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COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

ALBERT G. HODGES AND BARBARA ANN HODGES	:	CASE NO. 2003-CVH-01284 (JUDGE WALKER)
PLAINTIFFS,	:	**DEFENDANT/THIRD PARTY PLAINTIFF EMJ CORPORATION'S AMENDED THIRD PARTY COMPLAINT**
VS.	:	
KOHL'S DEPARTMENT STORES, INC., ET AL	:	
DEFENDANTS,	:	
EMJ CORPORATION	:	
DEFENDANT/THIRD PARTY PLAINTIFF,	:	
VS.	:	
ACR dba MAXIM CRANE WORKS aka ANTHONY CRANE RENTAL, L.P., dba MAXIM CRANE WORKS **SERVE VIA CERTIFIED MAIL:** C. T. Corporation System 1300 E. 9th Street Cleveland, OH 44114	:	
AND	:	
ACR MANAGEMENT, L.L.C. **SERVE VIA CERTIFIED MAIL:** C. T. Corporation System 1300 E. 9th Street Cleveland, OH 44114	:	

FILED
04 JUN 17 PM 2:17
DAVID R. CAUDILL, JR.
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

ARA, RUBERG,
LOR, SLOAN
. SERGENT
orneys at Law
Crestview Hills
Road, Suite 201
). Box 17411
ngton, Kentucky
1017-0411
9) 331-2000

EXHIBIT E

THIRD PARTY DEFENDANTS

** ** ** ** ** ** ** **

Now comes the Defendant/Third Party Plaintiff, EMJ Corporation (hereinafter, "EMJ"), and for its Amended Third Party Complaint against ACR dba Maxim Crane Works aka Anthony Crane Rental, L.P., dba Maxim Crane Works and ACR Management, L.L.C., states as follows:

COUNT I.

1. That EMJ Corporation incorporates by reference its prior Third Party Complaint, and all of its prior Answers, Cross Claims, and defenses and amendments thereto.

2. That Plaintiffs herein filed a Complaint against Defendant/Third Party Plaintiff, EMJ Corporation (hereinafter, "EMJ"), and others on October 7, 2003, alleging breach of contract by EMJ; a copy of said Complaint is attached hereto as Exhibit "A."

3. The aforementioned contract was for the construction of a Kohl's building and parking lot, as described therein.

4. EMJ incorporates by reference all of its previous defenses and denials and incorporates its prior Answer and Cross Claim filed in this action as if fully restated herein.

5. That on or about November 20, 2002, Defendant/Third Party Plaintiff EMJ entered into a contract ("subcontract") with ACR dba Maxim Crane Works, under which subcontract ACR dba Maxim Crane Works was to perform earth work, excavation work, grading work, and other construction services in connection with the construction of the Kohl's building and parking lot; a copy of the subcontract is attached hereto as Exhibit "B".

6. Pursuant to Clause 15 of the subcontract referenced in Paragraph 4 herein, ACR dba Maxim Crane Works "warrants and guarantees that it shall perform all work in a

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good and workmanlike manner, in conformity with all applicable laws, building codes, plans and specifications, and manufacturer's standards and recommendations."

7. Pursuant to Clause 15 of the subcontract referenced in Paragraph 4 herein, ACR dba Maxim Crane Works agreed that, as subcontractor, it "shall restore or repair any defective work or material or any work or material which does not meet the obligations of this Subcontract, or, at the election of the Contractor, pay the reasonable costs thereof."

8. If the Plaintiffs have been damaged as set forth in their Complaint, such damage was the direct result of negligence and/or breaches of contract by ACR dba Maxim Crane Works.

9. That pursuant to Clause 5 of the subcontract, ACR dba Maxim Crane Works agreed to indemnify EMJ for damages such as the damages being sought by Plaintiffs in this case.

10. That Anthony Crane Rental, L.P. is named as a Third Party Defendant herein because, based upon information from the office of the Ohio Secretary of State, Anthony Crane Rental, L.P. is a Pennsylvania limited partnership, registered in Ohio with the assumed name of Maxim Crane Works.

11. That ACR Management, L.L.C. is named as a Third Party Defendant herein, because, based upon information from the office of the Ohio Secretary of State, ACR Management, L.L.C. is a Delaware limited liability company, licensed to do business in Ohio and a general partner of Anthony Crane Rental, L.P. By virtue of its being the general partner of Anthony Crane Rental, L.P., ACR Management, L.L.C. is liable as general partner for its actions and the actions of Anthony Crane Rental, L.P.

12. That by reason of the inter-relationships between all the named Third Party

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Defendants, the Third Party Defendants are liable, jointly and/or severally, for the breaches of contract and contractual obligations of ACR dba Maxim Crane Works.

13. If Defendant/Third Party Plaintiff EMJ was negligent in any manner (which is denied), any such negligence was passive and secondary to the active and primary negligence of ACR dba Maxim Crane Works aka Anthony Crane Rental, L.P., dba Maxim Crane Works, and ACR Management, L.L.C., and if the Plaintiffs, or either of them, have judgment against Defendant/Third Party Plaintiff EMJ, Defendant/Third Party Plaintiff EMJ is entitled to judgment over against ACR dba Maxim Crane Works aka Anthony Crane Rental, L.P., dba Maxim Crane Works, and ACR Management, L.L.C. for indemnification and/or contribution.

14. That should there be a judgment rendered herein against Defendant/Third Party Plaintiff EMJ, then it is entitled to judgment over against ACR dba Maxim Crane Works aka Anthony Crane Rental, L.P., dba Maxim Crane Works, and ACR Management, L.L.C. for indemnification and/or contribution based upon the aforementioned subcontract and common law principles.

COUNT II.

15. Defendant/ Third Party Plaintiff EMJ Corporation incorporates by reference paragraphs 1 through 14 above as if fully restated.

16. That Defendant/Third Party Plaintiff EMJ Corporation paid Plaintiffs Eighteen Thousand Six Hundred and Forty-One Dollars and Fifty-Three cents ($18,641.53) on or about July 2, 2003 for a flood occurring on or about May 10, 2003, as evidenced by a Release, a copy of which is attached hereto as Exhibit "C."

17. That Defendant/Third Party Plaintiff EMJ Corporation is entitled to contribution and/or indemnification from ACR dba Maxim Crane Works aka Anthony Crane

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Rental, L.P., dba Maxim Crane Works, and ACR Management, L.L.C., due to the afore-mentioned negligence and actions of ACR dba Maxim Crane Works aka Anthony Crane Rental, L.P., dba Maxim Crane Works, and ACR Management, L.L.C., as a result of the payment and Release, in the amount of Eighteen Thousand Six Hundred and Forty-One Dollars and Fifty-Three cents ($18,641.53).

COUNT III.

18. Defendant/ Third Party Plaintiff EMJ Corporation incorporates by reference paragraphs 1 through 17 above as if fully restated.

19. That Defendant/Third Party Plaintiff EMJ Corporation paid Plaintiffs Three Thousand Five Hundred Dollars ($3,500.00) on or about July 2, 2003 for a flood occurring on or about June 14, 2003, as evidenced by a Release, a copy of which is attached hereto as Exhibit "D."

20. That Defendant/Third Party Plaintiff EMJ Corporation is entitled to contribution and/or indemnification from ACR dba Maxim Crane Works aka Anthony Crane Rental, L.P., dba Maxim Crane Works, and ACR Management, L.L.C., due to the afore-mentioned negligence and actions of ACR dba Maxim Crane Works aka Anthony Crane Rental, L.P., dba Maxim Crane Works, and ACR Management, L.L.C., as a result of the payment and Release, in the amount of Three Thousand Five Hundred Dollars ($3,500.00).

WHEREFORE, Defendant/Third Party Plaintiff EMJ prays as follows: for all relief prayed for in its Answer and Cross Claim and any amendments thereto, for all relief prayed for in its Third Party Complaint and any amendments thereto, including judgment over against ACR dba Maxim Crane Works aka Anthony Crane Rental, L.P., dba Maxim Crane Works and ACR Management, L.L.C. for indemnity and/or contribution, for its costs and for any and all

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other and proper relief to which it may appear entitled.

Respectfully submitted,

CHRISTOPHER J. ARLINGHAUS (OH 0068144)
ARNOLD TAYLOR
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Fax: 859-578-3365
carlinghaus@ortlaw.com
Attorneys for Defendant, EMJ Corporation

CERTIFICATION

I hereby certify that I have, this 16th day of June, 2004, mailed a copy of the foregoing pleading to the following attorneys of record:

Richard B. Uhle, Jr., Esq.
Durkee & Uhle
9000 Plainfield Road
Cincinnati, Ohio 45236
Attorney for Plaintiffs

Phillip J. Smith, Esq.
Thomas L. Gabelman, Esq.
Suite 2100, Atrium Two
221 East Fourth Street
P. O. Box 236
Cincinnati, Ohio 45201-0236
Attorneys for Defendant, Kohl's Department Stores, Inc.

