insurance. Workers' compensation insurance that complies with all applicable statutory requirements. Employers liability insurance that has a limit of not less than One Million and 00/100 Dollars (\$1,000,000.00) and includes a Waiver of Right to Recover From Others endorsement (NCCI form WC 000313) naming the Indemnitees;

2 Commercial General Liability Insurance. Commercial general liability insurance on a per occurrence basis, covering all operations of Engineer as named insured, including (i) independent contractor coverage, (ii) products/completed operations liability coverage (which shall be maintained for two (2) years following completion of the Services), (iii) broad form property damage liability coverage, (iv) broad form contractual liability coverage that insures Engineer's liabilities assumed under the Agreement, including the indemnification obligations under Section 9.1, (v) advertising injury coverage, and (v) bodily injury, personal injury (with employee and contractual exclusions deleted), property damage and death coverage, with limits of not less than One Million and 00/100 Dollars (\$1,000,000.00) per occurrence and Two Million and 00/100 Dollars (\$2,000,000.00) in the general aggregate;

3 Automobile Liability Insurance. Automobile liability insurance with limits of liability of not less than One Million and 00/100 Dollars (\$1,000,000.00) combined single limit for bodily injury and property damage coverage. Such coverage shall include all automobiles owned, leased, hired or non-owned. In addition, Engineer's automobile liability insurance policy shall include coverage for automobile contractual liability;

4 Professional Liability Insurance. Professional liability insurance (or errors and omissions insurance) that provides coverage for (i) claims arising out of the Services provided by Engineer, (ii) errors and omissions the Documents prepared by or through Engineer, and (iii) the indemnity in Section

TERMS AND CONDITIONS

9.1. The professional liability insurance shall have a limit of not less than Two Million and 00/100 Dollars (\$2,000,000.00) each claim and Four Million and 00/100 Dollars (\$4,000,000.00) in the annual aggregate, with a maximum One Hundred Thousand and 00/100 Dollars (\$100,000.00) self-insured retention or deductible per claim; and

.5 **Umbrella Liability Insurance.** Umbrella (excess) liability insurance on a per occurrence basis with a limit of liability of not less than Five Million and 00/100 Dollars (\$5,000,000.00) per occurrence and Five Million and 00/100 Dollars (\$5,000,000.00) in the annual aggregate excess of primary insurance, and a maximum Ten Thousand and 00/100 Dollars (\$10,000.00) self-insured retention or deductible per occurrence. This policy shall apply on a "following form" basis to the underlying insurance policies.

8.2 **Terms, Conditions and Endorsements.** All of the insurance in Section 8.1 shall be subject to the following terms, conditions and endorsements:

.1 **Insurer.** The insurance shall be purchased from a company with an "A-IX" or better rating from A.M. Best Company which is both lawfully able to provide insurance in the jurisdiction in which the Project is located and acceptable to Owner.

.2 **Additional Insureds Endorsements.** All insurance, except the workers compensation and professional liability insurance, shall include the Indemnitees as additional insureds thereunder, on a primary and non-contributory basis, pursuant to ISO Form CG 20 10 (11/85) or equivalent endorsement(s). Subsequent editions of these ISO Forms are not acceptable. The coverage provided to the additional insureds must be as broad as that provided to Engineer and shall not contain any additional exclusionary language or limitations applicable to such additional insureds. These endorsements shall apply without regard to other provisions of the Agreement.

.3 **Primary Insurance.** Engineer's commercial general liability insurance, the automobile liability insurance, and the umbrella liability insurance shall apply as primary insurance, without any right of contribution by any other insurance that may be carried by Indemnitees regarding the Services under the Agreement. Any general liability, automobile liability or umbrella liability insurance purchased by the Indemnitees is, or has been, specifically purchased as excess over any general liability, automobile liability or umbrella liability purchased by Engineer.

.4 **Contractual Liability Insurance.** ISO or other endorsements that restrict or modify the extent of the standard contractual liability coverage afforded by the commercial general liability and automobile liability insurance policies are not acceptable.

