

Subject: Fwd: Killian Construction Litigation

From: Heather Cole <heather.cole@como.gov>

To: Andrew Beverley <andrew.beverley@columbiabancshares.com>, Andy Waters <awaters36@gmail.com>, Christine King <chking@cpsk12.org>, "Ernie Wren, III" <erniewren@gmail.com>, "Grimm, Mark (G&B)" <MGRIMM@gilmorebell.com>, Heather Cole <Heather.Cole@como.gov>, Helen Wade <hwade@cpsk12.org>, Jeremy Root <Jar281@nyu.edu>, "John G. Clark" <jgclark@mchsi.com>, June Pitchford <jpitchford@boonecountymo.org>, Ken Pearson <Kmpearson11@gmail.com>, Lynn Cannon <LMCANNON@gocolumbiamo.com>, Maria Oropallo <maria.oropallo@gmail.com>, Martin Ghafoori <ghafoorim@stifel.com>, Melissa Carr <mcarr@dbrl.org>, Michael Kelly <michael.kelly@lssliving.org>, Nancy Thompson <Nancy.Thompson@como.gov>, "Tony St. Romaine" <Tony.St.Romaine@como.gov>

Time: Friday, October 20, 2017 8:01:09 AM GMT-06:00

Good morning,

Please see the question below from TIF member Andrew Beverley and the response from Nancy Thompson, City Counselor.

Thanks,

Heather Cole

Assistant to the City Manager
Vision Zero Program Manager
City of Columbia
701 E. Broadway - 2nd Floor
Columbia, MO 65201
Phone: [573.874.6338](tel:573.874.6338)
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----- Forwarded message -----

From: **Nancy Thompson** <nancy.thompson@como.gov>

Date: Thu, Oct 19, 2017 at 4:53 PM

Subject: Killian Construction Litigation

To: Heather Cole <Heather.Cole@como.gov>

The law department may not discuss ongoing litigation related to the Short Street Garage construction. What I may disclose is that although both projects utilized the same general contractor (Killian Construction) the litigation in which the city is involved on construction of the garage project is not related to the litigation in which Broadway Lodging LLC is involved on construction of the hotel project. Broadway Lodging LLC is not a party in the garage litigation nor is the city a party to the hotel litigation.

Attached are some of the initial pleadings in both of the cases to provide some background on the various allegations giving rise to the litigation. The attached is not intended to be a status update or representation of the current claims or outstanding issues being litigated as numerous amended pleadings, motions and responses have been filed in each of the separate cases since inception.

Hope that provides some background.

Nancy Thompson

City Counselor

City of Columbia Law Department

701 East Broadway

PO Box 6015

Columbia, Missouri 65205

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nancy.thompson@como.gov

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From: **Andrew Beverley** <andrew.beverley@columbiabancshares.com>

Date: Thu, Oct 19, 2017 at 11:39 AM

Subject: RE: Boards & Commissions Handbook

To: Heather Cole <heather.cole@como.gov>

Heather,

It was mentioned during the hearing that the City of Columbia is in litigation with its general contractor for the Short Street Garage. Would it be possible for the City to provide a brief description of this litigation to the TIF Commission? If the litigation is ongoing, I recognize that only limited information should be shared, but a summary of the publicly-available information regarding the City's claims would be helpful. Is this possible?

Andrew

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

KILLIAN CONSTRUCTION CO., INC.,)
 a Missouri corporation,)
)
 Plaintiff,)
)
 v.)
)
 CITY OF COLUMBIA,)
 Serve: City Clerk or City Attorney)
 701 E. Broadway)
 Columbia, MO 65205)
)
 WALKER PARKING CONSULTANTS/)
 ENGINEERS, INC.,)
 Serve: National Corporate Research, Ltd.)
 222 E. Dunklin, Suite 102)
 Jefferson City, MO 65101)
 and)
)
 CENTRAL CONCRETE COMPANY,)
 Serve at: 221 Bolivar St., Suite 400)
 Jefferson City, MO 65101)
)
 Defendants.)

Case No.:

PETITION

Killian Construction Co., Inc. (“Killian”) states the following for its Petition against the City of Columbia (the “City” or “Owner”), Walker Parking Consultants/Engineers, Inc. (the “Engineer”), and Central Concrete Company (the “Concrete Company”):

PARTIES, JURISDICTION AND VENUE

1. Killian is a Missouri corporation in good standing with a principal place of business in Springfield, Missouri.
2. The City is a municipality organized and existing under the laws of the State of Missouri.

3. The Engineer is a foreign corporation doing business in Missouri whose registered agent, National Corporate Research, Ltd., may be served at 222 E. Dunklin, Suite 102, Jefferson City, MO 65101.

4. The Concrete Company is a Missouri corporation with its principal place of business at 221 Bolivar St., Suite 400, Jefferson City, MO 65101.

5. The Circuit Court of Boone County, Missouri has jurisdiction over the subject matter and the parties to this action because, among other things, Killian's claims involve a construction project and real property in Boone County, Missouri and the damages first occurred in Boone County, Missouri.

6. Venue is proper in Boone County, Missouri under Mo. Rev. Stat. § 508.050.

GENERAL ALLEGATIONS

7. This action concerns the construction of a parking garage in Boone County, Missouri located at the corner of Short Street and Walnut Street, Columbia, MO 65201 (the "Short Street Parking Garage").

8. At times relevant to this action, the City was the fee simple owner of the real property on which the Short Street Parking Garage was constructed.

9. Killian, as general contractor, entered into a contract (the "Contract") with the City for the construction of the Short Street Parking Garage on the City's property (the "Project").

10. A true and accurate copy of the Contract between Killian and the City is attached as **Exhibit 1**.

11. Killian performed or substantially performed all of the work required under its Contract with the City.

12. A Certificate of Substantial Completion for the Project was issued and accepted by the City on November 27, 2013.

13. The Project is fully complete and the City is fully operating the Short Street Parking Garage.

14. During construction of the Project, twenty-five (25) Change Orders were agreed to between Killian and the City.

15. The agreed upon Change Orders increased the Guaranteed Maximum Price of the contract to \$9,713,477.10.

16. In addition to the Change Orders, the City executed a Construction Change Directive on or about October 23, 2012.

17. A true and accurate copy of the Construction Change Directive is attached hereto as **Exhibit 2**.

18. The Construction Change Directive directed Killian to make changes to the Contract scope of work as follows:

Due to conflicts with existing utility conduits and originally proposed banked excavation, provide revised temporary excavation bracing, sheeting and shoring for construction of the foundations along Grid C.

19. Pursuant to the Contract and Construction Change Directive, Killian was to track all costs to complete the work and the price for the additional work required by the Construction Change Directive would be reviewed and negotiated upon completion of the work.

20. The total costs for completion of the work the City directed Killian to perform in the Construction Change Directive was \$102,272.00.

21. To date Killian has been paid \$9,115,214.76 by the City on the Project.

22. Despite request and demand, the City has failed and refused to pay Killian the remaining amount owed on the Contract in the total amount of \$598,262.34.

23. Further, despite request and demand, the City has failed and refused to pay Killian the \$102,272.00 in total cost Killian incurred to complete the work in the City's Construction Change Direction, or any part thereof.

24. Also during construction of the Project, Killian suffered several concrete failures, blowouts, and significant delays as a direct result of using the concrete mix design specified and approved by the City, the Engineer, and the Concrete Company.

25. The Contract between Killian and the City specified a concrete that is not commonly used in the area where the Project is located.

26. Upon information and belief, the Engineer established the concrete specifications for the Project, including the concrete specifications for the post-tension concrete.

27. Upon information and belief, the Engineer also established the design specification that required tensioning of the post-tension concrete within 96 hours.

28. As indicated by the Engineer's name, "Walker Parking," the Engineer specializes in parking systems, including parking facilities like the Project at issue in this case.

29. Upon information and belief, while the Contract's concrete specifications were not commonly used in the area, the Engineer commonly uses the concrete specifications at issue in its projects nationwide.

30. The Engineer is very familiar and has significant experience and expertise with the Contract's concrete specifications and the concrete mix designs that satisfy the Contract's concrete specifications.

31. The Engineer is very familiar and has significant experience and expertise regarding which concrete mix designs satisfy the Contract's design specifications and are adequate to perform the mix's intended function under the design specifications.

32. Upon information and belief, the Engineer requires use of the uncommon concrete specifications because the Engineer is concerned with alkali-silica reaction ("ASR"), which can cause expansion and cracking in concrete.

33. The Contract's design specifications, including Division 3 Section "Unbonded Post-Tension Concrete," requires tensioning of the post-tension concrete to occur within 96 hours of pouring the concrete.

34. Upon information and belief, the Engineer established the design specification under Division 3 Section "Unbonded Post-Tension Concrete" requiring tensioning within 96 hours of pouring the concrete.

35. At all times relevant hereto, the Engineer was aware that the Project's design specifications required tensioning within 96 hours and the Engineer reasserted the requirement that tensioning occur within 96 hours to Killian and the other attendees of the August 28, 2012 pre-concrete meeting.

36. The intended design for the Project was for tensioning of the post-tension concrete to occur within 96 hours.

37. Killian was not familiar with the Contract's concrete specifications prior to this Project and was not familiar with the concrete mix designs that are used or could be used to satisfy the concrete specifications.

38. Unlike the Engineer, Killian was not familiar with the concrete mix designs that met the concrete specification and are adequate to perform the mix's intended function according to the design specifications for the construction of the Short Street Parking Garage.

39. Killian has built other parking garages, including a recently completed parking garage in the City of Columbia located at the corner of Fifth Street and Walnut, commonly referred to as the Fifth Street Parking Garage.

40. The Fifth Street Parking Garage project did not specify the uncommon concrete required by the Engineer for this Project.

41. The Fifth Street Parking Garage does not have any ASR issues.

42. The concrete specified and used for the Fifth Street Parking Garage did not experience any concrete failures, blowouts, delays, or issues similar to the concrete issues experienced at the Short Street Parking Garage Project.

43. Killian relied on the Concrete Company and the Engineer to provide and approve the concrete mix designs for the Project that met the concrete specifications and were adequate to perform their intended function according to the Contract's design specifications, including providing and approving a post-tension concrete mix that allowed tensioning within 96 hours.

44. Killian contracted with the Concrete Company and the Concrete Company agreed to identify and provide Killian with concrete mix designs for the Project that satisfied the Contract's concrete specifications and were adequate to perform their intended function under the Contract design specifications, including permitting tensioning within 96 hours.

45. The Concrete Company is in the business of identifying and supplying concrete mix designs and concrete for construction projects according to identified concrete specifications

that are adequate to perform their intended function as set out in an engineer's design specifications.

46. The Concrete Company owed Killian the duty of care commensurate with the degree of care, skill, and proficiency commonly exercised by ordinary, skillful, and prudent professionals in the concrete industry.

47. The Concrete Company knew, or should have known, the Contract required tensioning of the post-tension concrete within 96 hours.

48. The Concrete Company represented that the concrete mix designs it provided for the Project, including the concrete mix design for the post-tension concrete, satisfied the Contract's concrete specifications and were adequate to perform their intended function according to the Contract's design specifications.

49. Killian relied on the Concrete Company to provide concrete mix designs for the Project that satisfied the Contract concrete specification and were adequate to perform their intended function under the Contract's design specifications.

50. The Concrete Company provided Killian with concrete mix designs for the post-tension concrete that contained, among other things, 50% slag.

51. Killian then submitted the concrete mix designs, including the mix designs for the post-tension concrete, to the Engineer for confirmation that the mix designs were adequate and sufficient to perform their intended function under the Contract's design specifications, including the Engineer's design specification that required tensioning occur within 96 hours.

52. The concrete mix design for the post-tension concrete submitted to the Engineer did not deviate from the Contract's drawings or specifications.

53. The Engineer was aware or should have been aware of the early strength requirements for the post-tension concrete based on the requirement for tensioning within 96 hours.

54. In fact, in response to Killian's submittal for the post-tension concrete, the Engineer instructed Killian not to use a mix design, specifically mix design #3, for the post-tension concrete because of the mix's low strength test results.

55. On or about November 14, 2012, the Engineer approved the concrete mix design for the post-tension concrete, representing the concrete mix design conformed to the Engineer's intended design and was adequate to perform its intended function under the design specifications, including tensioning within 96 hours.

56. However, the concrete mix design for the post-tension concrete did not conform with the Engineer's project design, and in particular did not conform with the design specification that tensioning occur within 96 hours.

57. The post-tension concrete mix design was not adequate to perform its intended function under the Contract's design specifications, including the requirement that tensioning occur within 96 hours.

58. Instead, the post-tension concrete mix design identified and supplied by the Concrete Company and approved by the Engineer suffered multiple and significant failures and blowouts upon tensioning, sending concrete and debris flying, creating a hazardous environment, a risk of physical injury, and causing property damage.