Leonard A. Weakley, Jr., Esq.
RENDIGS, FRY, KIELY & DENNIS
Suite 900
One West Fourth Street
Cincinnati, Ohio 45202-3688
Attorneys for Defendant, Woolpert LLP

Peggy M. Barker, Esq.
Kohnen & Patton, LLP
PNC Center, Eighth Floor

201 East Fifth Street
Cincinnati, Ohio 45202-2994
Attorney for Third Party Defendants, ACR, d/b/a Maxim Crane Works, a/k/a Anthony Crane Rental, L.P., d/b/a Maxim Crane Works and ACR Management, L.L.C.

Thomas J. Gruber, Esq.
McCaslin, Imbus & McCaslin
Suite 900
632 Vine Street
Cincinnati, Ohio 45202
Attorney for Third Party Defendant, AHEPA 127, Inc.

CHRISTOPHER J. ARLINGHAUS
O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT

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COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

ALBERT G. HODGES AND BARBARA ANN HODGES	:	CASE NO. 2003-CVH-01284 (JUDGE WALKER)
PLAINTIFFS,	:	**DEFENDANT/THIRD PARTY PLAINTIFF EMJ CORPORATION'S THIRD PARTY COMPLAINT**
VS.	:	
KOHL'S DEPARTMENT STORES, INC., ET AL	:	
DEFENDANTS,	:	
EMJ CORPORATION	:	
DEFENDANT/THIRD PARTY PLAINTIFF,	:	
VS.	:	
ACR dba MAXIM CRANE WORKS aka ANTHONY CRANE RENTAL, L.P., dba MAXIM CRANE WORKS **SERVE VIA CERTIFIED MAIL:** C. T. Corporation System 1300 E. 9th Street Cleveland, OH 44114	:	
AND	:	
ACR MANAGEMENT, L.L.C. **SERVE VIA CERTIFIED MAIL:** C. T. Corporation System 1300 E. 9th Street Cleveland, OH 44114	:	
THIRD PARTY DEFENDANTS	:	

** ** ** ** ** ** ** **

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EXHIBIT
A

Now comes the Defendant/Third Party Plaintiff, EMJ Corporation (hereinafter, "EMJ"), and for its Third Party Complaint against ACR dba Maxim Crane Works aka Anthony Crane Rental, L.P., dba Maxim Crane Works and ACR Management, L.L.C., states as follows:

1. That Plaintiffs herein filed a Complaint against Defendant/Third Party Plaintiff, EMJ Corporation (hereinafter, "EMJ"), and others on October 7, 2003, alleging breach of contract by EMJ; a copy of said Complaint is attached hereto as Exhibit "A."

2. The aforementioned contract was for the construction of a Kohl's building and parking lot, as described therein.

3. EMJ incorporates by reference all of its previous defenses and denials and incorporates its prior Answer and Cross Claim filed in this action as if fully restated herein.

4. That on or about November 20, 2002, Defendant/Third Party Plaintiff EMJ entered into a contract ("subcontract") with ACR dba Maxim Crane Works, under which subcontract ACR dba Maxim Crane Works was to perform earth work, excavation work, grading work, and other construction services in connection with the construction of the Kohl's building and parking lot; a copy of the subcontract is attached hereto as Exhibit "B".

5. Pursuant to Clause 15 of the subcontract referenced in Paragraph 4 herein, ACR dba Maxim Crane Works "warrants and guarantees that it shall perform all work in a good and workmanlike manner, in conformity with all applicable laws, building codes, plans and specifications, and manufacturer's standards and recommendations."

6. Pursuant to Clause 15 of the subcontract referenced in Paragraph 4 herein, ACR dba Maxim Crane Works agreed that, as subcontractor, it "shall restore or repair any

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defective work or material or any work or material which does not meet the obligations of this Subcontract, or, at the election of the Contractor, pay the reasonable costs thereof."

7. If the Plaintiffs have been damaged as set forth in their Complaint, such damage was the direct result of negligence and/or breaches of contract by ACR dba Maxim Crane Works.

8. That pursuant to Clause 5 of the subcontract, ACR dba Maxim Crane Works agreed to indemnify EMJ for damages such as the damages being sought by Plaintiffs in this case.

9. That Anthony Crane Rental, L.P. is named as a Third Party Defendant herein because, based upon information from the office of the Ohio Secretary of State, Anthony Crane Rental, L.P. is a Pennsylvania limited partnership, registered in Ohio with the assumed name of Maxim Crane Works.

10. That ACR Management, L.L.C. is named as a Third Party Defendant herein, because, based upon information from the office of the Ohio Secretary of State, ACR Management, L.L.C. is a Delaware limited liability company, licensed to do business in Ohio and a general partner of Anthony Crane Rental, L.P. By virtue of its being the general partner of Anthony Crane Rental, L.P., ACR Management, L.L.C. is liable as general partner for its actions and the actions of Anthony Crane Rental, L.P.

11. That by reason of the inter-relationships between all the named Third Party Defendants, the Third Party Defendants are liable, jointly and/or severally, for the breaches of contract and contractual obligations of ACR dba Maxim Crane Works.

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12. If Defendant/Third Party Plaintiff EMJ was negligent in any manner (which is denied), any such negligence was passive and secondary to the active and primary negligence of ACR dba Maxim Crane Works aka Anthony Crane Rental, L.P., dba Maxim Crane Works, and ACR Management, L.L.C., and if the Plaintiffs, or either of them, have judgment against Defendant/Third Party Plaintiff EMJ, Defendant/Third Party Plaintiff EMJ is entitled to judgment over against ACR dba Maxim Crane Works aka Anthony Crane Rental, L.P., dba Maxim Crane Works, and ACR Management, L.L.C. for indemnification and/or contribution.

13. That should there be a judgment rendered herein against Defendant/Third Party Plaintiff EMJ, then it is entitled to judgment over against ACR dba Maxim Crane Works aka Anthony Crane Rental, L.P., dba Maxim Crane Works, and ACR Management, L.L.C. for indemnification and/or contribution based upon the aforementioned subcontract and common law principles.

WHEREFORE, Defendant/Third Party Plaintiff EMJ prays as follows: for all relief prayed for in its Answer and Cross Claim and any amendments thereto, for judgment over against ACR dba Maxim Crane Works aka Anthony Crane Rental, L.P., dba Maxim Crane Works and ACR Management, L.L.C. for indemnity and/or contribution, for its costs and for any and all other and proper relief to which it may appear entitled.

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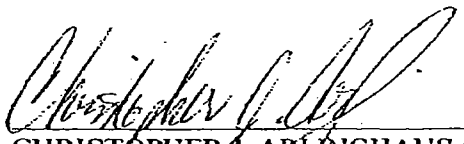
Respectfully submitted,



CHRISTOPHER J. ARLINGHAUS (OH 0068144)
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P. O. Box 17411
Covington, KY 41017-0411
(859) 331-2000
Attorneys for Defendant, EMJ Corporation

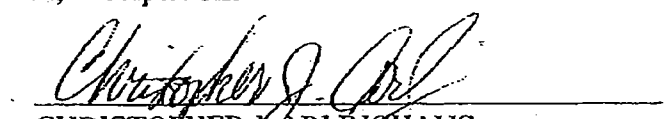
CERTIFICATION

I hereby certify that I have, this 5th day of December, 2003, mailed a copy of the foregoing pleading to the following attorneys of record:

Richard B. Uhle, Jr., Esq.
Durkee & Uhle
9000 Plainfield Road
Cincinnati, Ohio 45236
Attorney for Plaintiffs

Phillip J. Smith, Esq.
Thomas L. Gabelman, Esq.
Suite 2100, Atrium Two
221 East Fourth Street
P. O. Box 236
Cincinnati, Ohio 45201-0236
Attorneys for Defendant, Kohl's Department Stores, Inc.

Leonard A. Weakley, Jr., Esq.
RENDIGS, FRY, KIELY & DENNIS
Suite 900
One West Fourth Street
Cincinnati, Ohio 45202-3688
Attorneys for Defendant, Woolpert LLP



CHRISTOPHER J. ARLINGHAUS
O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT

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COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

ALBERT G. HODGES 8 Easley Drive Milford, Ohio 45150	:	CASE NO. 2003 CV H 01284
and	:	JUDGE WALKER
BARBARA ANN HODGES 8 Easley Drive Milford, Ohio 45150	:	
Plaintiffs,	:	COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF (JURY DEMAND ATTACHED)
vs.	:	
KOHL'S DEPARTMENT STORES, INC. N56 W17000 Ridgewood Drive Menomonee Falls, Wisconsin 53051	:	
and	:	
EMJ CORPORATION 2030 Hamilton Place Blvd. Suite 200 Chattanooga, Tennessee 37421	:	
and	:	
WOOLPERT ENGINEERING, LLP 4141 Rosslyn Drive Cincinnati, Ohio 45209	:	
Defendants.	:	

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CLERK OF COURTS
CLERMONT COUNTY, OHIO

FIRST CLAIM

1. Plaintiffs Albert G. Hodges and Barbara Ann Hodges are the owners of property located at 8 Easley Drive, Milford, Ohio in Clermont County, Ohio which is adjacent to the Kohl's Department Store development currently being constructed by Defendants.