.5 **Severability of Interest.** The insurance shall include a severability of interest clause for all named insureds and additional insureds.

.6 **Duration.** Coverage shall be maintained, without interruption, from the date of commencement of Engineer's Services under the Agreement until the date of the final payment, except that the professional liability insurance and umbrella policies shall continue for seven (7) years after Engineer's completion of its Services hereunder. The insurance obligations shall survive the expiration or termination of the Agreement.

.7 **Notice of Cancellation, Etc.** The insurance policies, certificates of insurance, and any renewals shall contain a provision that the insurer or Engineer shall give Owner at least thirty (30) days' prior written notice of any cancellation, termination, material modification or non-renewal of the insurance by registered or certified mail, return receipt requested. In the certificate of insurance, any "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives" wording in the cancellation notification portion shall be deleted.

.8 **Defense.** The insurance obtained by Engineer, except for professional liability and workers compensation insurance, shall provide that the insurer shall defend any suit against the additional insureds, even if such suit is allegedly or actually frivolous or fraudulent. Defense costs shall apply in excess of any per occurrence limit of liability and shall not reduce any aggregate limits of liability applying under the policies.

.9 **Delivery of Certificates and Policies.** Original certificates of insurance and all endorsements, in a form acceptable to Owner, should be submitted to Owner by the time the Agreement is executed by Engineer, and in no event later than commencement of the Services. Engineer's certificate of insurance shall be endorsed as follows: "The Indemnitees (as defined in the subject contract) are named as additional insureds for all insurance except the workers compensation and the professional liability insurance. A waiver of subrogation in favor of the Indemnitees is included for all insurance. This insurance is primary to and non-contributing with any and all insurance of the Indemnitees." The Certificate Holder box shall identify the name and address of Owner. With respect to insurance coverage required to remain in force after final payment, Engineer shall annually submit certificates of insurance evidencing continuation of such coverage. Engineer shall submit copies of the policies within seven (7) days following a request from Owner. Engineer shall provide its insurance carriers with a copy of the Agreement.

.10 **Non-Waiver.** PERMITTING ENGINEER TO COMMENCE THE SERVICES OR RELEASING ANY PAYMENT PRIOR TO COMPLIANCE WITH THESE REQUIREMENTS SHALL NOT CONSTITUTE A WAIVER THEREOF.

.11 **Deductibles, Premiums and Self-Insured Retentions.** Engineer shall be solely responsible to pay or otherwise satisfy all premiums, deductibles and self-insured retentions applicable to the insurance policies that Engineer is required to procure and maintain pursuant to the Agreement.

TERMS AND CONDITIONS

9.3 Waiver of Subrogation. Engineer waives all rights of recovery against the Indemnitees for any losses covered by insurance. Engineer agrees to defend and indemnify the Indemnitees from all such subrogation claims.