59. The post-tension concrete identified and supplied by the Concrete Company and approved by the Engineer, caused Killian to incur significant additional costs and to experience

significant delays on the project resulting in over \$1.6 million in damages and additional costs to remove, replace, repair, and otherwise correct the property damage and complete the Project.

60. After Killian first experienced the concrete failures, Killian requested the City and the Engineer allow Killian to use the same concrete as Killian used in the Fifth Street Parking Garage.

61. The City and the Engineer denied Killian's request to use the same concrete as Killian used in the Fifth Street Parking Garage and, instead, required Killian to use the uncommon concrete specified in the Contract.

62. The City, Engineer and the Concrete Company knew or should have known the concrete mix design for the post-tension concrete did not conform to the Engineer's project design and, instead, would result in significant concrete failures and blowouts when tensioned within the first 96 hours.

63. The Concrete Company mixed the concrete at its facility and supplied the concrete to the Project.

64. The Engineer was directly involved in the construction process for the Project, including reviewing work progress at the project and responding to submittals and other questions regarding the Project.

65. The Engineer and the Contract limited and identified the concrete suppliers that could be used for the Project.

66. The Concrete Company was one of the suppliers identified and approved by the Engineer and the Contract to provide concrete for the Project.

67. The Concrete Company and the Engineer were aware of the Project's progress and knew or should have known the approximate date and general temperature and weather conditions at the time the concrete, including the post-tension concrete, was being poured.

68. The Concrete Company knew or should have known that the post-tension concrete it delivered for use in construction of the Short Street Parking Garage would experience and suffer significant failures.

69. The Concrete Company and the Engineer knew or should have known the post-tension concrete mix design contained 50% slag.

70. The Concrete Company and the Engineer knew or should have known the post-tension concrete mix design that contained, among other things, 50% slag would not achieve sufficient early strength gains to allow tensioning within 96 hours.

71. The Concrete Company and the Engineer knew or should have known that tensioning the post-tension concrete with the approved concrete mix designs containing, among other things, 50% slag would result in concrete failures and blowouts creating a hazardous environment and a significant risk of physical injury as well as property damage and delays.

72. At all times relevant hereto, the Engineer was the designated representative and agent acting on behalf of the City.

73. Upon information and belief, the Engineer's seal is on the Project documents.

74. The design of the Parking Facility, including the tensioning of post-tension concrete is a matter requiring engineering expertise that cannot be delegated under Missouri law.

75. Under Missouri law, the Engineer is ultimately responsible for the shop drawings and submittals for the Project.

76. The Engineer, both individually and as the agent acting on behalf of the City, approved and represented to Killian that the concrete mix designs for the post-tension concrete conformed to the Contract's and the Engineer's intended design and were adequate to perform their intended function under the Contract's and the Engineer's design specifications, including the requirement that tensioning occur within 96 hours.

77. The Engineer is in the business of planning, designing, and overseeing the construction of parking facilities, which includes establishing, reviewing, confirming, and approving concrete mix designs that satisfy the design specifications and are adequate for the construction of the parking facility.

78. The Engineer, both individually and as the agent acting on behalf of the City, owed Killian the duty of care commensurate with the degree of care, skill, and proficiency commonly exercised by ordinary, skillful, and prudent Engineer involved in the design and construction of parking facilities.

79. Based on its familiarity with the concrete specifications and use of the concrete specifications nationwide, the Engineer had the most knowledge, information, and expertise of any party to determine the concrete mix designs were not adequate to perform the intended function under Contract's concrete design specifications and in particular were not adequate to allow tensioning within 96 hours.

80. The Engineer, both individually and as the agent acting on behalf of the City, breached its duties to Killian by approving a concrete mix design that did not conform with the project design expressed in the Contract, and in particular did not conform with the Contract's specification that tensioning occur within 96 hours.

81. As a direct result of the concrete failures, Killian was damaged in an amount in excess of \$1.6 million.

COUNT I – BREACH OF CONTRACT
(The City of Columbia)

82. Killian realleges and incorporates by reference its allegations in paragraphs 1-81 of its Petition.

83. There was a valid, existing and enforceable contract under Missouri law between Killian and the City for the Project.

84. Killian substantially performed its obligations under its Contract with the City.

85. The City breached the Contract by failing to make payment thereunder.

86. The City’s breach of contract has damaged Killian in the principal amount of \$700,534.34.

87. Killian made demand on the City to pay the above amount due, but the City of Columbia has failed and refused to pay Killian the amounts owed, including undisputed portions of the Contract balance.

88. Killian has incurred and will continue to incur interest, court costs, expenses, and attorneys’ fees as a result of the above breach of contract by the City.

89. Killian is entitled to recover its attorneys’ fees from the City pursuant to Mo. Rev. Stat. § 34.057.1.

WHEREFORE, Killian Construction Co., Inc. prays for judgment in its favor and against the City of Columbia on Count I of this Petition in the principal amount of \$700,534.34, plus pre-judgment and post-judgment interest at the rate of 1½ % per month pursuant to Mo. Rev. Stat. § 34.057.1; for its attorneys’ fees incurred herein, also pursuant to § 34.057.1; for the costs of this action; and for such further relief that the Court deems just and proper.

COUNT II – BREACH OF MISSOURI’S PUBLIC PROMPT PAY ACT
(The City of Columbia)

90. Killian incorporates and realleges herein the allegations set out in paragraphs 1 through 89 above.

91. The Contract between Killian and the City is governed by the Missouri Public Prompt Pay Act as stated in Mo. Rev. Stat. § 34.057.1, et seq.

92. The City has violated and breached and continues to violate and breach the Missouri Public Prompt Pay Act as stated in Mo. Rev. Stat. § 34.057.1, et seq.

93. Pursuant to § 34.057.1, the City was required to make final payment of all amounts owed to Killian, including any retainage, within thirty (30) days of certification by the Engineer that the Project has been completed.

94. The City accepted the certification that Killian’s work was substantially complete on or about November 27, 2013.

95. The City has fully accepted Killian’s work and is fully operating the parking garage.

96. Despite this fact the City fails and refuses to pay Killian the amounts owed.

97. The City was required to pay Killian within 30 days after receipt of each invoice pursuant to Mo. Rev. Stat. § 34.057.1(1).

98. The City was required to pay Killian 98% of the retainage upon substantial completion and acceptance of the work, pursuant to Mo. Rev. Stat. § 34.057.

99. The City did not refuse Killian’s work and/or the City did not give Killian a written explanation of its failure or refusal to accept Killian’s work within 14 days of Killian’s notice of substantial completion as required by Mo. Rev. Stat. § 34.057.1(4).

100. The City accepted Killian's work as substantially complete on or about November 27, 2013.

101. The City has failed and refused to pay Killian 98% of the retainage within 30 days of November 27, 2013 in violation of Mo. Rev. Stat. § 34.057.1(4).

102. Killian has incurred and will continue to incur interest, court costs, expenses, and attorneys' fees as a result of the above breach of contract by the City.

103. Killian is entitled to recover pre-judgment and post-judgment interest at the rate of 1½% per month and its attorneys' fees from the City pursuant to Mo. Rev. Stat. § 34.057.1.

WHEREFORE, Killian Construction Co., Inc. prays for judgment in its favor and against the City of Columbia on Count II of this Petition in the principal amount of \$700,534.34, plus pre-judgment and post-judgment interest at the rate of 1½% per month pursuant to Mo. Rev. Stat. § 34.057.1; for its attorneys' fees incurred herein, also pursuant to § 34.057.1; for the costs of this action; and for such further relief that the Court deems just and proper.

COUNT III – QUANTUM MERUIT
(The City of Columbia)

104. Killian incorporates and realleges herein the allegations set out in paragraphs 1 through 103 above.

105. Killian's work on the Project conferred a benefit upon the City.

106. The City appreciated and knew of the benefit conferred by Killian on the Project.

107. The City accepted and retained the benefit conferred by Killian on the Project under circumstances that make it inequitable for the City to retain the benefit without full payment of its value.

108. After taking into account all payments and other credits, the reasonable value of the benefit conferred on the City by Killian is at least \$700,534.34.

WHEREFORE, Killian Construction Co., Inc. prays for judgment in its favor and against the City of Columbia on Count III of this Petition in the principal amount of \$700,534.34, plus pre-judgment and post-judgment interest at the rate of 1½ % per month pursuant to Mo. Rev. Stat. § 34.057.1; for its attorneys' fees incurred herein, also pursuant to § 34.057.1; for the costs of this action; and for such further relief that the Court deems just and proper.

COUNT IV– NEGLIGENT MISREPRESENTATION
(Central Concrete Company)

109. Killian incorporates and realleges herein the allegations set out in paragraphs 1 through 108 above.

110. The Concrete Company represented to Killian that the concrete mix designs the Concrete Company submitted to Killian conformed to the Contract's concrete specifications and were adequate to perform their intended function under the Contract's design specifications, including tensioning of the post-tension concrete mix design within 96 hours.

111. The Concrete Company owed a duty of care commensurate with the degree of care, skill, and proficiency commonly exercised by ordinary, skillful, and prudent professionals in the concrete industry in providing the concrete mix designs for the Project.

112. Killian reasonably relied upon the Concrete Company's representations.

113. The Concrete Company's representations were false and the Concrete Company should have known the representations were false at the time the representations were made.

114. The concrete mix design for the post-tension concrete was not adequate to perform its intended function under the concrete specifications, including tensioning of the post-tension concrete mix design within 96 hours.

115. The Concrete Company mixes the concrete at its facility and delivered the concrete, including the post-tension concrete to the Project.

116. An ordinary, skillful, and prudent professional in the concrete industry should have known that the post-tension mix design that contained, among other things, 50% slag would not have sufficient early strength gains to allow tensioning within 96 hours after it was poured.

117. Killian was damaged as a direct and proximate result of the Concrete Company's misrepresentations in that the concrete experienced and suffered significant failures and blowouts, creating a serious risk of physical injury, hazardous and unsafe conditions, and requiring Killian to incur and suffer over \$1.6 million in damages.

WHEREFORE, Killian Construction Co., Inc. prays for judgment in its favor and against Central Concrete Company, on Count IV of this Petition in an amount in excess of \$1.6 million to be determined at trial, to compensate Killian for damages Killian suffered as a result of Central Concrete Company's negligent misrepresentations; and for such further relief that the Court deems just and proper.

COUNT V- NEGLIGENT MISREPRESENTATION
(Walker Parking Consultants/Engineers, Inc.)

118. Killian incorporates and realleges herein the allegations set out in paragraphs 1 through 117 above.

119. Killian relied upon the Engineer to review and confirm that the concrete mix designs identified by the Concrete Company conformed to the project's design specifications and were adequate to perform their intended function under the design specifications.

120. Killian relied upon the Engineer to review and confirm the post-tension concrete mix design identified by the Concrete Company conformed to the project's design specifications and were adequate to, among other things, allow tensioning within 96 hours.

121. The Engineer owed a duty of care commensurate with the degree of care, skill, and proficiency commonly exercised by ordinary, skillful, and prudent engineers involved in the design and construction of parking facilities.

122. The Engineer reviewed and approved the post-tension concrete mix design identified by the Concrete Company for use in the Project.

123. The Engineer represented to Killian that the approved concrete mix designs for the post-tension concrete conformed to the Contract's and the Engineer's design specifications and were adequate to perform their intended function under the Contract's and the Engineer's design specifications, including tensioning the post-tension concrete within 96 hours.

124. The Engineer specializes in parking systems including parking facilities like the Project at issue in this case and has used the concrete specifications for this Project in other projects nationwide.

125. Killian reasonably relied upon the Engineer's representations.

126. The Engineer's representation was false and the Engineer should have known the representations were false at the time the representations were made.

127. The concrete mix design for the post-tension concrete did not conform to the Contract's design specifications and was not adequate to perform the intended function under the Contract's concrete design specifications, including tensioning within 96 hours.

128. An ordinary, skillful, and prudent design professional in the business of designing parking facilities should have known that the post-tension concrete mix design that contained, among other things, 50% slag would not have sufficient early strength gains to allow tensioning within 96 hours after it was poured.

129. Killian was damaged as a direct result of the Engineer's misrepresentations in that the concrete experienced and suffered significant failures and blowouts, creating a serious risk of physical injury, hazardous and unsafe conditions, and requiring Killian to incur and suffer over \$1.6 million in damages.

WHEREFORE, Killian Construction Co., Inc. prays for judgment in its favor and against Walker Parking Consultants/Engineers, Inc. on Count V of this Petition in an amount in excess of \$1.6 million to be determined at trial, to compensate Killian for damages Killian suffered as a result of the Engineer's negligent misrepresentations; and for such further relief that the Court deems just and proper.

COUNT VI- NEGLIGENT MISREPRESENTATION
(The City of Columbia)

130. Killian incorporates and realleges herein the allegations set out in paragraphs 1 through 129 above.

131. At all times relevant hereto, the Engineer was the designated representative and agent acting on behalf of the City.