EXHIBIT
A TO
THIRD
AMENDED COMPLAINT

2. Defendant Kohl's is the owner and operator of the department store located across from Plaintiffs' property.

3. Defendant EMJ is the general contractor over seeing the construction of the Kohl's development.

4. Defendant Woolpert is the engineering firm working on the Kohl's development.

5. Defendants have negligently designed and constructed the Kohl's development site such that the storm water drainage flow has been severely altered such that vast amounts of additional water now drain through Plaintiffs' property.

6. Defendants have violated Plaintiffs' riparian rights by substantially altering the flow of storm water drainage through Plaintiffs' property causing extensive damages.

7. Plaintiff's property has been flooded on four separate occasions in 2003 and Plaintiffs are in constant fear of additional flooding after every rain fall.

8. Plaintiffs have suffered the loss of the use and enjoyment of their residence.

SECOND CLAIM

9. Defendants have actively and constructively trespassed on Plaintiffs' property and taken Plaintiffs' property for their own use and benefit for drainage of excess storm water and other uses.

10. Defendants do not have any written easement for the extensive alteration of Plaintiffs' property and use for storm water drainage and other purposes.

THIRD CLAIM

11. Defendants have constructively taken Plaintiffs' property and appropriated it for their own use.
12. Defendants' actions have been intentional and purposeful and Defendants are liable for punitive damages and attorney fees.
13. Defendants were aware of the flooding at Plaintiffs' property and continued to cause excessive storm water to drain through Plaintiffs' property.
14. Plaintiffs have suffered the total loss of use of their garage and family room and the loss of the use of their home for entertaining and family gatherings.
15. Plaintiffs have been prevented from traveling or vacationing due to the need to stay at home and defend their property from additional floods.
16. The present plans call for increasing the grade in Plaintiffs' front yard and driveway such that it will be too steep for safe use of Plaintiffs' property including the garage and driveway.

FOURTH CLAIM

17. Defendants have advised Plaintiffs that the Easley Drive upgrade will proceed and the Woodspoint extension (the road which connects o Easley Drive) regardless of its effect on Plaintiffs' property.

18. Plaintiffs believe that unless restrained and enjoined, Defendants will continue to divert excessive storm water through Plaintiffs' property and deny them the safe, peaceful and quiet use and enjoyment of their property.

19. Plaintiffs have and will suffer irreparable damages and have no adequate remedy at law.

20. Plaintiffs' property has been taken from them and Defendants should not be permitted to proceed with the construction and opening of the Kohl's department store until they have contracted to acquire and purchase Plaintiffs property and pay for Plaintiffs' damages and loss of use of their residence.

WHEREFORE, Plaintiffs Albert G. Hodges and Barbara Ann Hodges hereby demand judgment against Defendants Kohl's Department Stores, Inc., EMJ Corporation and Woolpert Engineering LLP, jointly and severally, in the amount of at least $1,000.00 for Plaintiffs damages and the loss of use of their property and the sum of at least $500,000.00 for the constructive appropriation in taking of Plaintiffs property and for a temporary restraining order and preliminary and permanent injunction ordering Defendants to cease construction and further use of Plaintiffs property until they have contracted to pay Plaintiffs damages and purchase Plaintiffs property and for attorney fees, interest, costs and any other relief to which Plaintiffs may be entitled.

Richard B. Uhle, Jr., #0022073
Attorney for Plaintiffs
DURKEE & UHLE
9000 Plainfield Road
Cincinnati, Ohio 45236
(513) 891-2201 Telephone
(513) 793-4691 Fax
E-mail: uhle@fuse.com

JURY DEMAND

Plaintiffs hereby demand trial by jury in the above matter.

Richard B. Uhle, Jr., #0022073
Attorney for Plaintiffs
DURKEE & UHLE
9000 Plainfield Road
Cincinnati, Ohio 45236
(513) 891-2201 Telephone
(513) 793-4691 Fax
E-mail: uhle@fuse.com

PRAECIPE

TO THE CLERK:

Please serve the three Defendants at their above business addresses, by Certified Mail, return receipt requested.

Richard B. Uhle, Jr., #0022073

RBU/s!
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FILE

MAILED
11-21-02

REC'D
NOV 22 2002
EMJ

SUBCONTRACTOR AGREEMENT

EMJ CORPORATION
2030 HAMILTON PLACE BLVD.
SUITE 200
CHATTANOOGA, TENNESSEE 37421
TELEPHONE: (423) 855-1550
FACSIMILE: (423) 855-6857

Bruce Lott
859-441-7400
FAX: 859-442-6203

DATE ISSUED: 11/20/02

THIS AGREEMENT, No. 2258202800, is made by and between ACR dba Maxim Crane Works

40 Licking Pike Wilder, KY 41076

hereinafter called the "SUBCONTRACTOR", and EMJ CORPORATION, hereinafter called the "CONTRACTOR".

1. SUBCONTRACTOR agrees to deliver, furnish, install, and pay for all materials, labor, scaffolding, equipment, tools, appliances, and everything necessary for the complete execution of the Work described in Paragraph

(2) for Kohl's - Miami Township OH

1164 State Route 28

Milford, OH 45150 hereinafter called the "Project" for

Kohl's Dept. Store, Inc.

hereinafter called the "Owner," in accordance with the Plans and Specifications as listed in Schedule A attached, as prepared by Woolpert, L.L.P.

hereinafter called the "Architect", including Addendum No.(s) SEE ATTACHED SCHEDULE A

all of which form a part of the Contract between the CONTRACTOR and the Owner dated _____ and

are hereby made a part of this Subcontract, are incorporated herein by reference, and all of which are sometimes referred to herein as the "Contract Documents."

Scope of Work 2. The SUBCONTRACTOR is to do the following:

All site demolition, grading, asphalt paving, storm system, utility systems, curb and gutter, retaining wall, steam mitigation stonework and erosion control work including but not limited to work specified in Divisions 0, 1, 2, and 3.

CONTINUED ON ATTACHMENT I.

and all other work incidental thereto to make this item or items of work complete. All obligations and representations placed on CONTRACTOR under its contract with the Owner shall apply to and be binding upon SUBCONTRACTOR to the extent that they relate in an way to SUBCONTRACTOR'S work or its general obligations under this contract. However, to the extent of any conflicting obligations, the provisions contained herein shall control.

Payments 3. The CONTRACTOR agrees to pay SUBCONTRACTOR for the performance of his work the sum of ONE MILLION SIX HUNDRED SIX THOUSAND THREE HUNDRED FIFTY-SIX

and 00 / 100 Dollars

($ 1,606,356.00), and to make payments on account thereof as follows:

EXHIBIT
B
Gobler

n or about the 20th day of each month, 90% of the value of labor and materials incorporated by SUBCONTRACTOR into the Work and 90% of e value of materials stored on the job site in a manner acceptable to CONTRACTOR through the 20th of the preceding month, less the aggregate of evious payments. CONTRACTOR, at its sole option, may issue joint checks. The balance of the contract price shall be paid to SUBCONTRACTOR on all of the following occurring:

A. Final completion of SUBCONTRACTOR'S work and obligations under this Subcontract;
B. Acceptance of the Work by the Owner and the Architect;
C. Furnishing to CONTRACTOR satisfactory evidence by SUBCONTRACTOR that all labor and material accounts incurred by SUBCONTRACTOR in connection with his work have been paid in full; and
D. SUBCONTRACTOR furnishing all As-Built Plans, submittals, warranties, guarantees, instruction manuals, spare parts or extra material, and other items, as required by the Contract Documents to CONTRACTOR.

No payment to SUBCONTRACTOR shall operate as an approval of SUBCONTRACTOR'S Work, or materials, or any part thereof, r a waiver of any obligation of SUBCONTRACTOR with respect to SUBCONTRACTOR'S warranty or duty to replace defective Work or other responsibilities of SUBCONTRACTOR under this Subcontract. SUBCONTRACTOR expressly waives any rights it may have under any law requiring that funds retained out of contracts for the improvement of real property be paid into an escrow account and held for the benefit of the payee or under any other law with respect to retainages. Payment to CONTRACTOR by Owner is a condition precedent to CONTRACTOR'S duty to pay SUBCONTRACTOR. Further, CONTRACTOR'S duty to pay is subject to any set-off or other rights of CONTRACTOR under this Subcontract. Should SUBCONTRACTOR be in breach of any other contract with CONTRACTOR, and should that breach not be cured after written notice, CONTRACTOR may terminate this subcontract or set off money otherwise due SUBCONTRACTOR for damages caused by this breach.

Bonds

SUBCONTRACTOR shall provide a 100% Payment and 100% Performance Bond on the form prescribed by and with surety acceptable to CONTRACTOR in the full amount of this Subcontract for the faithful and complete performance of this Subcontract. Failure to furnish such bonds in form satisfactory to CONTRACTOR by the date required in Paragraph 27 will entitle CONTRACTOR to terminate this subcontract without any liability or obligation to SUBCONTRACTOR. The premium for bonds shall be paid for by SUBCONTRACTOR.