Article 9 - Indemnity See next Page

9.1 Engineer's Indemnity. To the fullest extent permitted by law and at Engineer's sole cost and expense, Engineer and Engineer's successors and assigns, shall defend, indemnify, protect, hold the Indemnitees harmless from and against any and all claims, demands, damages, losses, lawsuits and other proceedings, judgments, causes of action, liabilities, claims of lien, liens, civil or criminal penalties and charges, costs and expenses (including, without limitation, claims for property damage or bodily injury, including death and reasonable attorneys' and expert witnesses' and consultants' fees and costs whether incurred before suit, during suit, during mediation, or at the appellate level) (collectively "Losses" and each individually, a "Loss") to the proportionate extent caused by any of the following: (i) Engineer's breach of the Agreement; (ii) any infringement of any patent, trademark or copyright or the violation of any trade secret or other proprietary right that arises in connection with the Services; (iii) any act, omission or error of Engineer, its Subconsultants, partners, members, managers, agents, officers, directors, representatives, employees and anyone for whose acts or omissions Engineer may be liable, including, without limitation, any failure to pay and sums due from them in connection with the Project; (iv) any claims made by a Subconsultant or any person working for or through Engineer, seeking money or compensation for services or work performed for the Project, including any liens filed by any such persons on or in connection with the Project; (v) any negligence, gross negligence, intentional misconduct, recklessness, fraud, bad faith or misconduct of Engineer, its Subconsultants, partners, members, managers, agents, officers, directors, representatives, employees and anyone for whose gross negligence or intentional misconduct Engineer may be liable or any of their agents or employees or other persons working for or through any of them; and/or (vi) any injury to the personnel, or damage to property of Engineer or any Subconsultant. Should any Loss be caused in part, but not in whole, by an Indemnitee's acts or omissions, then Engineer's obligations under this Section 9.1 shall be limited to that portion of the Loss that is not caused by such Indemnitee's acts or omissions. Engineer shall, upon receipt of notice of any Loss, promptly take such action necessary to make a claim under any applicable insurance policy or policies Engineer is carrying and maintaining; however, if Engineer fails to take such action as is necessary to make a claim under any such insurance policy, Engineer shall indemnify and hold Indemnitees harmless from any and all costs, damages, charges, expenses and liabilities, including without limitation, attorneys' fees, incurred by any and all Indemnitees in making any claim on behalf of Engineer under any insurance policy or policies required pursuant to this Article 9.

9.2 In light of the foregoing, all of Engineer's agreements to indemnify others pursuant to the terms of the Agreement shall be deemed limited and modified to the extent necessary for such indemnities to constitute enforceable indemnities under Section 725.06, Florida Statutes. With regard thereto, Engineer and Owner have not included a monetary limitation regarding the

indemnification obligations of Engineer because the Parties have interpreted Section 725.06, Florida Statutes, to require that limitation only (i) when Engineer agrees to assume the obligation to indemnify the Indemnitees fully, whether caused in whole or in part by any act, omission, or default of an Indemnitee arising from the Agreement or its performance, rather than (ii) when Engineer agrees (as with the Agreement) to assume the obligation to indemnify the Indemnitees as set forth in Section 9.1 hereof. For this reason, it is also understood and agreed that this indemnification obligation complies with the terms of Section 725.06, Florida Statutes, which prevent Engineer from indemnifying the Indemnitees to the extent that any such claims, damages, losses or expenses result (i) from gross negligence, or willful, wanton or intentional misconduct of the Indemnitees or (ii) for statutory violations or punitive damages, except and to the extent the statutory violations or punitive damages are caused by or result from the acts or omissions of Engineer, or any of its Subconsultants or agents of any tier, or their respective employees. As such, the Parties agree that neither shall challenge Engineer's indemnification obligations on the basis that the terms of Section 725.06, Florida Statutes, have not been satisfied.

9.3 The obligations described in this Article 9 shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person indemnified pursuant to this Article 9.

9.4 In any and all claims against one or more Indemnitees by any employee of Engineer, anyone directly or indirectly employed by Engineer, or anyone for whose acts Engineer may be liable, the indemnification obligation under this Article 9 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Engineer under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

9.5 Except to the extent that injuries to persons or damage to property are caused by the Indemnitees: (a) Engineer hereby assumes the risk of any and all injury and damage to the personnel and property of Engineer (or its Subconsultants) in or about the Project; and (b) the Indemnitees are hereby released from any liability for injury or damage which may be sustained by the person, goods or property of Engineer, or its employees and Subconsultants in or about the Project, whether said damage or injury results from conditions arising within the Project or from other sources.

9.6 All of Engineer's obligations under this Article 9 shall survive final payment to Engineer, completion of the Services, or any earlier termination of the Agreement.

Article 10 - Miscellaneous

10.1 Governing Law. The Agreement shall be governed by the laws of the State of Florida without regard to conflicts of laws principals.