132. Killian relied upon the City, by and through its representative Engineer, to review and confirm that the concrete mix designs identified by the Concrete Company conformed to the Contract specifications and were adequate to perform their intended function under the Contract's concrete design specifications, including tensioning within 96 hours.

133. The City, by and through its representative Engineer, reviewed and approved the concrete mix design selected by the Concrete Company for use in the Project.

134. The City, by and through its representative Engineer, represented to Killian that the concrete mix design for the post-tension concrete conformed to the Contract's design

specifications and were adequate to perform their intended function under the Contract's concrete design specifications, including tensioning within 96 hours.

135. Killian reasonably relied upon the City's representation.

136. The City's representation was false and the City should have known the representation was false at the time the representations were made.

137. The concrete mix design for the post-tension concrete did not conform to the Contract's design specifications and was not adequate to perform the intended function under the Contract's concrete design specifications, including tensioning within 96 hours.

138. The City, including its representative Engineer, should have known that the post-tension mix design that contained, among other things, 50% slag would not have sufficient early strength gains to allow tensioning within 96 hours after it was poured.

139. Killian was damaged as a direct result of the Engineer's misrepresentation in that the concrete experienced and suffered significant failures and blowouts, creating a serious risk of physical injury, hazardous and unsafe conditions, and requiring Killian to incur and suffer over \$1.6 million in damages.

WHEREFORE, Killian Construction Co., Inc., prays for judgment in its favor and against the City of Columbia on Count VI of this Petition in an amount in excess of \$1.6 million to be determined at trial, to compensate Killian for damages Killian suffered as a result of the City's negligent misrepresentations; and for such further relief that the Court deems just and proper.

COUNT VII- BREACH OF CONTRACT
(Central Concrete Company)

140. Killian incorporates and realleges herein the allegations set out in paragraphs 1 through 139 above.

141. Killian entered into a contract with the Concrete Company whereby the Concrete Company agreed to provide, among other things, concrete mix designs for the Project that conformed to the Contract's design specifications and were adequate to perform their intended function under the Contract design specifications, including providing post-tension concrete mix designs that permitted tensioning within 96 hours.

142. The Concrete Company is in the business of designing concrete mixes and supplying concrete for construction projects according to identified concrete specifications and that are adequate to perform their intended function under contract design specifications.

143. Killian fully performed under its Contract with the Concrete Company.

144. The Concrete Company breached its Contract with Killian.

145. The Concrete Company failed to provide concrete mix designs for post-tension concrete that conformed to the Contract's design specifications and were adequate to perform their intended function under the Contract design specifications, including permitting tensioning within 96 hours.

146. The Concrete Company failed to supply a post-tension concrete mix to the Project that conformed to the Contract's design specifications and were adequate to perform their intended function under the Contract design specifications, including permitting tensioning within 96 hours.

147. As a direct and proximate result of the Concrete Company's breach, Killian was damaged.

148. As a direct and proximate result of the Concrete Company's breach the post-tension concrete suffered significant failures and blowouts creating a risk of physical injury and hazardous conditions as well as property damage and delays.

149. As a direct and proximate result of the Concrete Company's breach of contract Killian suffered over \$1.6 million in damages.

WHEREFORE, Killian Construction Co., Inc. prays for judgment in its favor and against Central Concrete Company, on Count VII of this Petition in an amount in excess of \$1.6 million to be determined at trial, to compensate Killian for damages Killian suffered as a result of Central Concrete Company's breach of contract; plus its attorneys' fees and costs incurred herein; and for such further relief that the Court deems just and proper.

COUNT VIII- NEGLIGENCE
(The City of Columbia)

150. Killian incorporates and realleges herein the allegations set out in paragraphs 1 through 149 above.

151. The City owed Killian the duty to review and confirm the concrete mix design for the post-tension concrete conformed to the Contract's intended design and was adequate to perform its intended design function under the Contract's design specifications.

152. The City breached its duty by, among other things:

(a) Only disapproving one proposed post-tension mix design because of insufficient strength gains, and not all three;

(b) Approving post-tension concrete mix designs that did not conform to the Project's intended design as set out in the Contract's design specifications;

(c) Approving post-tension concrete mix designs that were not adequate to perform the intended design function of the concrete as set out in the Contract's design specifications, including the requirement that the post-tension concrete allow tensioning within the first 96 hours;

(d) Requiring Killian to use concrete specifications for the Project that were uncommon and not suitable for the construction of the Project; and

(e) Denying and refusing Killian's request to use a different concrete mix that was proven to be suitable for the Project because it had already been used for the Fifth Street Parking Garage.

153. As a direct result of the City's breach of its duties to Killian, the post-tension concrete mix design required and approved by the City experienced and suffered significant failures.

154. As a direct and proximate result of the City's breach of its duties to Killian, Killian suffered damages in excess of \$1.6 million in damages and additional costs to remove, replace, repair, and otherwise correct and complete the Project.

WHEREFORE, Killian Construction Co., Inc. prays for judgment in its favor and against the City of Columbia on Count VIII of this Petition in an amount in excess of \$1.6 million to be determined at trial, to compensate Killian for damages Killian suffered as a result of the City's negligence; and for such further relief that the Court deems just and proper.

COUNT IX– NEGLIGENCE
(Central Concrete Company)

155. Killian incorporates and realleges herein the allegations set out in paragraphs 1 through 154 above.

156. The Concrete Company owed Killian the duty to select and specify a concrete mix design suitable for the construction of the Short Street Parking Garage according to the Contract's design specification.

157. The Concrete Company owed Killian the duty to specify a concrete mix design for the post-tension concrete that would achieve sufficient early strength gains to allow tensioning within 96 hours.

158. The Concrete Company owed Killian the duty to deliver to the project a post-tension concrete mix that was suitable for the construction of the Short Street Parking Garage according to the Contract's design specification.

159. The Concrete Company owed Killian the duty to deliver to the project a post-tension concrete mix that would achieve sufficient early strength gains to allow tensioning within 96 hours.

160. The Concrete Company breached its duties to Killian.

161. The Concrete Company selected and specified a post-tension concrete mix design that was not suitable for the construction of the Short Street Parking Garage according to the Contract's design specification.

162. The Concrete Company delivered a post-tension concrete mix to the Project that was not suitable for use in the construction of the Short Street Parking Garage according to the Contract's design specification.

163. Upon information and believe the post-tension concrete design mix specified by the Concrete Company and delivered to the Project by the Concrete Company had too much slag to achieve sufficient early strength gains to allow tensioning within 96 hours.

164. Upon information and belief the Concrete Company failed to introduce sufficient heat into the post-tension concrete mix at the mixing plant and/or during the mixing process to cause it to achieve sufficient early strength gains to allow tensioning within 96 hours.

165. As a direct result of the Concrete Company's breach of its duties, the post-tension concrete mix selected by the Concrete Company and delivered to the Project by the Concrete Company experienced and suffered significant failures.

166. As a direct and proximate result of the Concrete Company's breach of its duties to Killian, Killian suffered damages in excess of \$1.6 million in damages and additional costs to remove, replace, repair, and otherwise correct and complete the Project.

WHEREFORE, Killian Construction Co., Inc. prays for judgment in its favor and against Central Concrete Company on Count IX of this Petition in an amount in excess of \$1.6 million to be determined at trial, to compensate Killian for damages Killian suffered as a result of the Central Concrete Company's negligence; and for such further relief that the Court deems just and proper.

COUNT X- NEGLIGENCE
(Walker Parking Consultants/Engineers, Inc.)

167. Killian incorporates and realleges herein the allegations set out in paragraphs 1 through 166 above.

168. The Engineer had a duty to Killian to exercise the same degree of ordinary and reasonable skill that another design professional in the business of design parking facilities would have exercised regarding the approval of the submittal because, among other reasons:

(a) The Engineer's contract with the City was intended to affect Killian and specifically required the Engineer to review the concrete submittals from Killian to assure the submittals conformed to the Engineer's intended design specifications, including the requirement that the post-tension concrete could withstand tensioning within the first 96 hours;

(b) It was certain or almost certain that Killian would suffer damages if the Engineer approved submittals from Killian that did not conform to the Contract's design specifications, including the requirement that the post-tension concrete could withstand tensioning within the first 96 hours;

(c) The Engineer's use of uncommon concrete specifications and approval of a concrete mix design that did not conform to the Engineer's own design specifications were closely connected, and was the direct and proximate cause, of the injury suffered by Killian;

(d) The Engineer has moral blame in this case because it required the use of a concrete specification not commonly used in the area, had the most knowledge and expertise regarding the available conforming concrete mix designs, and still approved a concrete mix design that did not meet the strength requirements for tensioning within 96 hours and that the Engineer should have known would not meet the early strength requirements because, among other reasons, the mix design contained 50% slag and/or could not reach sufficient temperatures during the mixing process; and

(e) Public policy favors holding engineers liable for their approval of submittals and shop drawings that do not conform to the engineers own intended design specification with which the engineer has the most knowledge and expertise. This is especially true in this case because the Engineer required and approved the use of uncommon concrete specifications for post-tension concrete that resulted in blowouts, hazardous conditions, and the risk of physical harm. Under these circumstances the duty owed to Killian will cause design professionals to provide a higher level of care to prevent similar harm in the future.

(f) *See e.g.* *Westerhold v. Carroll*, 419 S.W.2d 73 (Mo. 1967); *Duncan v. Missouri Board for Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524.

169. The Engineer breached its duty of care by approving a submittal that did not conform to the requirements of the intended project design and was not adequate to perform its intended function under the Contract design specifications, including tensioning within 96 hours.

170. As a direct and proximate result of the Engineer's breach of its duties to Killian, Killian suffered damages in excess of \$1.6 million in damages and additional costs to remove, replace, repair, and otherwise correct and complete the Project.

WHEREFORE, Killian Construction Co., Inc. prays for judgment in its favor and against Walker Parking Consultants/Engineers, Inc. on Count X of this Petition in an amount in excess of \$1.6 million to be determined at trial, to compensate Killian for damages Killian suffered as a result of the Engineer's negligence; and for such further relief that the Court deems just and proper.

SPENCER FANE LLP

/s/ Wade M. Early

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***Attorneys for Plaintiff
Killian Construction Co., Inc.***

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

KILLIAN CONSTRUCTION CO., INC.,)
 a Missouri corporation,)
)
 Plaintiff,)
)
 v.)
)
 CITY OF COLUMBIA,)
 WALKER PARKING CONSULTANTS/)
 ENGINEERS, INC., and)
 CENTRAL CONCRETE COMPANY,)
)
 Defendants.)
)

Case No.: 16BA-CV00708

JURY TRIAL DEMANDED

CITY OF COLUMBIA, MISSOURI’S ANSWER & COUNTERCLAIM

COMES NOW Defendant, the City of Columbia, Missouri, by and through its undersigned attorneys, and for its Answer to Plaintiff’s Petition, hereby states as follows:

PARTIES, JURISDICTION, AND VENUE

1. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 1 and, therefore, denies the same and demands strict proof thereof.
2. Defendant admits the allegations set forth in Paragraph 2.
3. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 3 and, therefore, denies the same and demands strict proof thereof.
4. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 4 and, therefore, denies the same and demands strict proof thereof.
5. Defendant admits that jurisdiction is proper, and denies all other allegations set forth in Paragraph 5.
6. Defendant admits the allegations set forth in Paragraph 6.

GENERAL ALLEGATIONS

7. Defendant admits that the parking garage is located in Boone County, Missouri, at 1110 East Walnut Street in Columbia, Missouri, and denies all other allegations set forth in Paragraph 7.

8. Defendant admits the allegations set forth in Paragraph 8.

9. Defendant admits the allegations set forth in Paragraph 9.

10. Defendant denies the allegations set forth in Paragraph 10.

11. Defendant denies the allegations set forth in Paragraph 11.

12. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 17 and, therefore, denies the same and demands strict proof thereof.

13. Defendant denies the allegations set forth in Paragraph 13.

14. Defendant denies the allegations set forth in Paragraph 14.

15. Defendant denies the allegations set forth in Paragraph 15.

16. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 16 and, therefore, denies the same and demands strict proof thereof.

17. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 17 and, therefore, denies the same and demands strict proof thereof.

18. Defendant answers that the document speaks for itself.

19. Defendant answers that the contract and associated documents speak for themselves.

20. Defendant answers that the contract and associated documents speak for themselves.

21. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 21 and, therefore, denies the same and demands strict proof thereof.

22. Defendant denies the allegations set forth in Paragraph 22.

23. Defendant denies the allegations set forth in Paragraph 23.

24. Defendant denies the allegations set forth in Paragraph 24.

25. Defendant denies the allegations set forth in Paragraph 25.

26. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 26 and, therefore, denies the same and demands strict proof thereof.

27. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 27 and, therefore, denies the same and demands strict proof thereof.

28. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 28 and, therefore, denies the same and demands strict proof thereof.

29. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 29 and, therefore, denies the same and demands strict proof thereof.

30. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 30 and, therefore, denies the same and demands strict proof thereof.

31. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 31 and, therefore, denies the same and demands strict proof thereof.

32. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 32 and, therefore, denies the same and demands strict proof thereof.

33. Defendant answers that the contract and associated documents speak for themselves.

34. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 34 and, therefore, denies the same and demands strict proof thereof.

35. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 35 and, therefore, denies the same and demands strict proof thereof.

36. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 36 and, therefore, denies the same and demands strict proof thereof.

37. Defendant denies the allegations set forth in Paragraph 37.

38. Defendant denies the allegations set forth in Paragraph 38.

39. Defendant denies the allegations set forth in Paragraph 39.

40. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 40 and, therefore, denies the same and demands strict proof thereof.

41. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 41 and, therefore, denies the same and demands strict proof thereof.

42. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 42 and, therefore, denies the same and demands strict proof thereof.

43. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 43 and, therefore, denies the same and demands strict proof thereof.

44. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 44 and, therefore, denies the same and demands strict proof thereof.

45. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 45 and, therefore, denies the same and demands strict proof thereof.

46. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 46 and, therefore, denies the same and demands strict proof thereof.

47. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 47 and, therefore, denies the same and demands strict proof thereof.

48. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 48 and, therefore, denies the same and demands strict proof thereof.

49. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 49 and, therefore, denies the same and demands strict proof thereof.

50. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 50 and, therefore, denies the same and demands strict proof thereof.

51. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 51 and, therefore, denies the same and demands strict proof thereof.

52. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 52 and, therefore, denies the same and demands strict proof thereof.

53. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 53 and, therefore, denies the same and demands strict proof thereof.

54. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 54 and, therefore, denies the same and demands strict proof thereof.

55. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 55 and, therefore, denies the same and demands strict proof thereof.

56. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 56 and, therefore, denies the same and demands strict proof thereof.

57. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 57 and, therefore, denies the same and demands strict proof thereof.

58. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 58 and, therefore, denies the same and demands strict proof thereof.

59. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 59 and, therefore, denies the same and demands strict proof thereof.

60. Defendant denies the allegations set forth in Paragraph 60.

61. Defendant denies the allegations set forth in Paragraph 61.

62. Defendant denies the allegations set forth in Paragraph 62.

63. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 63 and, therefore, denies the same and demands strict proof thereof.

64. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 64 and, therefore, denies the same and demands strict proof thereof.

65. Defendant denies the allegations set forth in Paragraph 65.

66. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 66 and, therefore, denies the same and demands strict proof thereof.

67. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 67 and, therefore, denies the same and demands strict proof thereof.

68. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 68 and, therefore, denies the same and demands strict proof thereof.

69. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 69 and, therefore, denies the same and demands strict proof thereof.

70. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 70 and, therefore, denies the same and demands strict proof thereof.

71. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 71 and, therefore, denies the same and demands strict proof thereof.

72. Defendant denies the allegations set forth in Paragraph 72.

73. Because the allegations in Paragraph 73 are vague and ambiguous, Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 73 and, therefore, denies the same and demands strict proof thereof

74. The allegations set forth in Paragraph 74 call for a legal conclusion to which no answer is required.

75. The allegations set forth in Paragraph 74 call for a legal conclusion to which no answer is required.

76. Defendant denies the allegations set forth in Paragraph 76.

77. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 77 and, therefore, denies the same and demands strict proof thereof.

78. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 78 and, therefore, denies the same and demands strict proof thereof.

79. Defendant lacks sufficient information to admit or deny the allegations set forth in Paragraph 79 and, therefore, denies the same and demands strict proof thereof.

80. Defendant denies the allegations set forth in Paragraph 80.

81. Defendant denies the allegations set forth in Paragraph 81.

COUNT I – BREACH OF CONTRACT
(The City of Columbia)

82. Defendant repeats, re-alleges, and incorporates by reference its answers to Paragraphs 1 through 81 as if fully set forth herein.

83. Defendant admits that there was a contract between Plaintiff and Defendant, and denies all other allegations set forth in Paragraph 83.

84. Defendant denies the allegations set forth in Paragraph 84.

85. Defendant denies the allegations set forth in Paragraph 85.

86. Defendant denies the allegations set forth in Paragraph 86.

87. Defendant denies the allegations set forth in Paragraph 87.

88. Defendant denies the allegations set forth in Paragraph 88.

89. Defendant denies the allegations set forth in Paragraph 89.

COUNT II – BREACH OF MISSOURI’S PUBLIC PROMPT PAY ACT
(The City of Columbia)

90. Defendant repeats, re-alleges, and incorporates by reference its answers to Paragraphs 1 through 89 as if fully set forth herein.

91. Defendant denies the allegations set forth in Paragraph 91.

92. Defendant denies the allegations set forth in Paragraph 92.

93. Defendant denies the allegations set forth in Paragraph 93.

94. Defendant denies the allegations set forth in Paragraph 94.

95. Defendant denies the allegations set forth in Paragraph 95.

96. Defendant denies the allegations set forth in Paragraph 96.

97. Defendant denies the allegations set forth in Paragraph 97.

98. Defendant denies the allegations set forth in Paragraph 98.

99. Defendant denies the allegations set forth in Paragraph 99.

100. Defendant denies the allegations set forth in Paragraph 100.

101. Defendant denies the allegations set forth in Paragraph 101.

102. Defendant denies the allegations set forth in Paragraph 102.

103. Defendant denies the allegations set forth in Paragraph 103.

COUNT III – QUANTUM MERUIT
(The City of Columbia)

In lieu of answering Count III (Paragraphs 104-108), Defendant files its Motion to Dismiss and reserves the right to answer, if necessary, pending resolution of its Motion.

COUNT IV – NEGLIGENT MISREPRESENTATION
(Central Concrete Company)

Defendant makes no answer to the allegations set forth in Count IV (Paragraphs 109-117) as the allegations set forth in said Count are not directed to this Defendant. To the extent any allegations set forth therein are intended to be directed to this Defendant, Defendant denies the same.

COUNT V – NEGLIGENT MISREPRESENTATION
(Walker Parking Consultants/Engineers, Inc.)

Defendant makes no answer to the allegations set forth in Count V (Paragraphs 118-129) as the allegations set forth in said Count are not directed to this Defendant. To the extent any allegations set forth therein are intended to be directed to this Defendant, Defendant denies the same.

COUNT VI – NEGLIGENT MISREPRESENTATION
(The City of Columbia)

Defendant makes no answer to the allegations set forth in Count V (Paragraphs 118-129) as the allegations set forth in said Count are not directed to this Defendant. To the extent any allegations set forth therein are intended to be directed to this Defendant, Defendant denies the same.

130. Defendant repeats, re-alleges, and incorporates by reference its answers to Paragraphs 1 through 129 as if fully set forth herein.

- 131. Defendant denies the allegations set forth in Paragraph 131.
- 132. Defendant denies the allegations set forth in Paragraph 132.
- 133. Defendant denies the allegations set forth in Paragraph 133.
- 134. Defendant denies the allegations set forth in Paragraph 134.
- 135. Defendant denies the allegations set forth in Paragraph 135.
- 136. Defendant denies the allegations set forth in Paragraph 136.
- 137. Defendant denies the allegations set forth in Paragraph 137.
- 138. Defendant denies the allegations set forth in Paragraph 138.
- 139. Defendant denies the allegations set forth in Paragraph 139.

COUNT VII – BREACH OF CONTRACT
(Central Concrete Company)

Defendant makes no answer to the allegations set forth in Count VII (Paragraphs 140-149) as the allegations set forth in said Count are not directed to this Defendant. To the extent any allegations set forth therein are intended to be directed to this Defendant, Defendant denies the same.

COUNT VIII – NEGLIGENCE
(The City of Columbia)

- 150. Defendant repeats, re-alleges, and incorporates by reference its answers to Paragraphs 1 through 149 as if fully set forth herein.
- 151. Defendant denies the allegations set forth in Paragraph 151.
- 152. Defendant denies the allegations set forth in Paragraph 152, and each and every sub-paragraph set forth therein.
- 153. Defendant denies the allegations set forth in Paragraph 153.
- 154. Defendant denies the allegations set forth in Paragraph 154.

COUNT IX – NEGLIGENCE
(Central Concrete Company)

Defendant makes no answer to the allegations set forth in Count IX (Paragraphs 155-166) as the allegations set forth in said Count are not directed to this Defendant. To the extent any allegations set forth therein are intended to be directed to this Defendant, Defendant denies the same.

COUNT X – NEGLIGENCE
(Walker Parking Consultants/Engineers, Inc.)

Defendant makes no answer to the allegations set forth in Count X (Paragraphs 167-170) as the allegations set forth in said Count are not directed to this Defendant. To the extent any allegations set forth therein are intended to be directed to this Defendant, Defendant denies the same.

AFFIRMATIVE DEFENSES

171. Further answering and as an affirmative defense, Defendant states that Plaintiff fails to state a cause of action for which relief may be granted.

172. Further answering and as an affirmative defense, Defendant states that Plaintiff failed to mitigate its damages.

173. Further answering and as an affirmative defense, Defendant states that Plaintiff, any damages sustained by Plaintiff were caused by the intervening and/or superseding acts or omissions of others who were not under this Defendant's control; therefore, Plaintiff's claims should be barred or reduced by the percentage of others' faults as determined by the trier of fact.

174. Further answering and as an affirmative defense, Defendant states that Defendant's alleged liability cannot be based upon the acts or omissions of independent contractors.

175. Further answering and as an affirmative defense, Defendant states that Plaintiff's claims were caused, or contributed to be caused, by Plaintiff's own negligence for its failure to comply with contract/project specifications; therefore, Plaintiff's claims should be barred or reduced by the percentage of its fault as determined by the trier of fact.

176. Further answering and as an affirmative defense, Defendant incorporates by reference each and every affirmative defense alleged by Co-Defendants.

177. Further answering and as an affirmative defense, Defendant states that Plaintiff's claims are barred by the doctrine of laches.

178. Further answering and as an affirmative defense, Defendant states that Plaintiff's claims are barred by the doctrine of waiver.

179. Further answering and as an affirmative defense, Defendant states that Plaintiff's claims are barred by the doctrine of estoppel.

180. Further answering and as an affirmative defense, and pleading in the alternative, Defendant states that any decisions of which Plaintiff complains were protected by the business judgment rule.

181. Further answering and as an affirmative defense, Defendant states that Plaintiff's claims are barred by the doctrine of ratification.

182. Further answering and as an affirmative defense, Defendant states that, pursuant to Section 537.060 of the Revised Statutes of Missouri, Defendant is entitled to a setoff, credit, and/or reduction with regard to any damages and/or settlements awarded/delivered to Plaintiff. Pursuant to said statute and Missouri common law, the Court must credit any award or settlement of damages assessed against the Defendant by the jury verdict.

183. Further answering and as an affirmative defense, Defendant states that the damages sought by Plaintiff, if allowed, would result in the betterment of the Plaintiff.

184. Further answering and as an affirmative defense, Defendant states that some of the damages sought by Plaintiff amount to economic waste.

185. Further answering and as an affirmative defense, Defendant states that Plaintiff should be barred or limited from recovery due to unclean hands.

186. Further answering and as an affirmative defense, Defendant states that Plaintiff's claims are barred by the economic loss doctrine.

187. Further answering and as an affirmative defense, Defendant states that the actions of third parties over whom Defendant had no control were the sole cause(s) of the damages of which Plaintiff complains for which Defendant cannot be found liable.

188. Further answering and as an affirmative defense, Defendant states Plaintiff has not sufficiently pled claims for negligent misrepresentation.

189. Further answering and as an affirmative defense, Defendant states that it is not vicariously liable for the actions of any other defendant.

190. Further answering and as an affirmative defense, Defendant states that Plaintiff previously materially breached the contract by failing to timely comply with the specifications of construction such that Plaintiff is precluded from pursuing the damages alleged.

191. Further answering and as an affirmative defense, Defendant states that Plaintiff negligently misrepresented its knowledge, capability, and ability to comply with the specifications for construction of the project at issue and, as such, Plaintiff is precluded from pursuing the damages alleged.

192. Further answering and as an affirmative defense, and pleading in the alternative, Defendant states that any payments were withheld in good faith with reasonable cause pursuant to subsections 2, 5, and/or 6 of Section 34.057 of the Revised Statutes of Missouri.

193. Further answering and as an affirmative defense, Defendant adopts and incorporates by reference the additional defenses and/or affirmative defenses of the other defendants in this action, if applicable.

WHEREFORE having answered the Plaintiff's Petition, Defendant respectfully requests that the claims against it be dismissed, for its costs incurred herein, and for such other and further relief as the Court deems just and proper.

DEFENDANT DEMANDS TRIAL BY JURY ON ALL COUNTS.

