IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

CENTEX/WORTHGROUP, LLC,

Plaintiff-Appellant,

v.

WORTHGROUP ARCHITECTS, L.P. and TERRACON, INC.,

Defendants-Appellees.

Ct. App. No. 32,331
Otero County
CV-2007-397

PLAINTIFF-APPELLANT'S REPLY BRIEF TO TERRACON, INC.'S ANSWER BRIEF

Civil Appeal from the Twelfth Judicial District Court
The Honorable Jerry H. Ritter

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Terracon's claim to limited liability fails on multiple levels. As explained in the brief in chief, Terracon is not a party to either the Design/Build or the Architect Agreement, and beyond its own say-so, Terracon offers no evidence—let alone undisputed evidence—that the parties intended Terracon to be a third-party beneficiary. In any event, the Architect Agreement expressly excludes the geotechnical engineering services that Terracon provided from the "Design Work" that the Design/Build Agreement's limitation-of-liability clause (as applied through the Architect Agreement's flow-down clause) could conceivably cover.

Even if Terracon is a third-party beneficiary and its errors arose from "Design Work," its claims still fail for the same reasons Worthgroup Architects' do. The limitation-of-liability clause in the Design/Build Agreement does not absolve Centex of the obligation to make the repairs necessary to bring the project into line with contractual specifications. The Architect Agreement squarely places primary financial responsibility for those repairs on the negligent parties—Worthgroup Architects and its subcontractors. And even if the Design/Build Agreement's limitation of liability clause somehow applied to Terracon, Terracon still could not limit its liability to Centex because it has failed to exhaust any of its own professional liability insurance—a predicate requirement of that clause.

ARGUMENT

I. TERRACON'S PROCEDURAL ARGUMENTS ARE MERITLESS

Rather than address the arguments Centex made, Terracon responds to a straw man. Centex has never argued that the Agreements are ambiguous (*compare* Terracon Br. 11, 15 *with* Br. in Chief 28 *and* R.P. 1195); Centex did not concede below that no issues of material fact exist as to whether Terracon is a third-party beneficiary to the Architect Agreement (*compare* Terracon Br. 14 *with* R.P. 944-945, 1199-1202); and Centex has not attempted to introduce parol evidence to alter the terms of the Architect Agreement (*compare* Terracon Br. 15-20 *with* Br. in Chief 36 n.2).

Here is what Centex *has* argued: First, Terracon failed to satisfy its burden of establishing that Centex and Worthgroup Architects specifically intended the Architect Agreement to extend third-party beneficiary rights to Terracon. Br. in Chief 28-33. Second, even if Terracon is a third-party beneficiary, it cannot avail itself of the Architect Agreement's flow-down clause because (i) substantial evidence shows that Terracon's work on the MSE Wall constituted geotechnical engineering work that fell outside the scope of the Architect Agreement, and (ii) Terracon has paid out nothing from the professional errors and omissions policy that the Design/Build Agreement required it to maintain. Br. in Chief 33-38. Finally, contrary to Terracon's suggestion (Br. 14), this Court has specifically

recognized that resolving these factual questions at summary judgment is inappropriate, *see Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, ¶ 81, 276 P.3d 252 ("Whether the parties had the requisite intent [to create third-party contractual rights] is a question of fact, appropriate for the trier-of-fact to decide"). Terracon's ostrich-like response—failing to engage on the merits—does not make these arguments go away. It merely draws into sharper relief the indefensibility of the district court's summary judgment ruling in Terracon's favor.

Additionally, Terracon's assertion (Br. 7-10) that Centex failed to preserve certain points is incorrect. Centex argued specifically that Worthgroup Architects' (and its sub-contractors') responsibility "for all redesign and additional construction costs *** falls into the category of an obligation 'except as otherwise provided herein' in the flowdown clause," R.P. 834, and that therefore the specific provision in the Architect Agreement controls over the general flow-down clause. Centex also argued below repeatedly that its recovery was not limited to one policy, but extended to the other insurance required under the Architect Agreement. *See, e.g.*, R.P. 830, 833-834. Accordingly, Centex did not forfeit these arguments. *See* Terracon Br. 8, 34, 41.