Due 11-21-02

Indemnification Insurance

(a) SUBCONTRACTOR agrees to DEFEND AND INDEMNIFY CONTRACTOR and the Owner and their officers, agents and employees from any damages, losses, expenses, penalties, attorney fees, costs, claims, causes of action, demands and judgments resulting from (i) injury or death to any person, (ii) property damage, (iii) contract claims or (iv) other claims or damages of whatever nature; which injury, death, damage or claim arises out of or results from the execution of the Work or occurs in connection therewith, or arises out of or results from any act or omission, or is caused or alleged to have been caused by (a) an act or omission, of SUBCONTRACTOR or its officers, agents, subcontractors, suppliers, employees or those with whom it controls for any part of the Work, (b) a violation of any provision of this Subcontract, or (c) by any act or failure to act contrary to any law, order, ordination, rule, regulation, standard or statute whether by SUBCONTRACTOR or anyone directly or indirectly employed, contracted or supervised by SUBCONTRACTOR or by anyone for whose acts SUBCONTRACTOR may be liable. This indemnification shall only be applicable to the conduct attributable to SUBCONTRACTOR or anyone directly or indirectly employed, contracted or supervised by SUBCONTRACTOR or by anyone for whose acts SUBCONTRACTOR may be liable. SUBCONTRACTOR acknowledges that CONTRACTOR shall have no obligation to supervise SUBCONTRACTOR'S work, and if anyone brings suit resulting from conduct of SUBCONTRACTOR will indemnify CONTRACTOR for CONTRACTOR'S losses, damages, costs, and legal fees, and from claim of CONTRACTOR'S own negligence in supervising SUBCONTRACTOR.

(b) SUBCONTRACTOR shall maintain, at its own cost, such insurance as will protect it and CONTRACTOR from (i) claims under the Workmen's Compensation Law of the State in which the Work is being performed, and (ii) any claim for bodily injury, including death, and property damage, both physical and loss of use, which may arise from the Work or any performance under this Subcontract, whether such Work or performance are by SUBCONTRACTOR or any of his subcontractors or anyone directly or indirectly employed by him, said insurance to be in the limits as set forth in the Contract Documents. SUBCONTRACTOR shall provide such insurance through an insurance company acceptable to CONTRACTOR, and will furnish a Certificate of Insurance to CONTRACTOR. This insurance shall be primary and shall name CONTRACTOR as an additional insured. This Certificate of insurance must be returned with this agreement, and must provide a thirty (30) day cancellation notice, with notice to CONTRACTOR by SUBCONTRACTOR and the insurer. Should SUBCONTRACTOR fail or neglect to provide said insurance required by this Paragraph 5(b), CONTRACTOR shall have the right, but not the obligation, to pay the premiums to maintain said insurance and offset such cost against SUBCONTRACTOR, but failure of CONTRACTOR to exercise such right shall not affect or diminish the obligations of SUBCONTRACTOR under this Subcontract. CONTRACTOR also has the right to recover from SUBCONTRACTOR a reimbursement for any premiums paid by CONTRACTOR in excess of amounts due SUBCONTRACTOR.

(c) SUBCONTRACTOR shall bear the risk of loss with respect to the restoration or repair of any of SUBCONTRACTOR'S Work or material caused or resulting from casualties or risks not insured under any standard casualty or builder's risk policy provided by CONTRACTOR or Owner under the Contract Documents. SUBCONTRACTOR waives any rights of subrogation against CONTRACTOR or Owner for any loss covered by insurance of any type.

Assignment

SUBCONTRACTOR shall not let, assign, transfer, subcontract, or delegate this Subcontract or any part thereof, or any interest herein, without the expressed written consent of CONTRACTOR. This written consent may be withheld at CONTRACTOR'S sole discretion.

Estimate

SUBCONTRACTOR shall submit to CONTRACTOR, within 30 days after the execution of this Subcontract and before the first partial payment hereunder is due, an accurate schedule of values acceptable to CONTRACTOR showing the estimated cost of each part of the Work covered by this Subcontract, the total of which shall be used as a basis for preparing and checking periodic estimates for partial payments.

Requisitions

8. SUBCONTRACTOR'S requisition statement, on a form provided by CONTRACTOR, shall be delivered to CONTRACTOR by the 20th of any month during which SUBCONTRACTOR requests payment. If the requisition statement is not received by the 20th, it will be processed and paid in the next billing cycle. As a condition of payment, CONTRACTOR may require lien waivers from SUBCONTRACTOR and its major suppliers and/or all affidavits that all bills have been paid for work performed and materials supplied through the date of the last payment by CONTRACTOR.

Time of Essence

9. Time is of the essence of this Subcontract and any breach of same shall go to the essence thereof, and SUBCONTRACTOR, in agreeing to complete the Work within the time set forth in this Subcontract, has taken into consideration and made allowances for all the hindrances and delays including, but not limited to, weather delays incident to the Work. SUBCONTRACTOR shall be entitled to an extension of time to complete the work under this Subcontract only if all of the following are satisfied: (i) delays to its work are caused by actions of CONTRACTOR and are beyond the control of SUBCONTRACTOR, its subcontractors and suppliers, (ii) the delays were not reasonably foreseeable before the contract was entered, (iii) SUBCONTRACTOR provides written notice to CONTRACTOR within forty-eight (48) hours of the first commencement of any delay, and (iv) CONTRACTOR can and has been awarded a time extension for such delay by the Owner. In the event of any delay, SUBCONTRACTOR shall first work on weekends or overtime before being entitled to any time extension. No time extension or damages may be recovered by SUBCONTRACTOR for weekend or overtime work. SUBCONTRACTOR EXPRESSLY AGREES THAT NO DAMAGES SHALL BE RECOVERABLE FOR ANY DELAYS IN THE WORK, REGARDLESS OF THE CAUSE; THE SOLE REMEDY IS AN EXTENSION OF TIME. Notwithstanding the foregoing, SUBCONTRACTOR shall not be entitled to any extension if CONTRACTOR has not been awarded a similar extension of time by the Owner.

Clean Up

10.(a) The SUBCONTRACTOR will make arrangements to remove from the work area and deposit in dumpsters provided by the CONTRACTOR, all debris, cartons, crates, and boxes at the end of each day and at all times keep the building area and premises free from debris and unsafe conditions resulting from the SUBCONTRACTOR'S work.

(b) In addition, the SUBCONTRACTOR will broom clean each work area prior to discontinuing work in the same.

(c) If the SUBCONTRACTOR fails to immediately commence clean-up duties within 24 hours after receipt from the CONTRACTOR of written notice of non-compliance, the CONTRACTOR's superintendent shall implement clean-up measures without further notice and deduct the entire cost thereof, plus handling charges from any amounts due or to become due the SUBCONTRACTOR.

Entry

11. All of SUBCONTRACTOR'S employees, suppliers, and material carriers shall use the gate so designated by CONTRACTOR for their use at this project.

Safety

12. The safety of workers is of critical importance to CONTRACTOR; therefore, SUBCONTRACTOR shall initiate, maintain and supervise all safety precautions with respect to the Work provided for in this Subcontract and shall oversee all such safety precautions. In this connection, SUBCONTRACTOR shall take all necessary and reasonable precautions for the safety of all its employees and other persons that the Work might affect for the safety of all Work and materials incorporated by it into the project, and for the safety of all property and improvements on the construction site related to the Work provided for in this Subcontract. SUBCONTRACTOR shall comply with all applicable laws, ordinances, rules, regulations, and orders of any government agency or public authority for the safety of persons or property and all other laws, ordinances, rules, OSHA rules, ADA requirements, regulations, and orders affecting the Work or the Project. If there are conflicting standards for safety, SUBCONTRACTOR shall always follow the more stringent standard. SUBCONTRACTOR shall attend all safety meetings and shall coordinate its activities with those of the CONTRACTOR and other SUBCONTRACTORS to ensure that it maintains a safe working environment. SUBCONTRACTOR ACKNOWLEDGES THAT THE OBLIGATION TO ENSURE A SAFE WORKING ENVIRONMENT FOR ITS EMPLOYEES AND THOSE WORKING AROUND ITS EMPLOYEES IS SOLELY THAT OF SUBCONTRACTOR. In the event that CONTRACTOR is cited by OSHA for a violation created and/or controlled by SUBCONTRACTOR, the cost of defending such citations and any penalties thereunder shall be deducted from sums otherwise payable to SUBCONTRACTOR. If the SUBCONTRACTOR fails to immediately commence corrective measures to comply with safety requirements after receipt of written notice, from CONTRACTOR or regulatory body, of noncompliance, the CONTRACTOR may take necessary action to enforce the requirements including implementing corrective measures without further notice deducting such costs for any amounts due to or to become due to SUBCONTRACTOR or removing the employee or equipment in violation from the job site. SUBCONTRACTOR shall follow CONTRACTOR'S site specific rules and regulations.

The CONTRACTOR may require that specific individual(s) working for the SUBCONTRACTOR be immediately removed from the project due to performance, unsafe activities, disruption, discrimination, harassment or any other reason as determined by CONTRACTOR.