10.2 Anti-Bribery and Anti-Corruption Commitment. Engineer acknowledges its responsibility and commitment to abide by and comply with international anti-corruption laws, including

9.1 To the fullest extent permitted by law, Consultant shall indemnify Owner, its officers, directors, partner, employees, and representatives, from and against losses, damages, and judgments arising from claims, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are found to be caused by a negligent act, error, or omission of Consultant or Consultant's officers, directors, members, partners, agents, employees, or sub consultants in the performance of services under this Agreement. In no event shall the indemnification obligation extend beyond the date when the institution of legal or equitable proceedings for professional negligence would be barred by any applicable statute of repose or limitations.

TERMS AND CONDITIONS

but not limited to the United State Foreign Corrupt Practices Act, and any amendments and regulations relating to such laws, in addition to their own ethical guidelines. Specifically, for example, no Engineer employee, or any individual or entity acting on behalf of or for the benefit of Engineer, shall give anything of value, or that may be perceived as valuable, to a foreign official or any other individual for the purpose of influencing any act, securing any improper advantage, or obtaining/retaining business. Further, no Engineer employee may receive or accept anything of value, or that may be perceived as valuable, from any other individual for the purpose of influencing any act, securing an improper advantage, or obtaining/retaining business. Owner may terminate the Agreement at any state of the Project, if it has a good faith basis to believe that Engineer failed to comply with the provisions of this Section 10.2, including any non-compliance prior to the Effective Date of the Agreement. Engineer shall indemnify Indemnitees from and against any and all liabilities, losses, damages, costs, and expenses (including reasonable attorneys' fees and costs of defense), together with interest thereon, arising out of or resulting from such non-compliance, without any limitation regarding the amount of such liability.

10.3 Asbestos and Hazardous Waste. Engineer shall have no responsibility for the discovery, presence, handling, containment, removal disposal, remediation, corrective action or other response to, or for exposure of persons to, any asbestos or hazardous waste which exists in any form at the Project as of the Effective Date of the Agreement. The foregoing shall not apply to any such hazardous waste introduced to the Project, or exacerbated, by Engineer or anyone acting by, through or under Engineer, including its Subconsultants, and, notwithstanding anything to the contrary in the Agreement, Contractor shall have full responsibility therefor and shall indemnify and hold Owner harmless from any liability or loss caused thereby.

10.4 Waiver of Consequential Damages. Engineer hereby waives claims against Owner for consequential, incidental, special and indirect damages arising out of, or relating to, the Project and the Services, including consequential, incidental, special and incidental damages proximately caused by either party's termination of the Agreement.

10.5 Successors and Assigns. Engineer binds itself, its partners, successors, assigns and legal representatives to Owner, any lender of Owner for the Project, and to partners, successors, assigns, and legal representatives of Owner in respect to the obligations contained in the Agreement. Nothing contained in the Agreement creates a contractual relationship with or a cause of action in favor of a third party against either Owner or Engineer. Engineer shall not assign or delegate any rights or obligations under the Agreement, or permit any change in the persons in effective control of Engineer's business or subcontract the performance of any portion of the Services required hereunder except as otherwise may be agreed in writing by Owner in its sole discretion. Any attempt to so assign or transfer the Agreement or any rights or obligations hereunder without such consent shall be null and void and of no force and effect. A change in Engineer's ownership (i.e., the ownership of one or more partners', or members' or shareholders' interests in Engineer) shall not constitute an assignment for purposes of this provision provided

that said change does not constitute a substantial change in the ownership structure of Engineer. Engineer acknowledges and agrees that Owner may assign its rights and obligations under the Agreement to any of its affiliates and to any person or entity which has an interest in the Project, to any lender for the Project, to any successor to Owner's interests in the Project or to any entity capable of performing Owner's obligations hereunder and, upon such assignment and the assumption of such rights and obligations by the assignee, Owner shall be relieved of all liability hereunder.

10.6 No Third-Party Beneficiaries. Owner is the sole beneficiary of the Services performed by Engineer. No third party may be deemed a third-party beneficiary of the Agreement.