Terracon itself raised and argued below the threshold issue whether Terracon is entitled to third-party beneficiary status under the Architect Agreement. *See* R.P. 747-750, 1105-1108. And the district court necessarily

decided that issue in granting Terracon's motion for summary judgment. *See Piano v. Premier Distribution Co.*, 2005-NMCA-018, ¶ 16, 137 N.M. 57, 107 P.3d 11 (purposes of the preservation rule are to "alert the district court to the error so that it is given an opportunity to correct the mistake and to give the opposing party a fair opportunity to meet the objection"); *see also Walker v. Spencer*, 1 F.3d 1250, 1993 WL 279763, *3 n.2 (10th Cir. July 19, 1993) (preservation rule did not bar consideration of plaintiff's argument made in response to argument defendant made below). Also, Terracon glosses over the fact that the record permits consideration of Centex's contentions; that all of the issues before this Court are subject to *de novo* review; and that all of the parties' contract-based arguments are premised on what the parties agree to be unambiguous agreements. *See Piano*, 2005-NMCA-018 at ¶ 17 (waiving preservation rule in similar circumstances).

Finally, Terracon cites no authority for the novel proposition that Centex is limited in this appeal to discussing only the legal authorities that it cited below. That is unsurprising: this Court has specifically held that in cases where the factual record and principles in contention are developed below, "the district court is 'charged with knowing and correctly applying established New Mexico precedent,'" and those authorities may be discussed on appeal "even if citation *** was not made to the district court." *Howse v. Roswell Indep. Sch. Dist.*, 2008-NMCA-095, ¶ 19, 144 N.M. 502, 188 P.3d 1253; *see also State v. Gomez*, 1997-

NMSC-006, ¶ 30, 122 N.M. 777, 932 P.2d 1 (similar). Centex is aware of no rule in *any* appellate court that refuses consideration of further legal authorities on issues raised below; indeed, almost every appeal involves citation of authority beyond that presented to the district court.

II. TERRACON IS NOT AN INTENDED THIRD-PARTY BENEFICIARY OF THE ARCHITECT AGREEMENT

As discussed in the brief in chief (Br. 27-40), Terracon's defense against liability for its errors is dependent on Worthgroup Architects' strained interpretation of the Agreements. Terracon's motion for summary judgment thus fails for the same reasons as Worthgroup Architects' (*see* Reply Br. to Worthgroup Architects 2-19; *see also* Part III, *infra*). Terracon's motion fails on independent grounds as well.

A. Terracon Cannot Show that the Parties Intended for the Architect Agreement to Redound to Its Benefit.

Terracon acknowledges (Br. 12) that its third-party beneficiary claim is a non-starter unless it can show through the Architect Agreement's plain text that Centex and Worthgroup Architects specifically intended to benefit Terracon, "either individually or as a member of a class of beneficiaries." *Valdez v. Cillessen & Son, Inc.*, 1987-NMSC-015, ¶34, 105 N.M. 575, 734 P.2d 1258; *see Vigil v. State Auditor's Office*, 2005-NMCA-096, ¶ 20, 138 N.M. 63, 116 P.3d 854 ("[A] party claiming third-party-beneficiary status has the burden of showing that the

parties 'to the contract intended to benefit him.'"). Terracon still has not met that burden.

1. Terracon asks (Br. 12) this Court to simply assume that because the Architect Agreement defined "Design Architect" to include, "*where appropriate*," Worthgroup Architect's "design subcontractors, consultants and agents" (R.P. 889, emphasis added), Centex and Worthgroup Architects necessarily intended for that definition to convey third-party rights on all members of that class in all instances. Of course, such an assumption would impermissibly read "where appropriate" out of the contract. See *Aspen Landscaping, Inc. v. Longford Homes of New Mexico, Inc.*, 2004-NMCA-063, 135 N.M. 607, 92 P.3d 53. Terracon's reliance on different cases involving different contracts, moreover, is misplaced: they have no bearing on whether the parties in *this* case intended the Architect Agreement to convey third-party rights to Terracon, much less whether it would be "appropriate" to do so with respect to the Architect Agreement's flow-down clause. *See Permian Basin Inv. Corp. v. Lloyd*, 1957-NMSC-048, ¶ 22, 63 N.M. 1, 312 P.2d 533 (third parties have no enforceable rights under a contract unless "the contract is so expressed as to give the promisor reason to know that such benefit is contemplated by the promise as one of the motivating causes of his making the contract.") (quoting 4 A. Corbin, CORBIN ON CONTRACTS § 776 (1950)); *see also THI of New Mexico at Hobbs Ctr., LLC v. Spradlin*, 893 F. Supp. 2d 1172, 1188-1189 (D.N.M.