Taxes, Permits and Approvals

13. SUBCONTRACTOR will pay all FICA, unemployment, social security and other employment taxes imposed upon him as an employer in connection with the performance of this Subcontract, and will furnish evidence, if requested by CONTRACTOR, showing that all such payments required to be made have been paid. SUBCONTRACTOR shall pay all local, state and federal taxes or assessments in connection with the Work, and shall secure and pay for all licenses, permits, premiums, and approvals necessary for the Work.

No Liens

4.(a) SUBCONTRACTOR will save and keep the Project, buildings, and Work referred to in this Subcontract and the lands upon which they are situated free from all mechanic's liens and all other liens or claims against any payment bonds by reason of SUBCONTRACTOR'S WORK or of any materials, labor or other things used therein. If SUBCONTRACTOR fails to remove any lien or claim by bonding it or otherwise discharging said lien, after forty-eight (48) hours written notice, by CONTRACTOR, CONTRACTOR may, in addition to all other rights and remedies available to CONTRACTOR, elect to retain sufficient funds out of any money due or thereafter to become due by CONTRACTOR to SUBCONTRACTOR, to pay the same and all costs (legal or otherwise) incurred by reason thereof, and may pay said lien or liens and costs out of any funds at any time in the hands of CONTRACTOR owing to SUBCONTRACTOR. CONTRACTOR has the right to recover from SUBCONTRACTOR a reimbursement of all costs incurred in removing any liens or claim in excess of amounts due SUBCONTRACTOR.

(b) SUBCONTRACTOR agrees and covenants that money received for the performance of this Subcontract shall be used solely for the benefit of the persons or firms supplying labor, materials, supplies, tools, machines, equipment, and or services exclusively for the Work or the Project and having the right to assert liens or claims against the land or improvements involved in the Work, or against any bond or security posted by CONTRACTOR, or in any way against the Project. Any money paid to SUBCONTRACTOR pursuant to this Subcontract shall immediately become and constitute a trust fund for the benefit of said persons and firms, and shall not in any instance be directed by SUBCONTRACTOR to any other purpose, until all obligations arising hereunder have been fully discharged, all claims fully paid, and all final lien waivers obtained and delivered to CONTRACTOR. SUBCONTRACTOR agrees to furnish CONTRACTOR such partial or final releases of claims or waivers of lien as CONTRACTOR may from time to time request.

Defective

15.(a) SUBCONTRACTOR warrants and guarantees that it shall perform all work in a good and workmanlike manner, in conformity with all applicable laws, building codes, plans and specifications, and manufacturer's standards and recommendations. SUBCONTRACTOR shall restore or repair any defective work or material or any work or material which does not meet the obligations of this Subcontract, or, at the election of the CONTRACTOR, pay the reasonable costs thereof. Should CONTRACTOR require it, SUBCONTRACTOR shall prepare and furnish copies of daily reports reflecting manpower and work performed each day.

(b) SUBCONTRACTOR agrees to promptly make good by replacement or correction, at its sole expense, any defective Work, any defect in materials or workmanship, or any work or material which does not meet the obligations of this Subcontract, including the restoration of work of CONTRACTOR or other subcontractors that has been affected thereby. SUBCONTRACTOR agrees to perform the Work under this Subcontract in such a manner that it will protect and not injure or damage any other work performed by CONTRACTOR or any other subcontractor and further agrees to pay CONTRACTOR for any damage that may be caused to such other work by SUBCONTRACTOR. SUBCONTRACTOR further agrees that if it shall cause any stains, blemishes, imperfection, marks or damage of any sort whatsoever, whether to its Work or to the work of CONTRACTOR or the work of other subcontractors, it will immediately remedy the damage so caused to the satisfaction of CONTRACTOR.

(c) Payments otherwise due SUBCONTRACTOR may be, but are not required to be, withheld by CONTRACTOR (i) on account of defective Work not remedied by SUBCONTRACTOR, (ii) when claims are filed or made against the Project or CONTRACTOR arising out of SUBCONTRACTOR'S performance of this Subcontract or when reasonable evidence indicates the probability of the filing of such claims, (iii) upon failure of SUBCONTRACTOR to make timely payments for any material or labor, (iv) when a reasonable doubt exists that the Subcontract can be completed for the balance then unpaid, or (v) when SUBCONTRACTOR causes damage or losses to the Project or CONTRACTOR, or SUBCONTRACTOR otherwise fails to perform its obligations under this Subcontract. If said causes are not removed or, in CONTRACTOR'S sole opinion, adequate corrective action is not taken by SUBCONTRACTOR after forty-eight (48) hours written notice from CONTRACTOR to SUBCONTRACTOR, CONTRACTOR may rectify the same at SUBCONTRACTOR'S expense and withhold from monies due or to become due or otherwise recover such amount from SUBCONTRACTOR. SUBCONTRACTOR grants a first security interest and right of set-off to CONTRACTOR in any unpaid funds or amounts due or to become due to SUBCONTRACTOR whether under this Subcontract or otherwise, to secure SUBCONTRACTOR'S obligations to CONTRACTOR, whether under this Subcontract or otherwise.

Default

6. If, in CONTRACTOR'S sole opinion, SUBCONTRACTOR should at any time fail, refuse or neglect to supply adequate supervision or sufficient skilled workmen or materials of the proper quality and quantity, to meet its contractual deadline and the project schedule, or fail in any respect to timely prosecute its Work or delay, stop, or interfere with the work of CONTRACTOR or any other subcontractors on the Project, including all submittals, or breach any of the obligations contained in this Subcontract, or become bankrupt or insolvent or go into liquidation either voluntarily or under an order of a court of competent jurisdiction, or make a general assignment for the benefit of creditors or otherwise acknowledge insolvency, CONTRACTOR may, provide written notice of default to SUBCONTRACTOR. If the default is not corrected to CONTRACTOR'S satisfaction within forty-eight (48) hours after sending the written notice to SUBCONTRACTOR, CONTRACTOR may take any of the following actions: (i) provide such materials, workmen, tools, equipment, and/or supervision as shall be deemed necessary by CONTRACTOR to prosecute the Work with due diligence, and to deduct the cost including any damages or attorney fees sustained by CONTRACTOR from any money due or thereafter to become due by CONTRACTOR to SUBCONTRACTOR , (ii) enter upon premises, take possession of all materials or other appliances of any kind whatsoever, terminate SUBCONTRACTOR'S Work under this agreement, and employ any and all persons and materials necessary to complete the Work in a prompt and diligent manner and/or (iii) take any other action it deems appropriate. In case of such action the said SUBCONTRACTOR shall not be entitled to receive any further payment under this Subcontract until the said Work shall be wholly finished at which time, if the unpaid balance of the amount to be paid under this Subcontract shall exceed the expense incurred by CONTRACTOR in finishing the said Work, and any costs associated with the breach such excess shall be paid by CONTRACTOR to SUBCONTRACTOR. If such expense and cost shall exceed such unpaid balance, then SUBCONTRACTOR shall pay the difference to CONTRACTOR. The expense incurred by CONTRACTOR shall include the cost of furnishing materials and of finishing the Work and any damage incurred through the default of SUBCONTRACTOR.

Legal Fees

17. If CONTRACTOR, in its sole discretion, shall deem it necessary to employ an attorney to assert any right of CONTRACTOR or to enforce any obligation of SUBCONTRACTOR, CONTRACTOR shall be entitled to recover all costs and expenses thereby incurred, including, without limitation, the reasonable fees, charges and expenses of the attorney so employed.

Arbitration

18. If any claim or dispute shall arise under or related to this subcontract and cannot be settled through negotiation, the SUBCONTRACTOR and CONTRACTOR agree to first try in good faith to settle the dispute by mediation. The mediation shall be considered non-binding and shall consist of a single mediator agreed upon by both SUBCONTRACTOR and CONTRACTOR. Each party shall pay one-half of the expense of the Mediation. If the claim or dispute is not settled through mediation, then either party may demand arbitration which shall be considered binding by a Board of Arbitrators. This board shall consist of one person selected by the CONTRACTOR, one person selected by the SUBCONTRACTOR, and then these two shall select a third person. In case the two Arbitrators fail to select a third person within three days, he shall be named by the Architect. In case either party fails to name an Arbitrator within three days after requested in writing to do so, the Architect shall name an Arbitrator to represent the party so failing to name one. The written decision of any two Arbitrators shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of the Arbitration. The parties hereby acknowledge that this Subcontract involves interstate commerce and that the agreement to arbitrate any claims or disputes arising under, from or in connection with this Subcontract or the Work, may be specifically enforced pursuant to the provisions of and subject to the Federal Arbitration Act which shall supersede any state or local law to the contrary. SUBCONTRACTOR consents to the joinder of any dispute that exists with CONTRACTOR into any pending dispute between Owner and CONTRACTOR. Notwithstanding anything to the foregoing, if Owner's contract with CONTRACTOR does not permit arbitration, CONTRACTOR may unilaterally elect to void this arbitration provision and join the claims between SUBCONTRACTOR and CONTRACTOR into any litigation with Owner.