10.7 Nondisclosure. Unless compelled by law, a Governmental Authority, an order of a court of competent jurisdiction, or a validly issued subpoena, Engineer agrees to refrain from disclosing any Project information, obtained from Owner and not readily available in the public domain, to any person without Owner's prior written authorization, which authorization may be withheld by Owner in its sole discretion. In the event of a legal compulsion or other order seeking disclosure of any non-public Project information, Engineer shall promptly notify Owner to permit Owner's timely legal objection, if necessary. Owner considers all information pertaining to the Work, the Services and the Project to be confidential and proprietary unless otherwise stated to Engineer in writing. Engineer shall refrain from disclosing such information without Owner's prior written consent, including information prepared or developed by or through Design Architect, Architect, Contractor, Owner, or other contractors or consultants.

10.8 Chapter 558, Florida Statutes. PURSUANT TO FLORIDA STATUTES SECTION 558.005(1) AND 558.005(6), OWNER AND ENGINEER HEREBY AGREE TO OPT OUT OF THE REQUIREMENTS OF CHAPTER 558, FLORIDA STATUTES, AND THEREFORE SAID SECTION DOES NOT APPLY TO ANY CLAIMS BETWEEN OWNER AND ENGINEER ARISING OUT OF OR RELATED TO THE AGREEMENT, THE SERVICES OR THE PROJECT.

10.9 PURSUANT TO SECTION 558.0035, FLORIDA STATUTES, AN INDIVIDUAL EMPLOYEE OR AGENT OF ENGINEER MAY NOT BE HELD INDIVIDUALLY LIABLE FOR NEGLIGENCE.

10.10 Survival of Obligations. All indemnities, representations, warranties and waivers made by Engineer in favor of Owner, its agents, employees, successors or assigns, shall survive final payment hereunder, completion of the Services, or any earlier termination of the Agreement.

TERMS AND CONDITIONS

10.11 Limited Partners and Members Not Liable. Engineer's recourse against Owner under the Agreement shall be limited to Owner's interest in the Project, and Owner's assets. Engineer shall have no other recourse to any assets of Owner's Representative whatsoever, or to any assets of any partner, member, director, officer, affiliate, manager, employee or other representative of Owner for the satisfaction of Owner's obligations hereunder.

10.12 Financing. If, in connection with the financing of the Project, the lender or title insurer requires subordination of any construction or other lien rights of Engineer in connection with the Project, Engineer agrees to execute and deliver to such lender or title insurer a subordination agreement in form and with substance reasonably required by the lender or title insurer. Furthermore, Engineer agrees to comply with any and all other customary or reasonable requirements of lenders and title insurers for the Project, including but not limited to any requirements that may be imposed as a condition to payments due under the Agreement and any requirements requiring modifications to the Agreement. Engineer agrees that notwithstanding a default by Owner under the Agreement which would give Engineer the right to terminate the Agreement, Engineer will continue to perform the Services (on the same terms and conditions set forth in the Agreement) for and on account of the lender financing the Project if the lender assumes the payment obligations of Owner arising after the lender receives written notice of such default from Engineer.

10.13 Confidentiality. Engineer, for itself and its employees, personnel and subconsultants, acknowledges, confirms and agrees that all information pertaining to the Project that Engineer learns prior to or during the course of performance of its Services, all data furnished by Owner, the name, trademarks, or logotypes now or hereafter used by the Project or Owner (or any variation thereof), the Documents, all documents prepared by, or through, Engineer, including plans, drawings, designs, specifications, and other data and information pertaining to the Project, are confidential and proprietary to Owner (collectively, "**Confidential Information**") and shall remain of a confidential nature. Except as is necessary for Engineer to perform its Services hereunder, Engineer shall not utilize or permit the utilization of any Confidential Information (including the design or the concepts utilized for the Project) at any time for any reason whatsoever, including advertising, without, in each such instance, the express, advance written consent of Owner. Engineer shall be responsible for the breach of this confidentiality by its employees, subconsultants, personnel, and agents. Any publicity or press releases with respect to the Project shall be under the sole discretion and control of Owner. Unless compelled by law, a Governmental Authority, an order of a court of competent jurisdiction, or a validly issued subpoena, Engineer agrees to refrain from disclosing any Confidential Information, to any person without Owner's prior written authorization, which authorization may be withheld by Owner in its sole discretion. In the event of a legal compulsion or other order seeking disclosure of any Confidential Information, Engineer shall promptly notify Owner to permit Owner's timely legal objection.