2012) (contract extended to third-party beneficiary where contract specifically named third party, expressly referred to third party's contractual benefits, and benefit to third party was essential purpose of the contract).

Moreover, Terracon concedes (Br. 23-24) that the New Mexico Supreme Court has specifically rejected the sort of amorphous classification of beneficiaries that Terracon now claims entitles it to third-party beneficiary status. *See Valdez*, 1987-NMSC-015, ¶ 36 (rejecting third-party beneficiary claim based on membership in generalized and undefined class of "workmen" because contractual provisions did not "indicate which workmen were to be protected" under the contract). To be sure, Terracon asserts that *Valdez* is distinguishable because the Architect Agreement's definition of "Design Architect" lists "specific classes of third-party beneficiaries that include Terracon." Terracon Br. 24. But it fails to articulate how a putative beneficiary class of "design subcontractors, consultants and agents of the Design Architect [where appropriate]" in the Architect Agreement (R.P. 889) lends itself to any greater precision or clarity of the parties' intent than *Valdez*'s rejected class of "workmen."

2. Terracon's claim (Br. 12, 24-25) that the parties intended to convey third-party rights through the "successors and assigns" clause fares no better. Terracon offers nothing more than its own assertion to support its theory that Centex and Worthgroup Architects intended to confer third-party beneficiary rights on *all*

"successors, assigns and legal representatives of, and persons in privity of contract with" (R.P. 905) either party. And Centex agrees with Terracon that construing the open-ended and seemingly indefinite "successors and assign" clause to dole out third-party beneficiary rights is "absurd." Terracon Br. 25. But that is Terracon's construction, not Centex's.

Terracon also ignores the morass of attendant interpretive problems that its reading of the "successors and assigns" clause creates. Such a broad extension of contractual rights—automatically sweeping in new parties—cannot be squared with the requirement that Centex first approve any subcontractor Worthgroup Architects wished to hire. *See* Architect Agreement ¶ 2.1.2; R.P. 893; Br. in Chief 30-31. Yet Terracon has no answer for that. Terracon similarly blinks away the fact that claiming third-party beneficiary status based on privity of contract with the "Design Architect" is incompatible with its claim of third-party beneficiary status based on the definition of "Design Architect" itself. *See* Br. in Chief 31.

Finally, while Terracon is correct that Section VII.C of the Design/Build Agreement (R.P. 854) determines when Centex can offer flow-down rights to subcontractors, Terracon is wrong that Section VII.C "specifically states that such contract rights should ultimately flow down to sub-subcontractors as well." Terracon Br. 26. Section VII.C says no such thing. Rather, it restricts the extension of flow-down rights to sub-subcontractors like Terracon to instances in

which Centex, "where appropriate, require[s] *** Subcontractor[s] to enter into similar [flow-down] agreements with Sub-subcontractors." Design/Build Agreement § VII.C (R.P. 854). In other words, the Design/Build Agreement does not allow Centex to extend flow-down rights to Terracon at all; those rights must come from Worthgroup Architects by separate agreement. Accordingly, Terracon cannot seize through third-party beneficiary status in the Architect Agreement what the Design/Build Agreement expressly prohibits Centex from offering.

B. Terracon's Services Fall Outside the Scope of the Architect Agreement.

The Architect Agreement could not be clearer: the flow-down clause applies only "[i]n respect of the Design Work," Architect Agreement ¶ 1.3.2; R.P. 890, and the Design Work expressly "excludes *** geotechnical engineering *** services ***." *Id.* ¶ 1.1.2 & Exhibit A. That means Terracon's geotechnical engineering services cannot be covered by the flow-down clause, and Terracon therefore cannot invoke the Design/Build Agreement's limitation-of-liability clause against Centex. *See* Br. in Chief, 33-38.

Critically, Terracon does not question Centex's interpretation of those provisions or even mention the geotechnical engineering exclusion. Terracon's only response (Br. 20-22) is that the Agreement was amended after execution to include design of the MSE Wall within the scope of "Design Work." But that misses the point. The issue is not whether the design of the MSE Wall generally

was part of the Architect Agreement, but whether the services that Terracon specifically provided constitute "Design Work." *See* Architect Agreement ¶ 1.3.2 (R.P. 890). Terracon nowhere argues that the amendment displaced the Architect Agreement's express exclusion of geotechnical engineering services from the scope of "Design Work."