Changes

19. This Subcontract may be amended or modified only by a written instrument signed by the parties hereto. SUBCONTRACTOR shall have no claim for additional compensation unless it has provided a request for a change in the scope of work and obtained written approval from an authorized agent of the change from CONTRACTOR before the work is performed. Any extra work performed without following this procedure shall be at SUBCONTRACTOR'S sole expense. SUBCONTRACTOR agrees to price all Change Requests within five (5) calendar days of receipt unless required otherwise by the CONTRACTOR. SUBCONTRACTOR agrees to provide detailed breakdowns of all associated costs and estimates as may be required by CONTRACTOR. If SUBCONTRACTOR fails to provide pricing within the five (5) day period, CONTRACTOR at its option, shall determine the pricing which shall then become binding upon the SUBCONTRACTOR. Mark-up of all Change Requests shall not exceed 10% overhead and profit. If the specifications allow a greater or lesser percentage of overhead and profit, the specifications shall be binding upon the SUBCONTRACTOR. The parties covenant and agree that they will not offer or attempt to offer parol evidence to vary the terms hereof and that such evidence shall not be admissible for any purpose whatsoever.

Authorization

20. The project superintendent of the CONTRACTOR shall not have authority to order, approve, or accept any alterations of any kind to the Work as shown or described by the Contract Documents; and the SUBCONTRACTOR shall have no claim for any additional work or changes unless such has been done pursuant to written order signed by an authorized representative of the CONTRACTOR.

Applicable Law

21. This Subcontract shall be governed by and interpreted in accordance with the substantive laws of the State of Tennessee. Notwithstanding the foregoing, if the contract between Owner and CONTRACTOR provides that the laws of another state govern, and if Owner is joined as part of any dispute between CONTRACTOR and SUBCONTRACTOR, then the laws of the State so provided for in the Contract between Owner and CONTRACTOR shall govern the Subcontract.

Severability

22. In the event any one or more of the provisions of this agreement, or any instrument executed and delivered hereunder or pursuant hereto, shall be held to be invalid, illegal or unenforceable in any respect or as to any person or party by any court or in any arbitration proceeding, the validity, legality and enforceability of the remaining provisions of this Subcontract or of any other instrument executed and delivered hereunder or pursuant hereto, and as to all other persons and parties shall not be affected or impaired thereby.

Written Notice

23. All written notices provided for in this Subcontract shall be deemed given if delivered in writing personally to a representative of the party or if sent by telegram, fax, or by regular mail to the party at its address herein or to the surety of the party named herein. Only one such notice shall be required, and any notice given in the manner herein described shall be deemed continuous.

Agreement Owners and Architect Approval

24. All negotiations and agreements prior to the date of this Subcontract not included herein are hereby voided. SUBCONTRACTOR warrants that the entire agreement between SUBCONTRACTOR and CONTRACTOR is set forth in this Subcontract. This Subcontract is subject to approval of the Architect and/or Owner.

Submittals

25. SUBCONTRACTOR shall submit to CONTRACTOR on or before 11/22/02 complete shop drawings, data; catalogue cuts and/or samples and one copy of Material Data Sheets (MSDS) for the Work, all in accordance with State and Federal Occupational Safety and Health Administrations, and as required by the Contract Documents. Contractor's approval of submittals shall not limit or abrogate SUBCONTRACTOR'S warranty that the submittals conform to the Contract Documents.

Commencement and
Prosecution of Work
26.(a) SUBCONTRACTOR agrees to commence the Work including timely submission of submittals when directed by written notice to proceed and as scheduled by CONTRACTOR and to diligently and continuously prosecute such Work and to coordinate the Work with other work being done on the Project by other trades, so that CONTRACTOR or other Subcontractors shall not be delayed by an act or omission of SUBCONTRACTOR in completion of the Project within the time specified in the contract Documents. Normal work days shall be Monday through Friday but work shall continue during the weekend to compensate for delays of any sort. Work covered under this Subcontract must be completed by 03/12/03 to allow all other work on this Project to be completed by 08/10/03.

If SUBCONTRACTOR falls behind schedule, as determined by CONTRACTOR at its sole discretion, SUBCONTRACTOR shall, at its expense and without any right to additional compensation, add additional men and equipment, and work extra hours and/or weekends in order to catch up and maintain its schedule. If SUBCONTRACTOR discovers any condition that impedes its work, impedes another trade's work, or will prevent it from complying with the project schedule, it will provide notice to CONTRACTOR of the condition within forty-eight (48) hours of any discovery.

(b) Any materials to be furnished by SUBCONTRACTOR shall be furnished in sufficient time to enable SUBCONTRACTOR to perform and complete its Work within the time provided herein and SUBCONTRACTOR will furnish, upon request, proof of placement materials order sufficient to assure delivery in a timely manner.

(c) SUBCONTRACTOR shall reimburse CONTRACTOR for any and all damages suffered by or assessed against CONTRACTOR which are attributable or caused by SUBCONTRACTOR'S failure to furnish materials Or labor, or perform the Work acquired by this Subcontract, within the time fixed or in the trainer provided for herein to the extent delay is the fault of SUBCONTRACTOR.

(d) SUBCONTRACTOR shall be obligated to inspect all field conditions and confirm that there is no inconsistency with the Contract Documents before performing work. In case of any inconsistency, SUBCONTRACTOR's work and the contract price will assume that the greater quality or better quality of work shall be provided. SUBCONTRACTOR has become familiar with the Contract Documents and site and warrants that it can perform all work in the contract time and for the contract amount.

Execution
27. This subcontract shall be subject to cancellation at EMJ Corporation's option unless three (3) executed copies of this agreement, and any other document required by this agreement are returned to our home office by 11/22/02. If so cancelled, SUBCONTRACTOR shall be entitled to no compensation.

SUBCONTRACTOR

ACR dba Maxim Crane Works

By

Title VP

Witness Christine M. Owens

Date 11-21-02

Notice Mailing Address:

Company: ACR dba Maxim Crane Works

Attention: Bruce Lott

Address: 840 Licking Pike

Wilder, KY 41076

Fax #: (859)442-6203

CONTRACTOR

EMJ CORPORATION

By
J. Phil Green

Title Vice President

Witness

Date 11/15/02

Notice Mailing Address:

EMJ Corporation

Attention: Chris Wichmann

Title: Project Manager

2030 Hamilton Place Blvd.
Suite 200
Chattanooga, Tennessee 37421
Fax #: (423) 855-6857

ATTACHMENT I

2258-02800
Kohl's
Miami Township, OH.

THIS SUBCONTRACT ALSO INCLUDES THE FOLLOWING:

1. All on and off excavation work including but not limited to; clearing, stripping of topsoil, stockpile of topsoil, machine spread topsoil in landscaped or seeded areas, rock excavation, haul-off or haul in of excess topsoil, cut and fill, temporary and final relocation of existing stream bed, mitigation of wetlands, new stream bed rock structures, haul off or haul in as necessary and stabilization to modify excessive soil moisture as necessary to bring the entire site to proper subgrades and final grades; detention basins, outflow structures, temporary standpipes, extension of the existing gravel road, backfill of curb and gutters with topsoil, temporary seeding of all disturbed areas, de-watering, re-grade site prior to placement of paving to correct any sub-grade damage and all compaction work for the work included in this subcontract.

2. All engineering, layout, blue topping, line and grade control work, marking and maintaining property corners, building corners and benchmarks by a registered surveyor. Once the sub-grade elevation is achieved, the surveyor will take confirming elevation shots at the agreed upon monitoring points set up on a 50' grid. Any damage to property corners, building corners and benchmarks by this subcontractor will be replaced at the expense of this subcontractor.

3. All paving work including but not limited to: asphalt paving for standard duty and heavy duty asphalt paving, straight curb, curb and gutter, initial two-coat traffic striping, restriping within six months of the grand opening and all traffic and handicap signage.

4. All modular retaining wall work including, but not limited to: layout, engineering, concrete footing, reinforcing, drain piping and fabric, backfill and 6' high chain link fence installed on top of and running the length of the modular retaining wall.

5. All references to contractor and subcontractor in the contract documents shall refer to ACR dba Maxim Crane Works.

6. All work in this subcontract is considered unclassified including utility excavation. Subcontractor shall perform all proof rolling work and necessary undercut and backfill as required by the soils report including but not limited to the creek bed.

7. All site demolition work including but not limited to: sawcuts, removal and legal disposal of existing dwellings, foundations, structures, utilities, asphalt, curb and gutter, sidewalks, bollards, rip-rap, flumes, concrete sanitary and storm structures.

8. Provide and maintain parking and a paved access for the existing real estate office.

9. Pad preparation including soil stabilization of existing subgrade and minimum 18" compacted stone fill to bring pad to proper subgrade elevation.

10. If there is a conflict between the plans, specifications and soils report, the most stringent will apply.

ATTACHMENT I

2258-02800
Kohl's
Miami Township, OH

11. Installation and maintenance a 25' wide x minimum 8" thick stone access road from State Route 28 to and around the proposed building pad and a 300'x 300' staging area as directed by the project superintendent.