10.14 Interest. Payments due and unpaid under the Agreement shall bear interest thirty (30) days from the date payment was due at the lower of the Prime Rate as listed in the *Wall Street Journal*

(or its successor) or the maximum legal rate prevailing from time to time in the state where the Project is located.

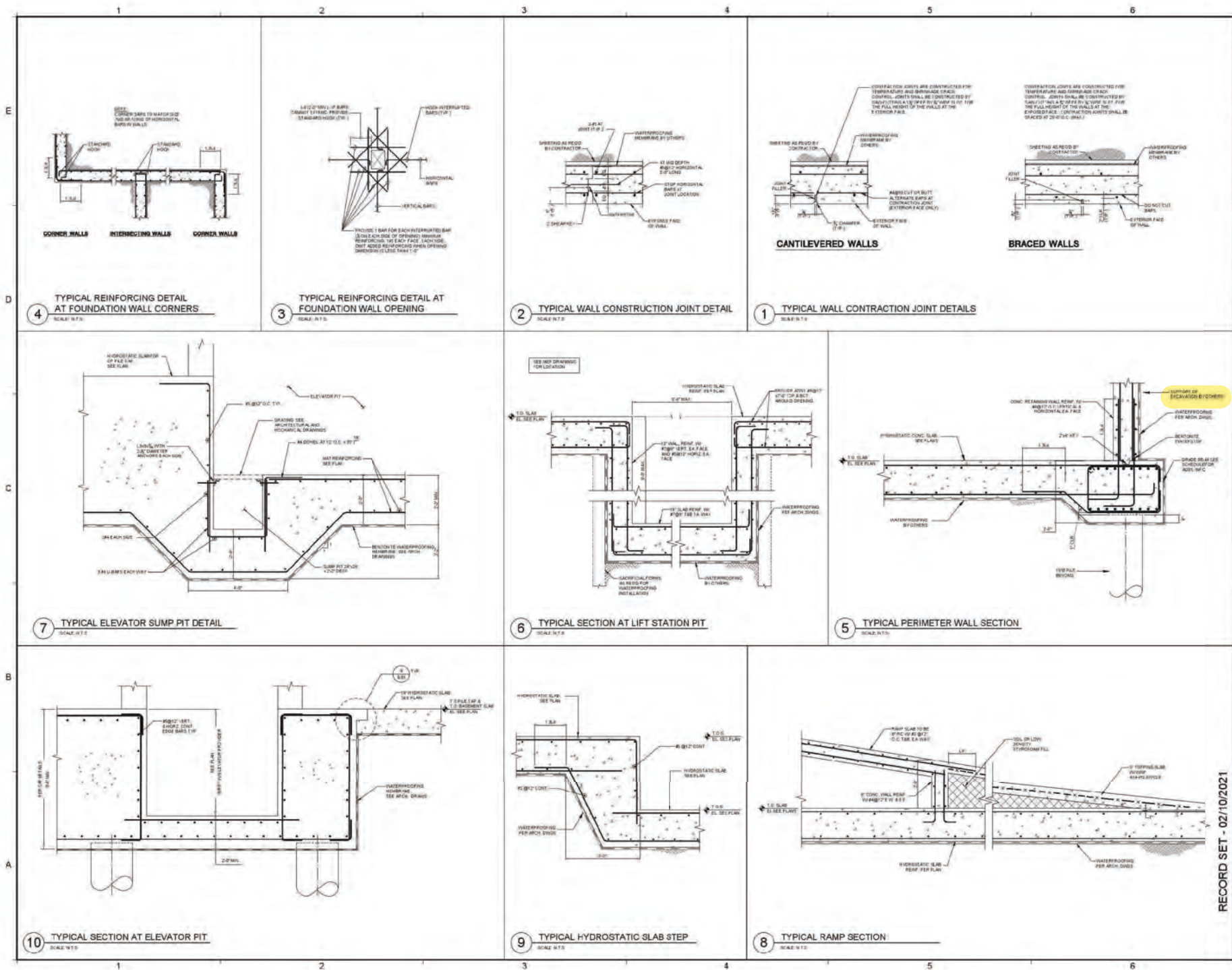
10.15 Non-Waiver. The failure of Owner, at any time, to require performance of any provision or to resort to any remedy provided under the Agreement shall in no way affect the right of Owner to require performance or to resort to a remedy at any time thereafter, nor shall Owner's express waiver of a breach be deemed to be a waiver of any subsequent breach. Neither course of dealing, nor the failure to exercise, or the delay in exercising, any right, power or privilege hereunder, shall operate as a waiver thereof. A waiver shall not be effective unless it is in writing and signed by the party against whom the waiver is being enforced.