Moreover, Terracon concedes that it provided engineering services with respect to the MSE Wall, *see* Br. 22, and largely ignores the record evidence suggesting that these services fell outside the scope of the flow-down clause. Indeed, it does not even mention the testimony of Worthgroup Architects' president and another geotechnical engineer retained to work on the project, both of whom stated unequivocally that Terracon performed geotechnical engineering work for the MSE Wall (*see* Br. in Chief 34-36).

To be sure, Terracon rehashes (Br. 15-20) its arguments challenging the admissibility of the testimony of John Lommler, Centex's expert in geotechnical engineering. The district court did not strike Mr. Lommler's affidavit, however, and it is therefore part of the record on appeal. *See Dean v. Paladin Exploration Co., Inc.*, 2003-NMCA-049, ¶ 17, 133 N.M. 491, 64 P.3d 518 (evidence subject to motion to strike but not ruled on by district court is part of record). Not only do Terracon's challenges to Mr. Lommler's testimony lack merit (Br. in Chief 36 n.2), but it is not the province of this Court to rule on the admissibility of evidence in the

first instance. *See, e.g., Roark v. Farmers Grp., Inc.*, 2007-NMCA-074, ¶ 20, 412 N.M. 59, 162 P.3d 896 ("The admissibility of evidence is discretionary with the trial court, and its ruling will only be reversed upon a showing of abuse of that discretion." (quoting *State v. Wynne*, 1988-NMCA-106, ¶23, 108 N.M. 134, 767 P.2d 373)); *State v. Marquez*, 1998-NMCA-010, ¶ 24, 124 N.M. 409, 951 P.2d 1070 ("Admission or exclusion of evidence is a matter within the discretion of the trial court ***.").

While Terracon is free to challenge the admissibility of that evidence on remand, the current record amply demonstrates a genuine issue of material fact as to whether Terracon's services constitute "geotechnical engineering" and thus fall outside the scope of the Architect Agreement's flow-down clause. *See Garcia-Montoya v. State Treasurer's Office*, 2001-NMSC-003, ¶ 7, 130 N.M. 25, 16 P.3d 1084 ("If there is the slightest doubt as to the existence of material factual issues, summary judgment should be denied." (quoting *Las Cruces Country Club v. City of Las Cruces*, 1970-NMSC-016, ¶3, 81 N.M. 387, 467 P.2d 403)).

III. IF TERRACON IS A THIRD-PARTY BENEFICIARY TO THE ARCHITECT AGREEMENT, ITS LIABILITY TO CENTEX HAS NOT BEEN EXTINGUISHED

A. The Design/Build Agreement Does Not Limit Centex's Ability To Recover For Redesign Costs and Additional Construction Costs.

Terracon wholly bypasses the only provision of either Agreement that speaks directly to the allocation of responsibility for the kinds of costs at issue

here—"[r]edesign costs and additional construction costs *** required to correct the Design Architect's errors and omissions." Architect Agreement ¶ 1.4.2(b); R.P. 891. If Terracon is a third-party beneficiary to the Architect Agreement standing in the shoes of the Design Architect (Worthgroup Architects), there is no escaping that provision's inexorable command that such costs "shall be the responsibility of the Design Architect," and thus of Terracon, regardless of the availability of insurance proceeds. *Id.*; *see also* Reply Br. to Worthgroup Architects 7-14.

The Architect Agreement's flow-down clause is no help. *See* Terracon Br. 28-34. *First*, the underlying limitation-of-liability clause does not purport to limit Centex's obligation to the Owner to make the necessary repairs to deliver the project in accordance with contract requirements. *See* Reply Br. to Worthgroup Architects 2-5; *see also* Design/Build Agreement § V.F.3.b; R.P. 847 (Owner allowed to withhold progress payments for defective work); *id.* § 10.B; R.P. 860 (Centex obligated to prevent damage at the site). Rather, the limitation-of-liability clause provides that Centex is not financially responsible for the costs of those repairs. Under the Design/Build Agreement, that responsibility is borne by the designers or their insurers in the first instance, and by the Owner as a backstop for whatever cannot be recovered from the designers or their insurers. The limitation-of-liability clause therefore would do nothing to absolve Terracon of its liability in

this case, because the clause could not (and did not) do the same for Worthgroup Architects. *See* Reply Br. to Worthgroup Architects 2-5.