COUNTERCLAIM

COMES NOW the Defendant/Counterclaim Plaintiff, but and through undersigned attorneys, and for its Counterclaim against Killian Construction Co., Inc. states as follows:

1. The City of Columbia, Missouri ("City") is a municipality organized and existing under the laws of the State of Missouri.
2. Killian Construction Co., Inc. ("Killian") is a Missouri corporation with its principal place of business in Springfield, Missouri.
3. At all times relevant, the City was the fee simple owner of certain real property upon which it desired to construct a parking garage facility.
4. The City submitted a request for quotation for construction of the parking garage facility known as the Short Street Parking Structure, which was ultimately assigned an address of 1110 East Walnut Street in Columbia, Missouri.
5. Killian's bid was ultimately accepted by the City.

6. By submitting an accepted bid on this project, Killian represented to the City that it was qualified to perform the construction of this project in accordance with the specifications set forth in the bid documents, and that it would complete the project within the time limits established by the bid documents.

7. Pursuant to the contract and bid documents, Killian was required to complete to project by or before June 1, 2013. The parties entered into a calendar day project.

8. Pursuant to the contract and bid documents, Killian was subject to a penalty of \$500 per calendar day as liquidated damages for each day that substantial completion was delayed beyond June 1, 2013.

9. In exchange for construction of the parking garage facility subject to the terms and conditions as set forth in the request for quotation and contract documents, the City agreed to pay the sum of \$6,625,000.00 to Plaintiff.

10. The City complied, or substantially complied, with all terms of the contract with Killian.

11. Killian failed to construct the parking garage in compliance with the specifications for the project including, but not limited to, the follows:

- a. The concrete slab finishes did not meet the project specifications and the finish mock-up prepared by Killian;
- b. The concrete slab finishes were uneven, with ridges, waves, ripples, bumps, and swirl marks and an inconsistent finish;
- c. The concrete slab finishes were too smooth in places;
- d. The concrete slab finishes were aesthetically flawed, containing small divots and depressions;

- e. Repairs to the concrete slab finishes were prepared poorly by Killian, with noticeable low spots and seams;
- f. Failed to properly install and fully-functioning Parking Access and Revenue Control (“PARC”) system to control payment and access to the garage by the public and/or patrons; and
- g. Improperly installed a sculpture.

12. The City relied on Killian to timely construct the parking garage facility by or before June 1, 2013, and contracted with nearby businesses to provide shared use of the parking garage facility.

13. Killian did not make the parking garage facility available for use until December 2013.

14. As a result of Killian’s poor workmanship and failures to comply with specifications, the City incurred additional expenses from engineers and experts to inspect, supervise, analyze, and oversee Killian’s work.

15. As a result of Killian’s poor workmanship and failure to comply with specifications, the City incurred additional expenses from engineers and experts to inspect, supervise, analyze, and oversee Killian’s work which totals in excess of \$56,700.00.

16. As a result of Killian’s poor workmanship, failure to comply with specifications, and delays, the City lost, and continues to lose, revenue in excess of \$150,000.00.

17. As a result of Killian’s poor workmanship, failure to comply with specifications, and delays, the City incurred damages of over \$689,000.00, including liquidated damages of \$89,500.00 for delaying the project 179 days.

BREACH OF CONTRACT

18. The City repeats, re-alleges, and incorporates herein its allegations set forth in Paragraphs 1 through 17 of its Counterclaim as through full set forth herein.

19. The City entered into a valid, existing, and enforceable written contract with Killian.

20. Killian materially breached the agreement by failing to comply with the specifications for the project.

21. The City has incurred, and will continue to incur, interest, damages, losses, court costs, expenses, and attorneys' fees as a result of Killian's material breach.

WHEREFORE, the City of Columbia, Missouri, prays for judgment in its favor and against Killian Construction Co., Inc., on Count I of this Counterclaim in the principal amount of \$689,000.00, plus post-judgment interest, for its attorneys' fees incurred herein, for costs, and for such other and further relief as the Court deems just and proper.

BREACH OF EXPRESS WARRANTY

22. The City repeats, re-alleges, and incorporates herein its allegations set forth in Paragraphs 1 through 21 of its Counterclaim as through full set forth herein.

23. The contract and contract documents expressly provided that Killian was obligated to make repairs or replacements caused by defective materials, workmanship, or equipment which, in the judgment of Walker Parking Consultants/Engineers, Inc., became necessary.

24. The contract further provided that if Killian neglected to bring such repairs or replacements, the City could perform them at Killian's expense.

25. The City notified Killian of the need for repairs alleged herein, and Killian failed or refused to perform them.

WHEREFORE, the City of Columbia, Missouri, prays for judgment in its favor and against Killian Construction Co., Inc., on Count II of this Counterclaim in the principal amount of \$689,000.00, plus post-judgment interest, for its attorneys' fees incurred herein, for costs, and for such other and further relief as the Court deems just and proper.

BRINKER & DOYEN, L.L.P.

By: /s/ Lee J. Karge
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Attorneys for Defendant, City of Columbia, MO

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system on the 9th day of May, 2016, upon the following:

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***Attorneys for Co-Defendant
Central Concrete Company***

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI**HIGHLAND GLASS, INC..**

Plaintiff,

vs.

CASE NO.

KILLIAN CONSTRUCTION, CO.serve Registered Agent
C T Corporation System,
120 South Central Ave,
Clayton, Missouri 63105.

and

BROADWAY LODGING, LLCserve registered agent
David Parmley,
5 McBride and Son Center,
Chesterfield, MO 63005.

and

ARC STEEL, LLCServe Secretary of State
pursuant to Rule 54.15..

Defendants.

**HIGHLAND GLASS, INC.'S PETITION TO ENFORCE MECHANIC'S LIEN FOR
DAMAGES FOR BREACH OF CONTRACT, SUIT ON ACCOUNT
AND QUANTUM MERUIT**

Comes Now Plaintiff Highland Glass, Inc. (hereinafter Highland Glass), by and through counsel, and for its causes of action states as follows:

PARTIES

1. Plaintiff Highland Glass is and was at all times herein alleged an Indiana corporation in good standing duly organized and existing according to the laws of the State of Indiana and has an office or agent for the transaction of business in Highland, Indiana.

2. Defendant Killian Construction, Co. ("Killian") is a corporation organized and existing under the laws of the state of Missouri with its principal place of business in Springfield, Greene County, Missouri; holding Charter Number 00100233 and whose Registered Agent is C T Corporation System, 120 South Central Ave, Clayton, Missouri 63105.

3. Defendant Broadway Lodging, LLC. ("Broadway Lodging") is a Missouri limited liability company authorized and in good standing to conduct business in the State of Missouri that has or usually keeps an office for the transaction of business in St. Louis County, at #5 McBride and Son Center Drive, Chesterfield, MO 63005 and whose registered agent is David Parmley, 5 McBride and Son Center, Chesterfield, MO 63005.

4. ARC Steel, LLC ("ARC Steel") is a corporation organized and existing under the laws of the State of Arizona with its principal place of business located in Gilbert, Maricopa County, Arizona and whose registered agent is Timothy Rudolph McEntire, 3535 E. Caleb Way, Gilbert, AZ 85234. ARC Steel, LLC has wholly failed to register with the Secretary of State of Missouri, and thus service of process on the Secretary of State pursuant to Rule 54.15 is proper.

VENUE AND JURISDICTION

5. Plaintiff's cause of action arose in Columbia, Missouri and concerns property located in Boone county, Missouri. Jurisdiction and venue are proper in this Circuit Court on all parties.

GENERAL ALLEGATIONS

6. At all times hereinafter alleged, defendant Broadway Loding, LLC was and is the owner of the real estate situated in Boone County, Missouri and described below:

**Double Tree by Hilton - The Broadway, 1111 East Broadway, Boone County, Columbia, MO 65201.
Parcel ID: 17-117-00-17-010-00 01; Legal Description: Hickman's Addition
Plat NO. 1-A Lot 1-A.**

7. Killian, as the general contractor and Highland Glass, Inc., as the subcontractor, entered into a written Subcontract Agreement dated November 16, 2012 (the "subcontract") for Glass and Glazing in "The Broadway, a Double Tree by Hilton Hotel located at 1111 E. Broadway, Columbia, MO 65201 per Plans and Specifications, including but not limited to Division 1 in its entirety, and Divisions 3, 4, 7, 8, 9 and 10 as they apply to the scope of the work. See Exhibit A, attached hereto and made a part hereof as if more fully set out herein.

8. ARC Steel on January 9, 2014 filed a document titled "Lien statement" purporting to establish a mechanic's lien on the property set out above.

9. Killian Construction Company has filed a Declaratory Judgment in Greene County, Missouri to have ARC Steel's Lien Statement declared invalid, void and of no consequence and the Mechanic's Lien unenforceable and as never having attached to the property.

COUNT I

**CLAIM FOR ENFORCEMENT OF
MECHANIC'S LIEN BY HIGHLAND GLASS, INC.
AS TO ALL DEFENDANTS**

10. Plaintiff Highland Glass incorporates by reference paragraphs 1 through 9 as if more fully set out herein.

11. Plaintiff Highland Glass, Inc. and Killian entered into an express and/or implied contract, and/or agreement whereby plaintiff, Highland Glass, as a subcontractor, would perform and furnish the work, labor and materials described and itemized in Exhibit A for and in connection with the construction of the building located at 1111 E. Broadway, Columbia, Missouri and defendant Killian agreed to pay plaintiff Highland Glass the amounts charged by plaintiff Highland Glass for said work, labor and materials and/or agreed to pay plaintiff Highland Glass the fair and reasonable value of said work, labor and materials performed and

furnished.

12. At the request of defendant Killian, as the general contractor for defendant Broadway Loding, LLC, plaintiff Highland Glass performed work and labor and furnished materials as described in Exhibit A.

13. Highland Glass performed and furnished the work, labor and materials, in a good and workmanlike manner.

14. All of the charges itemized in Exhibit A are for work labor and building materials, and are a fair and reasonable value for the amount charged therefor at the time said work was performed or furnished and all of the items set forth in Exhibit A are reasonably worth \$130,523.48.

15. Each and every item set out of Exhibit A was performed and furnished for said restaurant building, improvements and appurtenances thereto on the faith and credit of plaintiff Highland Glass' lien against the above-described real estate, building, improvements and appurtenances thereto and were actually entered into the remodeling and the making of other improvements to said building, improvements and appurtenances thereto and directly benefitted and improved the said property.

16. All of the items described in Exhibit A, were performed and furnished under one contract and constituted one continuous running account. The last items of said account was performed and/or furnished for and actually entered into the remodeling and the making of other improvements to said building, improvements and appurtenances thereto and/or its value was consumed thereby on March 7, 2014, on which date said account accrued and became due and payable.

17. Plaintiff Killian and Broadway Loding, LLC have been given all credit due, if

any.

18. Plaintiff Highland Glass has complied with or satisfied all conditions precedent of recovery in connection with said agreement, account and contract.

19. As a direct result of defendant Killian and Broadway Lodging, LLC's failure to pay plaintiff Highland Glass the sum of \$130,523.48 for both the unpaid work, labor and materials performed and furnished, defendant Highland Glass has been damaged in the amount of \$130,523.48.

20. Plaintiff Highland Glass has demanded payment from defendants Killian and Broadway Lodging, LLC but said defendants failed and/or refused to pay the balance owed, and the sum of \$130,523.48, which remains due to plaintiff Highland Glass

21. On March 21, 2014, and at least 10 days prior to the filing of its mechanic's lien, plaintiff Highland Glass mailed to defendants Killian and Broadway Lodging, LLC, Highland Glass' Notice of Mechanic's Lien, which set forth and described plaintiff Highland Glass' claim, the amount thereof, from whom due and of plaintiff Highland Glass' intention to file a mechanic's lien if said amount was not paid. A copy of plaintiff Highland Glass' Notice of Mechanic's Lien is attached hereto as Exhibit B and made a part hereof as if more fully set out herein. A representative of Broadway Lodging, LLC signed a return receipt for said document on March 24, 2014. See Exhibit C attached hereto and made a part hereof as if more fully set out herein. A representative of Killian Construction Co. signed a return receipt for said document, but it was undated. See Exhibit D attached hereto and made a part hereof as if more fully set out herein.

22. On April 18, 2014, plaintiff Highland Glass filed its mechanic's lien with the office of the Clerk of the Circuit Court of Boone County, Missouri, Mechanic's Lien No.14BA-

MC00908.

23. Plaintiff Highland Glass' mechanic's lien contained a just and true account of the demand of plaintiff Highland Glass and contained a true description of the property to be charged with said lien or so near as to identify the same and contained the name of the property owner and general contractor, all verified by the oath of Dan Lewis as President of Highland Glass. A copy of said mechanic's lien is attached as Exhibit E.

24. Said mechanic's lien was filed within six months of the date said account accrued and became payable and plaintiff Highland Glass satisfied all conditions precedent for obtaining a mechanic's lien against the above-described real estate.