10.16 Construction of Agreement. Both Parties have participated freely in the negotiation and drafting of the Agreement and the Agreement shall not be more strictly construed against either Party hereto.

10.17 Invalid or Inconsistent Provisions. In the event that any of the provisions of the Agreement, or any part thereof, is rendered invalid or unenforceable by Governmental Requirements, or by judicial decision, then such provision, or any part thereof, shall continue in effect only to the extent permitted. However, the invalidity or unenforceability of any provision, or any part thereof, of the Agreement shall not affect the enforceability of the remaining provisions of the Agreement. To the extent that any of the Articles or Sections herein contain provisions relating or pertaining to the same subject matter, the obligations, covenants and/or conditions set forth therein shall be cumulative and, where applicable, concurrent. Further, to the extent that any such provisions may be interpreted to be conflicting and/or mutually exclusive, it is the intent of the Parties hereto that the obligations, conditions or covenants, as applicable, which provide the greatest protection or benefit to the Party for whose benefit such protection is intended, shall apply.

TERMS AND CONDITIONS

EXHIBIT B



REVISIONS / SUBMISSIONS		
NO.	DATE	DESCRIPTION
1	11/11/2021	ISSUED FOR PERMIT
2	11/11/2021	ISSUED FOR PERMIT
3	11/11/2021	ISSUED FOR PERMIT
4	11/11/2021	ISSUED FOR PERMIT
5	11/11/2021	ISSUED FOR PERMIT
6	11/11/2021	ISSUED FOR PERMIT
7	11/11/2021	ISSUED FOR PERMIT
8	11/11/2021	ISSUED FOR PERMIT
9	11/11/2021	ISSUED FOR PERMIT
10	11/11/2021	ISSUED FOR PERMIT

14369.00

8701 COLLINS AVE
8TH FLOOR
MIAMI BEACH, FL 33154

FOUNDATION SECTIONS
AND DETAILS

RENZO PIANO BUILDING WORKSHOP

ROA

WEST 8 URBAN DESIGN
& LANDSCAPE
ARCHITECTURE P.C.

DESMONE CONSULTING
ENGINEERS

STEVEN FELLER
P.E., P.L.

YSN ENGINEERING,
INC.