Second, Terracon's reliance on the flow-down clause ignores that the Architect Agreement twice forecloses applying the limitation-of-liability clause to lessen the burden of the parties' contractual obligations under that agreement. Provisions of the Design/Build Agreement only "flow down" to the extent that they do not contradict rights and obligations "otherwise provided" in the Architect Agreement. Architect Agreement ¶ 1.3.2; R.P. 890. Moreover, the Architect Agreement's "order of precedence" clause expressly forbids the parties from usurping the Architect Agreement's plain language where the Design/Build Agreement would impose a "[lower] standard or [lesser] requirement on the parties." *Id.* § 9.11; R.P. 906. A term from the Design/Build Agreement limiting Terracon's liability would directly contradict a term in the Architect Agreement holding Terracon absolutely responsible for "redesign" and "additional construction" costs, and demand substantially less of Terracon than the Architect Agreement does.[1]

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[1] Terracon asserts (Br. 34-35) that this Court held in *Hasse Contracting* that a flow-down clause must operate in an all-or-nothing fashion, but this Court had no occasion to address that question. *See Hasse Contracting Co. v. KBK Fin., Inc.*, 1998-NMCA-038, ¶¶ 5, 27, 125 N.M. 17, 956 P.2d 816 (concluding court "need not, *** resolve *** to what extent, if any, incorporation of the [prime] contract" mattered where sub-contract "generally" incorporated prime contract through flow-

Terracon's attempt to sidestep the Architect Agreement's indemnity clause (Br. 36-38) fails for similar reasons. *See* Reply Br. to Worthgroup Architects 12-13. The Architect Agreement required Worthgroup Architects (and under Terracon's theory, Terracon) to "indemnify [Centex] *** from and against all damages, *** to the extent arising out of or resulting from [Worthgroup Architects' (or Terracon's)] acts or omissions in carrying out its obligations under this Agreement, *including but not limited to*, liability incurred by [Centex] *** pursuant to the provisions of the [Design/Build] Agreement." Architect Agreement ¶ 9.10.1; R.P. 905-906 (emphasis added). The provision therefore covers much more than Centex's liability to the Owner under the Design/Build Agreement; it requires indemnification for *all* damages that Centex incurs as a result of Worthgroup Architects' (or Terracon's) "acts or omissions in carrying out its obligations" under the Architect Agreement.[2]

Terracon suggests (Br. 36) that this interpretation reads the limitation-of-liability clause out of the Architect Agreement. But that presupposes that a clause limiting the designers' liability to Centex was ever read *into* the Architect

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down clause incorporating provisions "[i]nsofar as they are not inconsistent with the terms and conditions of" the subcontract).

[2] Terracon's contention that no record evidence exists regarding the extent of Centex's costs, Terracon Br. 36-37, forgets the case's procedural posture. Worthgroup Architects and Terracon moved for summary judgment on the basis of the limitation-of-liability clause alone. R.P. 612-622a, 682-690. The parties have not yet litigated the substance of Centex's claims.

Agreement in the first place. With respect to responsibility for redesign costs and additional construction costs necessary to comply with Centex's repair obligations under the Design/Build Agreement, no limitation of liability was part of the Architect Agreement to begin with.

B. If the Limitation-of-Liability Clause Applies, Centex is Not Precluded From Seeking Insurance Proceeds From Terracon.

1. Even if the limitation-of-liability clause extends to Terracon, the Agreements do not limit Centex's ability to pursue insurance proceeds from all policies held by Worthgroup Architects and Terracon that cover professional errors and omissions. *See* Reply Br. to Worthgroup Architects 17-20.

By its terms, the Architect Agreement specifically permits Centex to pursue "available insurance proceeds" without restricting its pursuits to a specific policy. Architect Agreement ¶ 1.4.2(b); R.P. 891. And the Design/Build Agreement's limitation-of-liability clause hardly identifies a particular policy to which Centex must look for recovery, much less "limits liability for design errors to that policy." Terracon Br. 39. Rather, the limitation-of-liability clause generally requires all "design professional Subcontractor(s) to obtain and maintain professional errors and omissions coverage"—however many subcontractors there might be. Design/Build Agreement § VI.F; R.P. 852. Nor can the intention to restrict insurance proceeds to a single policy be found in the requirement that the Owner "limit [Centex]'s liability *** to whatever sums Owner is able to collect from the

above described professional errors and omissions insurance carrier." *Id.*; *see* Terracon Br. 40. Indeed, the sentence preceding the "above described *** insurance carrier" clause makes clear that the provision of several policies may be necessary to ensure coverage of design errors for "each professional Subcontractor in an amount not less than $3,000,000." *Id.; see* Reply Br. to Worthgroup Architects 20. Where, as here, the one insurance policy that Terracon seeks to interpose as a defense to liability covered both design errors and other kinds of professional errors, recourse to additional policies is required to achieve the mandatory minimum insurance coverage for design errors of $3 million.[3]