25. The above-described real estate and the building, improvements and appurtenances thereto are subject to the following Mechanic's Liens, Notices of Mechanic's Liens and Amended Notice of Mechanic's Lien filed in the office of the Circuit Court of Boone County, Missouri:

1. Mechanic's Lien filed on January 22, 2014, by defendant Arc Steel in the amount of \$93,153.89, Case No.14BA-MC00266.

26. Any interest in the above-described real estate and the building, improvements and appurtenances thereto that plaintiff and any other defendants may have pursuant to the above-described Mechanic's Liens, Notices of Mechanic's Liens and Amended Notice of Mechanic's Lien, are subject to and inferior, either in whole or in part, to the mechanic's lien of plaintiff Highland Glass against the above-described real estate and the restaurant building, improvements and appurtenances thereto.

27. Plaintiff Highland Glass has complied with all provisions of RSMo. Section 429.005 through and including Section 429.360, including but not limited to the service of a Notice of Mechanic's Lien, the filing and perfection of plaintiff Highland Glass' mechanic's lien, and the filing of this lawsuit to enforce plaintiff Highland Glass' mechanic's lien.

28. The above-referenced account, express and/or implied contract, and agreement between plaintiff Highland Glass and defendants Killian and Broadway Lodging constitutes a contract for private design or construction work as that term is used in RSMo. Section 431.180.

29. As a direct result of defendants failure to pay plaintiff Highland Glass the amount owed for the remaining unpaid materials and labor as stated above, plaintiff Highland Glass is entitled to recover interest at the rate of eighteen percent (18%) per annum as allowed by RSMo. Section 431.180.2.

WHEREFORE, Plaintiff Highland Glass prays that the Court enter judgment on Count I in favor of Highland Glass and against defendants Killian Construction, Inc. and Broadway Lodging, LLC in the amount of \$130,523.48, with statutory interest of eighteen percent from date of Notice and through the date the judgment is satisfied in full, and for court costs and that the amount of \$130523.48 be adjudged a mechanic's lien against the building, improvements, appurtenances, and real estate above described, and that if sufficient property of defendant Broadway Lodging, LLC cannot be found to satisfy said judgment, interest and costs of Highland Glass against defendant Killian Construction, Inc., that defendant Highland Glass have special execution against said building, improvements, appurtenances and the above-described real estate to satisfy said judgment, interest and costs; further, plaintiff Highland Glass prays that its mechanic's lien be adjudged, declared and decreed to be superior to and have priority over the above-described mechanic's liens, Notice of Mechanic's Liens, Amended Notice of Mechanic's Lien and/or any other interests claimed against said building, improvements, appurtenances and the above-described real estate by all other parties to this lawsuit; that the rights and interests of all other parties be adjudicated and determined by the Court; and for such other relief as the Court deems proper in the circumstances.

COUNT II

CLAIM FOR QUANTUM MERUIT

Comes now plaintiff and for Count II of its Petition states as follows:

29. Plaintiff Highland Glass incorporates by reference paragraphs 1 through 26 above as if more fully set out herein.

30. All of the work, labor and materials performed and furnished by plaintiff Highland Glass in connection with the construction and other improvements to the building, improvements and appurtenances thereto on the above-described real estate were furnished at the special instance and request of defendant Broadway Lodging, LLC and Killian, which has received and accepted the direct benefit of plaintiff Highland Glass' materials furnished and work and labor performed.

31. At all relevant times, defendants Killian and Broadway Lodging,, LLC knew or reasonably should have known that plaintiff Highland Glass was furnishing the above-described materials and performing the above-described work and labor and Killian and Broadway Lodging acquiesced in plaintiff Highland Glass' performing and furnishing of the above-referenced work, labor and materials and accepted plaintiff Highland Glass' work, labor and materials, all of which directly benefitted and improved the above-described real estate and the building, improvements and appurtenances thereto located on the above-described real estate.

32. Upon information and belief, defendants Killian and Broadway Lodging have not paid any entity for the remaining unpaid work, labor and materials performed and furnished by plaintiff Highland Glass.

33. Defendants Broadway Lodging and Killian are justly indebted to plaintiff Highland Glass in the amount of \$130,523.48 for remaining unpaid work, labor and materials that plaintiff Highland Glass performed and furnished as described above.

34. Plaintiff Highland Glass demanded that Broadway Lodging and Killian pay plaintiff Highland Glass the sum of \$130,523.48 for the remaining unpaid work, labor and

materials performed and furnished, but defendants Broadway Lodging and Killian have refused and failed to pay plaintiff Highland Glass any amount.

35. As a direct result of defendants' failure to pay plaintiff Highland Glass the amount owed for the remaining unpaid work, labor and materials, plaintiff Highland Glass has been damaged in the amount of \$130,523.48 plus interest at nine percent from date of the Notice, and costs.

36. Defendants retention of the benefits of plaintiff Highland Glass' work and labor performed and materials furnished without paying the full, fair and reasonable value for those materials furnished has unjustly enriched defendants, \$130,523.48 at the expense of plaintiff Highland Glass.

WHEREFORE, Plaintiff Highland Glass prays that the Court enter judgment on Count II in favor of plaintiff Highland Glass against defendant Broadway Lodging,, LLC and Killian Construction, Inc. in the amount of \$130,523.48, plus interest at nine percent from date of the Notice, and post judgment interest at the rate of nine percent per annum through the date this judgment is satisfied, for court costs and for such other orders as the Court deems proper in the circumstances.

COUNT III
BREACH OF CONTRACT

Comes now plaintiff and for Count III of its Petition states as follows:

38. Defendant Highland Glass incorporates by reference paragraphs 1 through 35 above as if more fully set out herein.

39. The Subcontract entered into by Highland Glass and Killian was a valid enforceable contract.

40. Highland Glass performed all of its obligations under the Subcontract.

41. Killian has breached the contract by failing to pay Highland Glass pursuant to the

terms of the Subcontract.

42. Highland Glass has demanded payment from Killian and Killian has failed and refused and still fail and refuses to pay the same.

43. The charges made by Highland Glass were fair and reasonable.

44. As a result of the failure of Killian to pay Highland Glass, Highland Glass has suffered damages.

WHEREFORE, Highland Glass prays for a judgment in its favor against Killian , plus prejudgment interest since the date of demand, with interest thereafter at the statutory rate of nine percent, for costs and for such other and further relief as the court deems just and proper in the circumstances.

COUNT IV

SUIT ON ACCOUNT

Comes now plaintiff and for Count IV of its Petition states as follows:

45. Defendant Highland Glass incorporates by reference paragraphs 1 through 42 above as if more fully set out herein.

46. Defendant Highland Glass provided products and services to Killian regarding the completion of the Subcontract set out above.

47. Defendant Highland Glass provided an account statement due to Killian.

48. Killian has failed and refused and still fails and refuses to pay the same.

49. As a result of the failure of Killian to pay Highland Glass, Highland Glass has suffered damages.

WHEREFORE, Highland Glass prays for a judgment in its favor against Killian , plus prejudgment interest since the date of demand, with interest thereafter at the statutory rate, for costs and for such other and further relief as the court deems just and proper in the circumstances.

/s/ Gwen Froeschner Hart

Gwen Froeschner Hart

MBE 29245

SHURTLEFF FROESCHNER HARRIS, LLC

25 North Ninth Street

Columbia, Missouri 65201-4845

573-449-3874; Fax: 573-875-5055

ATTORNEYS FOR PLAINTIFF

SERVICE INSTRUCTIONS

KILLIAN CONSTRUCTION, CO.

serve Registered Agent
C T Corporation System,
120 South Central Ave,
Clayton, Missouri 63105.

and

BROADWAY LODGING, LLC

serve registered agent
David Parmley,
5 McBride and Son Center,
Chesterfield, MO 63005.

and

ARC STEEL, LLC

Serve Secretary of State
pursuant to Rule 54.15..

**NOTICE OF SERVICE
PURSUANT TO RULE 54.15**

Should go to:

Timothy Rudolph McEntire,
ARC Steel
3535 E. Caleb Way,
Gilbert, AZ 85234

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

HIGHLAND GLASS, INC.,)	
)	
v.)	Case No. 14BA-CV02717
)	
KILLIAN CONSTRUCTION CO., et. al.,)	
)	
Defendants)	
-----)	
)	
BROADWAY LODGING, LLC,)	
)	
Defendant, Cross-Claim Plaintiff,)	
)	
v.)	
)	
KILLIAN CONSTRUCTION CO.,)	
)	
Cross-Claim Defendant.)	

**CROSS-CLAIM OF DEFENDANT BROADWAY LODGING, LLC
AGAINST DEFENDANT KILLIAN CONSTRUCTION COMPANY**

COMES NOW Separate Defendant Broadway Lodging, LLC and for its Cross-Claim against Defendant Killian Construction Company, alleges and states as follows:

ALLEGATIONS COMMON TO ALL COUNTS

1. Broadway Lodging, LLC ("Broadway") is a Missouri limited liability company in good standing.
2. Killian Construction Company ("Killian") is a Missouri corporation in good standing.
3. Venue is proper in this Court as the claims made herein are within an equitable mechanic's lien action pending before this Court.
4. Broadway and Killian are party to a written contract dated August 1, 2012 (the "Contract") wherein, inter alia, Killian agreed to perform specifically described

construction services for a project generally referred to as "The Broadway, a Doubletree by Hilton Hotel" in Columbia, Missouri (the "Project") and Broadway agreed to pay Killian for Killian's properly performed services in accordance with the terms of the Contract.

COUNT I (Breach Of Contract)

5. Broadway incorporates by reference the allegations of Paragraph 1 through 4 of the Cross-Claim.

6. Killian agreed in the Contract to achieve Substantial Completion of the entire Work by no later than August 1, 2013.

7. The Contract provides that liquidated damages are to be assessed at the rate of \$2,500 per day for every day Killian is late in achieving Substantial Completion, with a five day grace period at the outset.

8. The concept of "Substantial Completion" is defined in the Contract at Paragraph 9.8.1 of the General Conditions and at Section 01-77-00, Par. 1.2, entitled "Substantial Completion".

9. Killian did not timely achieve Substantial Completion of the Work, as such term is defined in the Contract.

10. As of the date of the filing of this Cross-Claim, Killian has still not achieved Substantial Completion of the Work in accordance with the Contract's terms.

11. Liquidated damages of \$2,500 commenced on August 6, 2013 and have continued to the date of filing of this Cross-Claim and currently aggregate \$1,292,500.00.

12. Liquidated damages continue to accrue at the rate of \$2,500 per day until such time as Killian finally complies with the Contract's requirements to achieve Substantial Completion.

13. Killian agreed in the Contract that all materials and equipment furnished for the Project would be of good quality, new, and free from defects.

14. Killian provided materials and equipment for the Project that were defective, and in some cases never provided the required materials and equipment at all, including the following:

(a) Windows: Section 085113, Par. 1.4(B) requires very specific shop drawings as to the window installation details. Killian failed to provide many of the required details, most importantly including the flashing and drainage and weather stripping details. Further many of the features of the shop drawings that were submitted, such as shims and weeps, never actually were installed. The windows have leaked since installation. All tests that have been performed have shown leaks throughout the building, showing various joints not properly sealed (or not sealed at all) and improperly installed flashing and sealing, all causing leaks.

(b) Roof Leaks: The project has exhibited extensive leaks. Water damage has occurred in guest rooms, corridors, public spaces, restaurant seating area, general manager's office, and laundry area, all due to incorrect flashing of penetrations through the roof deck.

(c) Door Defects: The doors that Killian delivered to the project were damaged upon delivery due to Killian's improper handling and storing of doors. Virtually all of the doors were scratched and otherwise disfigured in some manner, resulting in

their rejection. Although Killian eventually replaced the damaged doors, numerous installation issues remained unresolved, as well as other unresolved issues respecting the propriety of the hardware that Killian installed, with a large percentage of the doors still requiring adjustment to fit properly.

(d) **Vanities:** The vast majority of the vanities were scratched and damaged during installation, especially with respect to the bottom shelves.

(e) **Lobby Granite/Marble:** In the lobby area, upon installation, Killian damaged the fireplace bench, the hostess stand, the concierge stand, and the front desk in a variety of ways, resulting in an unprofessional, aesthetically unappealing appearance that does not meet industry standards. The damages include stains, chipping, cracking and excessive (unsightly) gluing.

(f) **High Speed Internet Access:** Killian's scope of work included the purchase and installation of the high speed internet access. Killian failed to carry out the work. Eventually, Broadway had to engage ATT directly to perform the necessary work, which ATT did. Broadway paid ATT \$43,708.57 for the service, which is a proper deduct to the Killian contract.

(g) **Brick Lintels:** Killian defectively installed the brick lintels in various ways, with the exposed welded locations done in an unsightly fashion, with incorrectly installed welds, the wrong color caulk provided, and the fluid applied moisture barrier installed in a fashion that makes it visible (when it should not be). Killian has addressed many but not all of the defectively installed lintels.