12. All new and relocated storm, sanitary, domestic water, fire water, and gas work including, but not limited to: road boring, temporary water, excavation, disconnection, grouting, removal, legal disposal, backfill with compacted stone backfill of all abandoned utility excavation, installation of new utilities, re-connection, backfilling of new trenches with compacted stone, piping, catch basins, inlets, grates, headwalls, rip-rap, valves, hydrants, vaults, post indicator valves (not on plans), bollards, double detector check and backflow assemblies, temporary water, irrigation piping and meter to three feet outside the meter pit, chlorination, pressure testing, written certifications, pits, sewer and water tap fees and meters. Domestic and fire water to be stubbed up 1'-0" above finish floor with blanked off flange. The sanitary and storm system to be installed within 5'-0" of the building.

13. This subcontractor realizes that certain operations such as demolition, landscaping, site lighting, power work, phone line work, etc. will be proceeding along with this work and agrees to coordinate his work to accommodate all other operations in an orderly and timely manner.

14. This subcontractor will closely coordinate his work with all subcontractors working on site. In the event of a dispute between this subcontractor and any other subcontractor working on the site, EMJ Corporation at its sole discretion will determine responsibility for corrective action concerning subgrades and compaction, and EMJ Corporation's decision will be binding to all subcontractors and at no cost to EMJ Corporation.

15. The installation and maintenance necessary for sediment and erosion control measures to meet all governmental requirements including but not limited to the measures delineated in the contract documents and attached Exhibit A. Subcontractor is responsible for all fines and judgements resulting from subcontractor's failure to maintain erosion and sediment control measures. Subcontractor is also responsible for removal of temporary erosion control measures.

16. Competent person(s) for excavation shall be designated prior to commencement of work as required by OSHA.

17. Kohl's Attachment E including subcontractor exhibits 1-6.

18. EMJ Corporation and Kohl's will be named as additional insured on the subcontractor's insurance certificate (to be submitted with signed subcontract).

19. This subcontractor shall supply all labor, material and equipment as needed to maintain project schedule(s) including all additional manpower as requested by EMJ Corporation at no additional cost. The following work durations will be incorporated into the agreement and the subcontractor will provide sufficient manpower and crews to achieve the durations and insure scheduled completion.

    1. Start sitework 11-25-02.
    2. Building pad complete by 01-02-03.
    3. All civil work completed by 3-12-03.

ATTACHMENT I

2258-02800
Kohl's
Miami Township, OH

20. Subcontractor shall provide EMJ Corporation with certification that the building pad has been constructed in accordance with the plans and specifications. Such certification shall be performed by a licensed registered surveyor and shall include a survey indicating pad elevations on a 50 foot grid to the tolerances indicated in the construction documents. The building pad certification survey shall include the building area, vestibule, etc., and an area 10 feet outside the building walls. Should the survey determine that the building pad is not constructed in accordance with the contract documents, subcontractor shall have 24 hours to make the necessary corrections to bring the pad into compliance.

21. All permits, fees and licenses to perform the work included in this subcontract.

22. Subcontractor is to provide an as-built survey of all storm water detention facilities, site grading, storm sewer and site utilities upon completion of project. Survey is to be completed by a licensed registered surveyor.

23. This subcontractor shall not proceed with the work included in this subcontract without a written notice to proceed from the EMJ Corporation (Submittals shall be submitted at this time). This subcontract agreement must be approved by Kohl's Department Stores. If not approved within 30 days, EMJ Corporation has the right to cancel this subcontract agreement at no cost to EMJ Corporation or Kohl's Department Stores.

24. All traffic control, dust control, street cleaning and barricades.

This subcontract excludes the following;

1. Testing.
2. Bond
3. Landscaping.
4. Irrigation.

EMJ Corporation
GENERAL CONTRACTOR

By: _____ Title VP

Witness: _____

ACR dba MAXIM CRANE WORKS
SUBCONTRACTOR/SUPPLIER

By: _____ Title VP

Witness: Christine M. Owens

KOHL'S

ATTACHMENT E

(REVISED 1/31/01)

SUBCONTRACTOR EXHIBITS 1 - 6

NOTE TO GENERAL CONTRACTOR:

KOHL'S Department Stores require that the General Contractor include attached Exhibits 1 - 6 as part of the Agreement between Contractor and Subcontractor which General Contractor shall be solely in charge of ensuring attachment and execution thereof.

General Contractor is responsible for obtaining properly completed Exhibits E.1.1 through E.1.3 (attached) from Subcontractor at time Bids are due. Completed Exhibits E.1.1 through E.1.3 are due to Owner within thirty (30) days of subcontract award.

EXHIBIT "1"

HARMONY AGREEMENT

Should there be any delay in the delivery of equipment, material or supplies described in this Purchase Order/Subcontract agreement, or any cessation of work at the project by the Subcontractor due to any work stoppage, slowdown, strike, picketing, boycott, observation of picket lines, or any other cessation of work which, in the judgment of the Contractor, is causing or is likely to cause any delay in the progress of the work to be performed at the construction job site, the Contractor shall have the right to terminate this Purchase Order/Subcontract Agreement after giving the Supplier/Subcontractor twenty-four (24) hours written notice of the intention of the Contractor to so terminate.

EXHIBIT "2"

ON-SITE SAFETY REQUIREMENTS

The Subcontractor has been retained as an expert in this particular work, and with respect to that work, is solely responsible for compliance with all safety requirements, including the provisions of the Occupational Safety and health Act, of the Owner, or of any contractual obligations which are included by reference in this Subcontract, pursuant to the General Terms and Conditions.

In connection with its obligations, Subcontractor shall perform the following:

1. Provide all project personnel with the necessary orientation and training needed for the project.
2. Prior to commencement of work, submit a safety and hazard communication program prepared for the specific project which will be maintained on file for review by any other contractors or subcontractors.
3. Before commencing work, and during its progress, inspect the work site and report to the General Contractor's Project Superintendent or other job site representative any safety hazards which may affect its employees.
4. Correct any hazards identified before commencing work on the project.
5. Provide adequate safety devices and methods for its own employees, sufficient for the risk of the assigned task.
6. If any safety devices or methods necessary for subcontractor employees are to be provided by others, notify the General Contractor prior to commencement of such operations if any are missing or defective.
7. Reinstall any safety devices removed for construction operations immediately upon cessation of the construction operations.
8. Attend the project safety meeting held weekly after the project construction meeting.
9. Provide and require utilization of all necessary personal protective equipment, including but not limited to, hard hats, safety belts and lanyards, and other equipment.
10. Report immediately all injuries to the General Contractor's Project Superintendent, as well as to the company representative for the subcontractor. In addition, a Report of Accident form shall be submitted to the General Contractor within one week of the injury.
11. Should the General Contractor encounter any safety hazard created by the Subcontractor, it may, without notice, correct the hazard created or permitted by the Subcontractor, and backcharge the Subcontractor for the cost of such item.
12. Subcontractor shall defend, indemnify and hold harmless the General Contractor and Owner with respect to the performance or nonperformance of its Work including but not limited to any compliance with the Occupational Safety and Health Commission, safety obligations imposed by the Industrial Commission for violation of specific safety requirements, that may occur with respect to the General Contractor or its employees for the Subcontractor's failure to comply with all applicable safety regulations, any and all deaths, bodily injuries, property damage or other damages occasioned by Subcontractor's failure to comply with its safety obligations or its negligent acts or omissions regardless of whether or not such claim, damage, loss or expense is caused in whole or in part by a party indemnified hereunder.

EXHIBIT "3"

PAYMENT PROCEDURES

1. All pay requests must be submitted on an AIA G-702 Application and Certificate for Payment, along with an AIA G-703 Continuation Sheet. These forms must be completed, notarized, and submitted by the 25th of the month.

2 Partial lien waivers will be sent with each payment. These must be completed, notarized, and returned before payment is negotiated.

3 Signed, approved Change Orders must be obtained for any extra work in advance of conducting the extra work. Change Orders should be listed separately on the G-703 Continuation Sheet

ACCOUNTING RECORDS

The Subcontractor shall keep keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement. The General Contractor's and Owner's representative(s) shall be afforded access to the Subcontractor's records, books, correspondence, instructions, drawings, receipts, sub subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement. The Subcontractor shall preserve these for a period of three years after final payment, or for such longer period as may be required by law.

CHANGE ORDERS

All change orders must be approved in writing by the Owner and General Contractor. Any field changes must be documented and signed by a representative of theOwner and a representative of the General Contractor.

Pricing on Change Orders will be as follows:

Labor	Actual wages paid plus taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements, and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions. These costs are to be substantiated. (See Exhibit 6, Paragraph 7)
Material	Actual costs incurred. Supplier invoices must be provided.
Subcontract	Actual costs incurred. Subcontractor invoices must be provided.
Fee	A Ten percent (10%) fee may be added to labor, material and subcontract costs to cover Overhead & Profit.