Similarly, the indemnity provision in the Design/Build Agreement specifically allows the Owner (and, if applied through the flow-down provision, Centex) to "look solely to designers employed on the Project *and their insurers*" collectively in the event of any loss due to design errors, without limitation to any particular policy. Design/Build Agreement § IX; R.P. 858 (emphasis added). Terracon contends the indemnity provision is irrelevant because this suit is for damage to the work itself, which it claims the indemnity clause does not cover. Terracon Br. 41. But the indemnity provision expressly references the limitation

[3] Centex's argument is not an admission that any construction management errors caused $3 million of the damage from the retaining wall failure. *See* Terracon Br. 42 n.4. It simply reflects the fact that the Owner made claims of construction-management errors. The policy thus could have been paid, in part, for construction management errors—a disputed issue of fact not suited for resolution on summary judgment. *See* R.P. 1348.

of liability in Section VI.F with respect to the Owner's recourse to "designers *** and their insurers," reflecting the intent of the parties that the limitations of liability in both provisions are to be interpreted in the same manner.

2. Terracon claims that it was not required to purchase professional liability insurance because only "Subcontractors" are required to secure coverage under the limitation-of-liability clause, and it is not a "Subcontractor" as that term is defined in the Design/Build Agreement. Terracon Br. 38-39. But that argument upends Terracon's assertion that it is a third-party beneficiary.

Third-party beneficiary status is a two-way street: beneficiaries assume both the "rights *and limitations*" of the contracting parties. *Flying Phoenix Corp. v. Creative Packaging Mach., Inc.*, 681 F.3d 1198, 1201 (10th Cir. 2012); *see also Nearburg v. Yates Petroleum*, 1997-NMCA-069, ¶ 31, 123 N.M. 526, 943 P.2d 560 ("Parties to a contract agree to be bound by its provisions and must accept the burdens of the contract along with the benefits.").

Accordingly, if Terracon is a third-party beneficiary of the Design/Build Agreement's limitation-of-liability clause (as applied through the Architect Agreement's flow-down clause), it necessarily has a "third-party" obligation to "obtain and maintain" its own separate $3 million professional liability insurance policy under that same clause. *See* Design/Build Agreement § VI.F; R.P. 852; *see also* Architect Agreement ¶ 1.3.2; R.P. 890 (noting that rights and obligations in

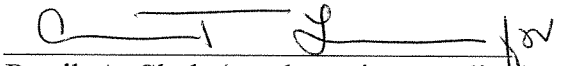
flow-down clause are reciprocal). And until the proceeds from that policy are paid out, Terracon cannot benefit from the Design/Build Agreement's Limitation of Liability Clause even if it applies.

CONCLUSION

For the foregoing reasons and those stated in Appellant's brief in chief, this Court should grant the relief requested in Plaintiff-Appellant's reply brief to Wothgroup Architects' answer brief, and declare that Terracon is not a third-party beneficiary of the Architect Agreement. The grant of summary judgment to Defendants-Appellees should therefore be reversed, and the case remanded for further proceedings consistent with this Court's opinion.

DATED: January 21, 2013

Respectfully submitted,



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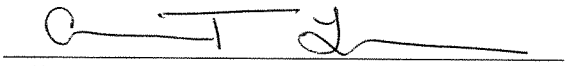
STATEMENT REGARDING ORAL ARGUMENT

This case involves a contractual "flow-down" clause, which allows parties to a prime contract to extend their own rights and obligations to affiliated subcontracting parties in a separate agreement. These clauses are increasingly common features in commercial contracts executed or performed in this State, but no New Mexico court has yet had occasion to elucidate the principles governing the interpretation of such a clause. Oral argument in this case would help clarify the manner in which these clauses should be interpreted under New Mexico law.



Alice T. Lorenz

STATEMENT OF COMPLIANCE WITH RULE 12-213(F) NMRA

Undersigned counsel certifies that the body of this Brief in Chief has a total of 4,006 words, is in 14-point font, is proportionally spaced, and complies with Rule 12-213(F) NMRA. The word processing program used to obtain the word count is Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by U.S. Mail to all parties entitled to service of same, as required by Rule 12-202 NMRA and addressed as follows on January 21, 2013:

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