(h) **Site Concrete:** The sidewalk concrete directly in front of the hotel as installed is unsightly with highly visible ugly white streaks. The circle drive lane

concrete is defective in many locations, rampant cracks, settling, chips, nicks and other imperfections. On the opposite side of the building, the concrete elevations were not poured correctly, with water draining towards the building and entering at the kitchen receiving door, and flowing into the elevator shaft.

(i) **Can Lights:** The can lights that Killian installed in the guest room foyers and baths are not the specified lights. There are also other instances of wrongful substitution with respect to other exterior and interior lighting.

(j) **CAT6 Phone And Data Wiring:** The contract specified phone and data wiring as CAT6 as required by Doubletree Standards. Instead, Killian installed CAT5e.

(k) **Miscellaneous Items:** There are numerous other smaller dollar issues that also remain to be resolved, including but not limited to: OCO 54, OCO 5R1, OCO 42, OCO 62, Architect Additional Time And Expense (More Than Contract Contemplated For Substantial Completion/Punch List Determination), Nonconforming Masonry Work, Foundation Ties Not Grouted In LL, Waterproofing Membrane Improperly Installed, Steel Not Painted LL & GF Ceiling Closed, Joints Not Sealed With Epoxy & Turn Down Slab, Improper Ductwork Lining And PVC Piping, Weeps Not Installed For Masonry Below Grade, VWSHIP Access Doors Wrong, Rooftop Stained Concrete Repair Needed, LEED Expense Jim Childester (Should Have Been Electrical Expense), Deason – Credit For Signage Installation, MPE: Classic Engineering: Never Conducted Two Required Site Visits, Granite Sills At North Windows), Credit For Deleting 6 S-1 Eyebrow Fixtures, Credit Roof Bar Door From DD To Single, WC-2 Wallcovering Attick Stock, WC Wasted At LL Restroom, Tile Wasted ADA Rooms Repairs, Fed Ex Expense For Citidel Panels Sent To Architect, Loomis – Parts Needed For Laundry Damper, Tile

Adds/Deletes At Roof (Use Of Smaller Tile), Tech Electronics Extra Time Fixing Phone Lines, Car Wash Area Not Correct, and Saflok Garage Controller Parts.

15. Killian was obligated to perform all if its work. In addition to the defective items described in the preceding paragraph, Killian has failed to either complete all components of its work and/or correct minor issues with its work, all as found and specified on a punch list prepared by the Architect as of August 27, 2014.

16. Killian breached its contractual obligations to Broadway by failing to timely perform its work, providing defective work, failing to complete its work, and failing to correct all of its defective work.

17. As a direct and proximate result of Killian's breaches of its contractual obligations, Broadway has been damaged in an amount indeterminate at this time, with the final amount to be proven at trial, but after taking into account the contract balance, no less than \$500,000.00.

WHEREFORE, Broadway seeks judgment in its favor and against Killian on Count I of this Cross-Claim, and damages as follows:

- a. Actual damages in an amount indeterminate at this time to be proven at trial, but of at least \$500,000.00;
- b. Prejudgment interest on said actual damages as permitted by law;
- c. Costs; and
- d. Such other and further relief as the Court deems just, fair and proper.

COUNT II (Indemnification)

18. Broadway incorporates by reference the allegations of Paragraph 1 through 4 of the Cross-Claim.

19. Section 429.140 provides that: "In all cases where a lien shall be filed under the provisions of Sections 429.010 to 429.340 by any person other than a contractor, it shall be the duty of the contractor to defend any action brought thereupon, at his own expense; and, during the pendency of such action, the owner may withhold from the contractor the amount of money for which such lien shall be filed; and in case of judgment against the owner or his property upon the lien, he shall be entitled to deduct from any amount due by him to the contractor the amount of such judgment and costs, and, if he shall have settled with the contractor in full, shall be entitled to recover back from the contractor any amount so paid by the owner for which the contractor was originally the party liable."

20. In this case, actions to enforce liens have been filed by Highland Glass, Inc., Exceptional Professionals, Inc. and Rosales Masonry. Other mechanic's liens have also been filed against the property, but as of the date of the filing of this Cross-Claim, actions to enforce such liens have not yet been filed.

21. The actions to enforce liens referenced in Paragraph 20, both current and future, are collectively referred to as the "Lien Actions".

22. Pursuant to Section 429.140, Killian has a duty to defend the Lien Actions.

23. By letter dated November 24, 2014, Broadway made demand on Killian to defend the Lien Actions.

24. Killian has refused to undertake the defense of the Lien Actions, and has thereby breached its obligations as provided in Section 429.140.

25. As a direct and proximate result of Killian's failure to comply with Section 429.140, Broadway has been forced to undertake the defense of the Lien Actions to its detriment, expending legal fees and other costs and resources.

WHEREFORE, Broadway prays for judgment against Killian on this Count II of the Cross-Claim, for recovery of all attorney's fees, expenses, costs and other damages incurred by Broadway in connection with the defense of the Lien Actions, and for such other and further remedies as are stated to be available to Broadway by the terms of Section 429.140.

/s/ Richard B. Hicks
 Richard B. Hicks, MO Bar No. 51843
**Van Matre, Harrison, Hollis,
 and Taylor, P.C.**
 1103 E. Broadway
 Columbia, MO 65201
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 Attorneys for Separate Defendant
 Broadway Lodging, LLC, Advantage Capital
 Community Development Fund XVII, LLC,
 Advantage Capital Community
 Development Fund, XV, LLC and Jarrod H.
 Sharp

/s/ Matthew D. Menghini
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 Joseph M. Blanner, No. 50908
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mmenghini@mlklaw.com
jblanner@mlklaw.com
 Attorneys for Separate Defendant
 Broadway Lodging, LLC, Advantage
 Capital Community Development Fund
 XVII, LLC, Advantage Capital Community
 Development Fund, XV, LLC and Jarrod
 H. Sharp

Certificate of Service

The undersigned certifies that a complete and conformed copy of the foregoing document was mailed on January, 5, 2015 to each attorney who represents any party to this matter by U.S. Mail, postage prepaid in the proper amount, at said attorney's last known address.

/s/ Richard B. Hicks
 Richard B. Hicks

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

HIGHLAND GLASS, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	
KILLIAN CONSTRUCTION CO., et al.,)	Case No. 14BA-CV02717
)	
Defendants.)	
)	
v.)	
)	
ROSALES MASONRY COMPANY, LLC,)	
)	
Intervenor)	

KILLIAN CONSTRUCTION CO.’S ANSWER TO INTERVENOR’S PETITION AND CROSS-CLAIMS FOR BREACH OF CONTRACT, QUANTUM MERUIT, PROMPT PAY AND FORECLOSURE OF MECHANIC’S LIEN

Defendant Killian Construction Co. (“Killian”), and for its answer to Intervenor Rosales Masonry Company, LLC’s (“Intervenor”) Petition, hereby states as follows:

1. Killian admits the averments of paragraph 1 of Intervenor’s Petition.
2. Killian admits the averments of paragraph 2 of Intervenor’s Petition.
3. Killian admits the averments of paragraph 3 of Intervenor’s Petition.
4. Killian admits the averments of paragraph 4 of Intervenor’s Petition.
5. Killian admits the averments of paragraph 5 of Intervenor’s Petition.
6. Killian admits the averments of paragraph 6 of Intervenor’s Petition.
7. Killian admits the averments of paragraph 7 of Intervenor’s Petition.
8. Killian admits the averments of paragraph 8 of Intervenor’s Petition.
9. Killian admits the averments of paragraph 9 of Intervenor’s Petition.
10. Killian admits the averments of paragraph 10 of Intervenor’s Petition.
11. Killian admits the averments of paragraph 11 of Intervenor’s Petition.

12. Killian admits it retained Intervenor to perform certain brick and masonry work on the Project including work described in the subcontract and change orders. Killian denies the remaining averments of paragraph 12 of Intervenor's Petition.

13. Killian admits Intervenor completed the majority of the brick and masonry work it was retained to perform. Killian denies any remaining averments of paragraph 13 of Intervenor's Petition.

14. Killian agrees the majority of Intervenor's work was completed to Killian and Owner's satisfaction. However, Owner is demanding that certain portions of Intervenor's work be remedied or replaced. Killian denies any remaining averments of paragraph 14 of Intervenor's Petition.

15. Killian admits the allegations of paragraph 15 of Intervenor's Petition.

16. Killian admits Intervenor filed a mechanic's lien and that the lien reflects certain work performed by Rosales. However, Owner is demanding that certain portions of Intervenor's work be remedied or replaced. Killian denies any remaining averments of paragraph 16 of Intervenor's Petition.

17. Killian admits that Intervenor performed work and that generally its charges are reasonable. However as stated above, Owner is demanding that certain portions of Intervenor's work be remedied or replaced. Intervenor would be responsible for any such remedies or repairs. Accordingly Killian denies the averments of paragraph 17 of Intervenor's Petition.

18. Killian admits the means and methods of Intervenor's work was largely the responsibility of Intervenor. The remaining averments in paragraph 18 of Intervenor's Petition are denied.

19. Killian denies the averments of paragraph 19 of Intervenor's Petition.

20. Based on current information and belief, Killian admits the averments of paragraph 20 of Intervenor's Petition.

21. Based on current information and belief, Killian admits the averments of paragraph 21 of Intervenor's Petition.

22. Based on current information and belief, Killian admits the averments of paragraph 22 of Intervenor's Petition.

23. Killian admits the averments of paragraph 23 of Intervenor's Petition.

24. Killian admits the averments of paragraph 24 of Intervenor's Petition.

25. Killian does not have sufficient knowledge or information to admit or deny the averments of paragraph 25 of Intervenor's Petition.

26. Killian does not have sufficient knowledge or information to admit or deny the averments of paragraph 26 of Intervenor's Petition. Answering further, Killian states that the Owner is claiming portions of Intervenor's work is defective and/or deficient and needs to be repaired or replaced. The owner is also claiming delay damages which, in whole or in part, may be attributable to Intervenor. If Owner's claims are correct, Intervenor's demand does not contain a just and/or true account.

27. Killian admits the averments of paragraph 27 of Intervenor's Petition.

28. Based on information and belief, Killian admits the parties set forth in paragraph 28 of Intervenor's Petition claim an interest in the Property described in the Petition. Any remaining allegations of paragraph 28 of Intervenor's Petition are denied.

29. Killian admits the averments of paragraph 29 of Intervenor's Petition.

30. Killian denies the averments of paragraph 30 of Intervenor's Petition.

WHEREFORE, having fully responded to Intervenor's Petition, Killian prays this Court enter judgment in its favor on all counts, enter an Order dismissing all claims in Intervenor's Petition against Killian, and for such other and further relief as this Court deems just and proper.

AFFIRMATIVE DEFENSES

31. Intervenor's claims against Killian must fail because the Subcontract between Killian and Intervenor contains an enforceable "pay-if-paid" provision that makes payment by Owner to Killian a condition precedent to any obligation by Killian to pay Intervenor. As set forth in Killian's Cross-Claims below it has not received payment from Owner.

32. Additionally, Owner is claiming portions of Intervenor's work needs to be repaired or replaced. If correct, Intervenor's claim needs to be reduced accordingly.

33. Additionally, Owner is alleging delay damages against Killian and its subcontractors. To the extent Intervenor delayed the project it is responsible for the resulting delay damages.

34. Killian reserves the right to add additional affirmative defenses.

**KILLIAN’S CROSS-CLAIMS FOR BREACH OF CONTRACT, QUANTUM MERUIT,
PROMPT PAY AND FORECLOSURE OF MECHANIC’S LIEN**

Killian states the following for its claims against Broadway Lodging, LLC (“Broadway” or “Owner”) and the Real Property:

PARTIES, JURISDICTION AND VENUE

1. Killian is a Missouri corporation in good standing with a place of business in Springfield, Missouri.

2. Defendant Broadway Lodging, LLC (“Broadway” or “Owner”) is a Missouri limited liability company with a place of business in Chesterfield, Missouri.

3. Defendant Advantage Capital Community Development Fund XVII, LLC is a Delaware limited liability company authorized to do business in Missouri, with a place of business in St. Louis, Missouri.

4. Defendant Jarrod H. Sharp is a trustee of Deeds of Trust mentioned below and has a place of business in St. Louis, Missouri.

5. Defendant Advantage Capital Community Development Fund XV, LLC is a Delaware limited liability company authorized to do business in Missouri, with a place of business in St. Louis, Missouri.

6. Defendant Midland States Bank is an Illinois banking corporation with a place of business in Chesterfield, Missouri.

7. Defendant Trustee Services, Inc. is a Missouri corporation with a place of business in Chesterfield, Missouri.

8. Defendant Exceptional Professionals, Inc. is a Missouri corporation with a place of business in Nixa, Missouri.

9. Defendant Rosales Masonry Company, LLC is a Missouri limited liability company, with a place of business in Springfield, Missouri.