8701 COLLINS
DEVELOPMENT
8701 COLLINS AVE
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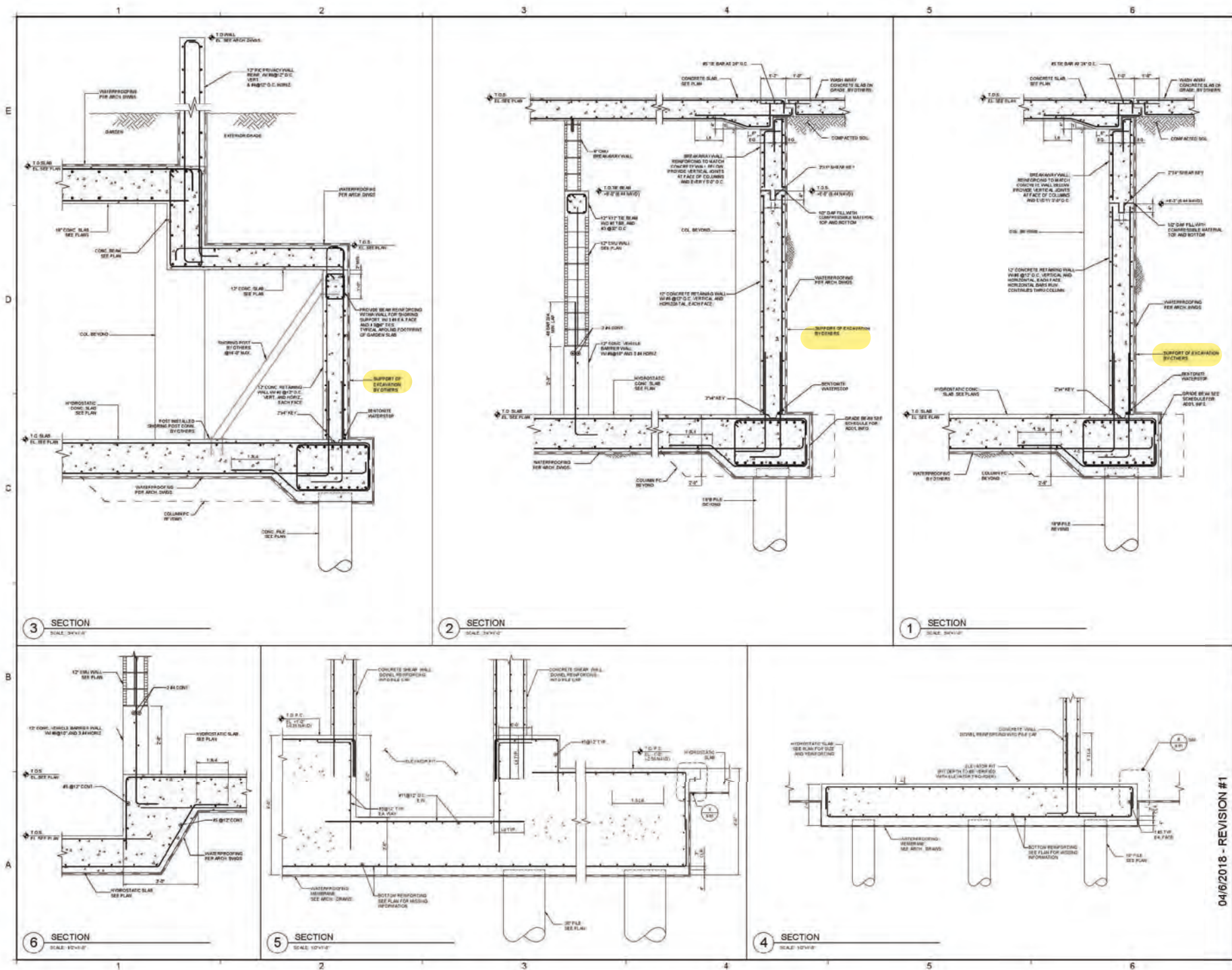


DRAWN BY: WJC
CHECKED BY: YJS
DATE: 12/14/21

S-102

RECORD SET - 02/10/2021

DS-0044149



REVISIONS / SUBMITTALS
NO. 1
DATE 04/06/2018
BY [Signature]
DESCRIPTION
1. FOUNDATION SECTIONS AND DETAILS
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20. FOUNDATION SECTIONS AND DETAILS

14369.00

8701 COLLINS AVE
8701 COLLINS AVE
MIAMI BEACH, FL 33154

RENCO PIANO
BUILDING WORKSHOP

RDAI

WEST 8 URBAN DESIGN
& LANDSCAPE
ARCHITECTURE P.C.

DESMONE CONSULTING
ENGINEERS

STEVEN FELLER
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VSN ENGINEERING,
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DEVELOPMENT
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DESIGNED BY: [Signature]
CHECKED BY: [Signature]
DATE: 04/06/18

S-106

04/06/2018 - REVISION #1

DS-0044153