EXHIBIT "4"

ACKNOWLEDGMENT AGREEMENT

Ten working days after this contract has been fully executed, the Subcontractor of this agreement shall furnish the General contractor with purchase orders and/or material order acknowledgments from each material supplier, and each subcontractor furnishing material or labor under this contract. Delivery dates shall be included on the purchase orders and/or material order acknowledgments and shall indicate delivery of all material as required for performance of work under this contract within the dates contained on the Project Schedule of this contract.

EXHIBIT "5"

WARRANTY

The Subcontractor warrants to the Contractor and Owner that materials and equipment furnished under the Subcontract or Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, including but not limited to materials or equipment provided by the Owner, and that the Work will conform with the Contract Documents and be performed without interuption despite the commonly referred to Year 2000 problem. Work not conforming to these requirements, including substitutions not properly approved and authorized, shall be considered defective. If required by the Contractor or Owner, the Subcontractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

EXHIBIT "6"

Prior to starting work or ordering materials, the subcontractor is to submit the following to the General Contractor in addition to other requirements which may be included elsewhere in the contract documents:

1. Health and Safety programs under which the subcontractor's work will be performed as per Exhibit "2".
2. Site Specific Work Plan under which the subcontractor work will be performed as per Exhibit "2".
3. A copy of current Workers' Compensation Certificate under which the subcontractor's work will be performed.
4. A current Certificate of Insurance listing the General Contractor and Owner as an additional insured and other certificates as required by the contract documents.
5. A complete listing of any subcontractor or supplier which will be employed by the subcontractor for the completion of the work.
6. Delivery dates for all materials conforming to the project schedule.
7. Properly completed "Exhibit E.1.1 through E.1.3 – Labor Rates" applicable to the occupations used for the Project. Wage Rate Provisions and Fringe Benefit Trust Funds summary sheets or union agreement in total shall be attached to appropriate Exhibits E.1.1 through E.1.3.
8. Product Material and Work Submittals for approval by the General Contractor and/or as required by the contract documents as necessary to describe the installation including, but not limited to: color, catalog cuts, shop drawings, product samples, product specifications

Special Remarks and Number of Copies if in Excess of 3

TYPE	COPIES	REMARKS
Color		
Samples		
Catalog Cuts		
Shop Drawings		
Product Specifications		

EMJ CORPORATION
SCHEDULE A

PO #: 2258202800

Kohl's - Miami Township OH
1164 State Route 28
Milford OH45150

DRAWING NO.	TITLE	DATE	REV. NO.	REVISION DATE
C000	Cover Sheet	-	-	-
C100	Existing Conditions Plan	8-21-02	-	-
C101	Demolition Plan	8-21-02	-	-
C200	Site Plan	8-21-02	-	-
C300	Grading & Erosion Control Plan	8-21-02	-	-
C400	Utility Plan	8-21-02	-	-
C500	Storm Profiles	8-21-02	-	-
C501	Storm and Sanitary Profiles	8-21-02	-	-
C600	Overall Landscape Plan	8-21-02	-	-
C601	Enlarged Landscape Details	8-21-02	-	-
C602	Enlarged Wetland Mitigation	8-21-02	-	-
C603	Enlarged Stream Mitigation	8-21-02	-	-
C604	Mitigation Details	8-21-02	-	-
C700	Lighting Plan	8-21-02	-	-
C800	Erosion Control Notes & Details	8-21-02	-	-
C801	Site Construction Details	8-21-02	-	-
C900	Standard Details Waterworks System Improvements	8-21-02	-	-
C901	Standard Details Waterworks System Improvements	8-21-02	-	-
	Specifications titled "Project Manual for Proposed Kohl's Department Store Milford, Ohio" dated 8-21-02.			
	Subsurface Investigation & Foundation Recommendations Proposed Kohl's Department Store State Road 28 Milford, Ohio by Alt & Witzig Engineering, Inc. dated May 20, 2002.			

EMJ CORPORATION

By: [signature] Date 11/25/02

Witness: [signature]

ACR dba Maxim Crane Works

By: [signature] VP. Date 11-21-02

Witness: Christine M. Owens

EMPLOYEE SAFETY FORM

2258 - 0280001
Kohl's - Miami Township OH
Milford, OH

- All injuries no matter how slight are to be reported immediately to your supervisor.
- Hard hats are to be worn at all times.
- Appropriate clothing and footwear are required. No short pants, no tennis shoes and no working without shirts.
- Job and work areas are to be kept clean. Scrap and material trash are to be placed in garbage containers.
- No horseplay or scuffling is tolerated on job premises.
- Running within the job area is strictly prohibited except in an emergency situation.
- Intoxicants of any kind are not permitted on site and anyone under the influence of intoxicants will not be tolerated on the jobsite.
- Weapons of any kind will not be tolerated on job premises.
- All electrical extensions and tools are to be properly grounded.

0. Know and follow rules concerning time and place to wear safety eye wear.
1. When climbing is necessary, secure an approved ladder and make sure it is tied off.
2. Do not wear jewelry or loose clothing while working around or operating moving equipment.
3. We follow and abide by all OSHA rules and regulations.
4. I have been instructed about the presence and location of hazardous materials on the jobsite and the location of MSDS file.
5. All subcontractor's personnel have been trained in the Hazard Communication Program.
6. Violations of any of the above rules may result in immediate removal of individual(s) from the project.

COMPANY NAME : ACR dba Maxim ~~Crane~~ Works
SUBCONTRACTORS SIGNATURE : [illegible]
SUBCONTRACTOR FOREMAN : Bob Wallace
DATE : 11-21-02
EMJ SUPERINTENDENT : Bill Gibson

EMJ 21DS (REVISED 7/96)

PROPERTY DAMAGE RELEASE

KNOW ALL MEN BY THESE PRESENTS:

That the Undersigned, being of lawful age, for sole consideration of **Eighteen Thousand Six Hundred Forty-One and 53/100 Dollars ($18,641.53)** to be paid to **Al Hodges** do/does hereby and for my/our/its heirs, executors, administrators, successors and assigns release, acquit and forever discharge **EMJ Corporation and ACR dba Maxim Crane Works** and his, her, their, or its agents, servants, successors, heirs, executors, administrators and all other persons, firms, corporations, associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of services expenses and compensation whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen property damage and the consequences thereof resulting or to result from the (*alternative language)* occurrence on or about the **10th** day of **May, 2003** at or near **8 Easley Dr., Milford, OH.**

It is understood and agreed that this settlement is the compromise of a doubtful and disputed claim, and that the payment made is not to be construed as an admission of liability on the part of the party or parties hereby released, and the said releasees deny liability therefor and intend merely to avoid litigation and buy their peace.

The undersigned further declare(s) and represent(s) that no promises, inducement or agreement not herein expressed has been made to the undersigned, and that this Release contains the entire agreement between the parties hereto, and that the terms of this Release are contractual and not a mere recital.

THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT.

Signed, sealed and delivered this 2 of JULY, ~~1999~~. 2003

CAUTION: READ BEFORE SIGNING BELOW

[signature] Witness — [signature] L.S.

Witness — [signature] L.S.

Witness — L.S.

STATE OF _____)
ss:
COUNTY OF _____)

On the _____ day of _____, 19__, before me personally appeared _____ to be known to the person(s) named herein and who executed the foregoing Release and _____ acknowledged to me that _____ voluntarily executed the same.

My term expires _____, 19__

NOTARY PUBLIC

Exhibit C

PROPERTY DAMAGE RELEASE

KNOW ALL MEN BY THESE PRESENTS:

That the Undersigned, being of lawful age, for sole consideration of **THREE THOUSAND FIVE HUNDRED AND 00/100 Dollars ($_3,500.00)** to be paid to **AL HODGES** do/does hereby and for my/our/its heirs, executors, administrators, successors and assigns release, acquit and forever discharge **EMJ CORPORATION** and **ACR dba MAXIM CRANE WORKS** and his, her, their, or its agents, servants, successors, heirs, executors, administrators and all other persons, firms, corporations, associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of services expenses and compensation whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen property damage and the consequences thereof resulting or to result from the (*alternative language)* occurrence on or about the **14TH** day of **JUNE, 2003** at or near **8 Easley Dr., Milford, OH.**

It is understood and agreed that this settlement is the compromise of a doubtful and disputed claim, and that the payment made is not to be construed as an admission of liability on the part of the party or parties hereby released, and the said releasees deny liability therefor and intend merely to avoid litigation and buy their peace.

The undersigned further declare(s) and represent(s) that no promises, inducement or agreement not herein expressed has been made to the undersigned, and that this Release contains the entire agreement between the parties hereto, and that the terms of this Release are contractual and not a mere recital.

THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT.

Signed, sealed and delivered this 2 of JULY, ~~1999~~ 2003

CAUTION: READ BEFORE SIGNING BELOW

[signature]	Albert S Hodges L.S.
Witness	
	Wm Hodges L.S.
Witness	
	L.S.
Witness	

STATE OF _____)
ss:
COUNTY OF _____)

On the _____ day of _____, 19__, before me personally appeared _____ to be known to the person(s) named herein and who executed the foregoing Release and _____ acknowledged to me that _____ voluntarily executed the same.

My term expires _____, 19__

_____
NOTARY PUBLIC

Exhibit D