10. Plaintiff Highland Glass, Inc. is an Indiana corporation with a place of business in Highland, Indiana.

11. Defendant Arc Steel, LLC is an Arizona limited liability company with a place of business in Gilbert, Arizona.

12. Defendant Custom Manufacturing & Polishing, Inc. is a Missouri corporation with a place of business in Springfield, Missouri.

13. Defendant Glenrock Distributing is a Colorado company with a place of business Englewood, Colorado.

14. Defendant Business Interiors, LTD, Inc. is an Indiana corporation with a place of business in Indianapolis, Indiana.

15. Defendant Questec Constructors, Inc. is a Missouri corporation with a place of business in Columbia, Missouri.

16. The Circuit Court of Boone County, Missouri has jurisdiction over the subject matter of and the parties to this action because, among other things, Killian's claims involve a construction project and Real Property located in a mechanic's lien filed in Boone County, Missouri.

17. Venue is proper in Boone County, Missouri under § 508.030 RsMo.

GENERAL ALLEGATIONS

18. This action concerns real estate in Jackson County, Missouri located at 1111 E. Broadway, Columbia Missouri (the "Real Property") more specifically described as:

Lot One-A (1-A) of Hickman's Addition Plat Number One-A (1-A), a subdivision located in the City of Columbia, Boone County, Missouri, as shown by the plat thereof recorded in Plat Book 45, Page 31, Records of Boon County, Missouri.

19. At times relevant to this action, Broadway was the fee simple owner of the Real Property.

20. Killian, as general contractor, contracted with Broadway for the construction of The Broadway Columbia Doubletree, Hotel on the Real Property (the "Project"). A true and accurate copy of

the Contract between Killian Broadway is attached as Exhibit B to Killian's Mechanic's lien attached hereto as Exhibit 1.

21. Killian performed or substantially performed all of the work required under its Contract with Broadway.

22. A Certificate of Substantial Completion was issued and accepted by Broadway on March 26, 2014.

23. The Project has been fully complete, and Broadway has fully operated its hotel, on April 2, 2014.

24. The Contract called for Killian to construct the Project on a "Cost-Plus" contract with an original Guaranteed Maximum Price of \$12,000,000.

25. During construction there were 16 agreed upon Change Orders that reduced the Guaranteed Maximum Price to \$11,884,061.

26. Additionally Killian is owed additional claims, not agreed to by Broadway, totaling \$1,213,147 that raise the Contract sum owed Killian to \$13,097,208.08,

27. To date Killian has been paid \$10,094,990 by Broadway on the Project.

28. Accordingly, Killian is owed a total of \$3,002,217.92.

29. A summary of work performed and amounts owed Killian for its work on the Projects is contained within the Mechanic's Lien filed by Killian on September 26, 2014 and attached hereto as Exhibit 1.

COUNT I – BREACH OF CONTRACT

(Against Broadway)

30. Killian incorporates and realleges herein the allegations set out in paragraphs 1 through 29 above.

31. There was a valid, existing and enforceable contract under Missouri law between Killian and Broadway for the Project.

32. Killian substantially performed its obligations under its Contract with Broadway.

33. Broadway breached the Contract by failing to make payment thereunder.

34. Broadway's breach of contract has damaged Killian in the principal amount of \$3,002,217.92.

35. Killian made demand on Broadway to pay the above amount due, but Broadway has failed and refused to pay Killian the amounts owed, including undisputed portions of the Contract balance.

36. Killian has incurred and will continue to incur interest, court costs, expenses, and attorneys' fees as a result of the above breach of contract by Broadway.

37. Killian is entitled to recover its attorneys' fees from Broadway pursuant to § 431.180, RSMo.

WHEREFORE, Killian Construction Co., prays for judgment in its favor and against Broadway Lodging, LLC on Count I of this Petition in the principal amount of \$3,002,217.92, plus pre-judgment and post-judgment interest at the rate of 1 1/2 % per month pursuant to § 431.180, RSMo; for its attorneys' fees incurred herein, also pursuant to § 431.180, RSMo; for the costs of this action; and for such further relief that the Court deems just and proper.

COUNT II – BREACH OF MISSOURI'S PRIVATE PROMPT PAY ACT

(Against Broadway)

38. Killian incorporates and realleges herein the allegations set out in paragraphs 1 through 37 above.

39. The Contract between Killian and Broadway is governed by the Missouri Private Prompt Pay Act as stated in § 436.300 – 436.336 RSMo.

40. Pursuant to § 436.327, "The project shall be deemed to have reached substantial completion upon the occurrence of the earlier of the architect or engineer issuing a certificate of substantial completion in accordance with the terms of the contract documents or the owner accepting the performance of the full contract."

41. A certificate of Substantial Completion was issued by the architect on March 26, 2014.

42. Broadway fully accepted Killian's work and was fully operating its hotel on April 2, 2014.

43. Despite this fact Broadway refuses to acknowledge the Project as substantially complete and pay Killian the undisputed monies owed.

44. Killian has incurred and will continue to incur interest, court costs, expenses, and attorneys' fees as a result of the above breach of contract by Broadway.

45. Killian is entitled to recover its attorneys' fees from Broadway pursuant to § 436.333, RSMo.

WHEREFORE, Killian Construction Co., prays for judgment in its favor and against Broadway Lodging, LLC on Count II of this Petition in the principal amount of \$3,002,217.92, plus pre-judgment and post-judgment interest at the rate of 1 1/2 % per month pursuant to § 436.333, RSMo; for its attorneys' fees incurred herein, also pursuant to § 436.333, RSMo; for the costs of this action; and for such further relief that the Court deems just and proper.

COUNT III – QUANTUM MERUIT
(Against Broadway)

46. Killian incorporates and realleges herein the allegations set out in paragraphs 1 through 45 above.

47. Killian's work on the Project conferred a benefit upon Broadway.

48. Broadway appreciated and knew of the benefit conferred by Killian on the Project.

49. Broadway accepted and retained the benefit conferred by Killian on the Project under circumstances that make it inequitable for Broadway to retain the benefit without full payment of its value.

50. After taking into account all payments and other credits, the reasonable value of the benefit conferred on Broadway by Killian is at least \$3,002,217.92.

WHEREFORE, Killian Construction Co., prays for judgment in its favor and against Broadway Lodging, LLC on Count III of this Petition in the principal amount of \$3,002,217.92, plus pre-judgment

and post-judgment interest at the rate of 1 1/2 % per month pursuant to § 436.333, RSMo; for its attorneys' fees incurred herein, also pursuant to § 436.333, RSMo; for the costs of this action; and for such further relief that the Court deems just and proper.

COUNT IV – FORECLOSURE OF MECHANIC'S LIEN

(Against All Parties)

51. Plaintiff incorporates and realleges herein the allegations set out in paragraphs 1 through 50 above.

52. During Killian's work on the Project Broadway had a legal interest in the Real Property.

53. The following lending entities appear to assert an interest in the Real Property at issue in this Petition as follows:

- a. Advantage Capital Community Development Fund XVII, LLC and Jarrod H. Sharp, Trustee, by virtue of Deed of Trust dated November 30, 2011 and recorded in Book 3885, Page 200, Deed Records, Boone County, Missouri, to secure a loan in the original amount of \$3,000,000.00;
- b. Advantage Capital Community Development Fund XV, LLC and Jarrod H. Sharp, Trustee, by virtue of Deed of Trust dated November 30, 2011 and recorded in Book 3885, Page 202, Deed Records, Boone County, Missouri, to secure a loan in the original amount of \$1,500,000.00;
- c. Advantage Capital Community Development Fund XVII, LLC, by virtue of an Assignment of Leases and Rents dated November 30, 2011 and recorded in Book 3885, Page 201, Deed Records, Boone County, Missouri;
- d. Advantage Capital Community Development Fund XV, LLC, by virtue of an Assignment of Leases and Rents dated November 30, 2011 and recorded in Book 3885, Page 203, Deed Records, Boone County, Missouri;

- e. Midland States Bank and Trustee Services, Inc., Trustee, by virtue of a Deed of Trust dated July 25, 2012 and recorded in Book 4005, Page 117, Deed of Records, Boone County, Missouri, to secure a loan in the original amount of \$13,850,000.00;
- f. Midland States Bank and Trustee Services, Inc., Trustee, by virtue of UCC Financing Statement, recorded August 2, 2012 in Book 4005, Page 119, Deed Records, Boone County, Missouri;
- g. Terms and provisions of an instrument entitled "Subordination and Intercreditor Agreement" made by Advantage Capital Community Development Fund XV, LLC, and others, dated July 25, 2012 and recorded in Book 4005, Page 134, Deed of Records, Boone County, Missouri;
- h. Terms and provisions of an instrument entitled "Third Modification Agreement" made by and between Broadway and Advantage Capital Community Development Fund XVII, LLC, dated January 28, 2013 and recorded in Book 4118, Page 137, Deed Records, Boone County, Missouri.
- i. Terms and provisions of an instrument entitled "First Amendment to Subordination and Intercreditor Agreement" made by and between Broadway and others dated January 28, 2013 and recorded in Book 4118, Page 138, Deed Records, Boone County, Missouri; and
- j. Defendant Midland States Bank, and Trustee Services, Inc., Trustee by virtue of a Deed of Trust dated April 25, 2013 and recorded in Book 4151, Page 117, Deed of Records, Boone County, Missouri, to secure a loan in the original amount of \$150,000.00.

54. Additionally, the following contractors, subcontractors and suppliers appear to assert a claim to the Real Property arising from mechanic's liens filed due to Broadway's failure to pay for work and materials incorporated into the Project:

- a. Exceptional Professionals, Inc., by virtue of a Mechanic's Lien, filed as Mechanic's Lien No. 14BA-MC01908;
- b. Rosales Masonry Company, LLC, by virtue of a Mechanic's Lien, filed as Mechanic's Lien No. 14BA-MC02357;
- c. Highland Glass, Inc. by virtue of a Mechanic's Lien, filed as Mechanic's Lien No. 14BA-MC00908;
- d. Arc Steel, LLC, by virtue of a Mechanic's Lien, filed as Mechanic's Lien No. 14BA-MC00266;
- e. Custom Manufacturing & Polishing, Inc., by virtue of a Mechanic's Lien, filed as Mechanic's Lien No. 14BA-MC02178;
- f. Glenrock Distributing, by virtue of a Mechanic's Lien, filed as Mechanic's Lien No. 14BA-MC01470;
- g. Business Interiors, LTD, Inc., by virtue of a Mechanic's Lien, filed as Mechanic's Lien No. 14BA-MC02552;
- h. Questec Constructors, Inc., by virtue of a Mechanic's Lien, filed as Mechanic's Lien No. 14BA-MC02288;

55. Killian first performed work on the Project on or about July 16, 2012.

56. Killian last performed work on the Project and/or last incorporated materials into the Real Property under its contract with Broadway on or about April 2, 2014.

57. All of the labor, equipment, supplies and other materials were provided and/or performed by Killian in the execution and construction of the Project and was fully incorporated into the Real Property.

58. On September 26, 2014, Killian filed a mechanic's lien in the principal amount of \$3,002,217.92 with the Clerk of the Circuit Court of Boone County, Missouri pursuant to § 429.010, RSMo naming Broadway as the owner of the Real Property.

59. A true and accurate copy of the Mechanic's Lien filed by Killian is attached hereto as Exhibit 1 and incorporated by reference as if fully set out herein.

60. This action is being filed within six months of the filing of the mechanic's lien by Killian, in accordance with § 429.170, RSMo.

61. Killian has met all terms and conditions necessary to filing a valid mechanic's lien and perfecting a mechanic's lien interest in Boone County, Missouri and is entitled to foreclose all interests in the Real Property pursuant to Missouri's mechanic's lien laws and statutes.

62. Killian's claim against the Real Property is superior or equal to all other claims.

WHEREFORE, Killian Construction Co. prays for judgment in its favor and against all other parties asserting a claim in the Real Property on Count IV of this Petition and for a declaration:

- that Killian Construction Co. has a valid and existing mechanic's lien against the aforescribed Real Property and the buildings, appurtenances and improvements thereon in the principal amount of \$3,002,217.92, plus interest, costs and attorneys' fees;
- that said mechanic's lien is a first lien and superior or equal to any other lien or claim against the Real Property;
- that a special execution be issued against the Real Property and improvements, that the same be sold pursuant to such special execution and that the aforesaid judgments under Counts I – III be paid from the proceeds of the sale;
- that the rights and interests of all other claimants against the Real Property be adjudicated and determined;

for the costs of this action; and for such further and other relief as the Court deems just, equitable and proper.

Respectfully submitted,

SPENCER FANE BRITT & BROWNE LLP

By /s/ Wade M. Early

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CERTIFICATE OF SERVICE

I hereby certify that January 5, 2015 the foregoing was electronically served on all parties of record via the Court's electronic filing system:

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/s/ Wade M. Early

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