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 WORTHGROUP ARCHITECTS, L.P.'S ANSWER BRIEF

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

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The question in this appeal is whether Centex contracted to bear the burden of Worthgroup Architects' ("Architects'") liability for the latter's own negligence. Under the plain language of the Agreements, the answer is no. In pertinent part, the Agreements, taken together, do two things: (1) limit Centex's liability to the Owner for design defects (Design/Build Agreement § VI.F; R.P. 852), and (2) make the design sub-contractor liable for the design defects it caused (Architect Agreement ¶ 1.4.2(b); R.P. 891), such that the Owner is only secondarily responsible for any resulting costs. Architects' misplaced reliance on "simple fairness" in the balancing of burdens (Architects Br. 1) cannot alter those basic features embodied in the Agreements' text.

According to Architects (Br. 20-23), Centex absolved Architects of its responsibility to correct the defects caused by its faulty work—thereby undermining Centex's ability to deliver a non-defective project—by negotiating a limitation on Centex's ultimate financial liability to the Owner. That defies both the text of the Agreements and common sense. To the contrary, Centex specifically negotiated in the Architect Agreement that Architects would cover the cost of Architects' errors. That allocation of responsibility is neither lopsided nor unfair: under the Agreements, each primary subcontractor—the designer (Architects) and the builder (Centex Construction Company)—is simply responsible for its own

errors. Centex supervised both and bore ultimate responsibility for delivering a project to the Owner that met contract specifications. The Owner's agreement to limit the financial liability imposed on Centex for Architects' design errors did not authorize, much less require, Centex to abandon the project in a defective state and decline to insist upon the necessary corrective work (or its costs) from Architects.

ARGUMENT

I. THE ARCHITECT AGREEMENT'S PLAIN TERMS MAKE ARCHITECTS FULLY RESPONSIBLE FOR REPAIRS NECESSARY TO CORRECT ITS ERRORS

1. The parties agree that this Court's task is to ascertain the parties' "purpose, meaning and intent." *Rivera v. American Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 27, 150 N.M. 398, 259 P.3d 803; *see* Architects Br. 2-4. Because the parties further agree that the contracts are unambiguous, the Court's search for intent is "to be deduced by the language employed." *Id.* Because it conflicts with the Agreements' unambiguous text, Architects' attempt (Br. 4) to engraft a requirement that the Agreements be read to ensure a precise balance of burdens and benefits fails. And read properly, the Agreements create no mismatch between burden and benefit; instead, they allocate financial responsibility to each party for its own mistakes.

a. Centex's chief obligation under the Design/Build Agreement was to deliver a renovation to the Owner completed "in a good and workmanlike manner"

and "in accordance with the *** Specifications." Design/Build Agreement §§ I.C, I.D; R.P. 840-841. Although Centex performed neither the design nor building work, it agreed to "provide competent supervision" of that work. *Id.* § I.D; R.P. 841.

Centex agreed to indemnify the Owner for personal injury or damage to preexisting property arising out of Centex's or its subcontractors' negligence, except that the "Owner shall look solely to designers employed on the Project and their insurers in the event of any loss, injury or damages due to the [design] causes" in the contract, as "provided in Section VI.F." *Id.* § IX; R.P. 858. In Section VI.F, the Owner agreed to "limit [Centex's] liability to Owner for any errors or omissions in the design of the Project to whatever sums Owner is able to collect" from required design-error insurance of not less than $3 million. *Id.* § VI.F; R.P. 852. Taken together, those clauses show that Centex agreed that the Owner generally could look to Centex for indemnification from any losses caused by Centex's subcontractors, but that with respect to design work, either the responsible subcontractor (or its insurer) or the Owner would cover any costs. In other words, the Owner agreed to limit Centex's ultimate financial responsibility for Architects' negligence to the amounts that could be collected from Architects or its insurers, making the Owner secondarily responsible for the costs of repairs.

That limitation of liability did not, however, purport to remove Centex's responsibility to ensure the repairs were timely made and to deliver the project in accordance with contract requirements. Indeed, the Design/Build Agreement expressly allowed the Owner to withhold progress payments for defective work, regardless of the source of the defects. *See* Design/Build Agreement § V.F.3.b; R.P. 847. The Design/Build Agreement, moreover, separately obligated Centex to "provide reasonable protection to prevent damage, injury, or loss to" persons, the project, and other property at the site. *Id.* § 10.B; R.P. 860.

In keeping with its obligation under the Design/Build Agreement to ensure delivery of a defect-free project, Centex's contract with Architects contemplated necessary expenditures for "[r]edesign costs and additional construction costs" to complete the project, and assigned Architects the "responsibility" for those costs if "required to correct [Architects'] errors or omissions" in designing the project. Architect Agreement ¶ 1.4.2(b); R.P. 891. By noting that Architects' "responsibility" for redesign and additional construction costs "shall not preclude the pursuit of available insurance proceeds," the Agreement also made clear that the former responsibility was distinct from any party's right to recover insurance proceeds. *See id.*

b. Architects would turn Centex's obligation to the Owner on its head. It posits a contractual arrangement in which Centex was allowed—indeed, *required*

by its agreement with the design subcontractor (Architects Br. 20-23)—to ignore defects caused by Architects and its subcontractors when those defects proved especially costly to fix (*i.e.*, above the $3 million in insurance proceeds available to Centex here). But the Agreements demonstrate that the purpose of Centex's liability limitation was not to absolve Centex from the requirement to deliver a project free of defects, but to allocate primary financial responsibility to Architects for additional costs incurred due to design negligence—with a $3 million insurance floor to ensure immediate access to some repair funds. The Design/Build Agreement's limitation on Centex's liability operates only as a backstop to allow Centex to potentially recover from the Owner any costs that Centex cannot recover from the primarily responsible and negligent parties or their insurance.

Contrary to Architects' framing (Br. 29), enforcement of Architects' obligation to pay the cost of repairs does not result in Centex's unjust enrichment. At this stage of the litigation, Architects does not dispute that Centex has incurred at least $4 million in unreimbursed costs to remediate the retaining wall (Br. in Chief 1). Architects' reimbursement of the repairs necessitated by its negligence would not enrich Centex but simply allocate those costs to the responsible party and restore Centex to the position contemplated by the limitation-of-liability clause.

Nor does enforcement result in the pass-through to Architects of "the entire

burden of [Centex's] liability to Owner without the benefit of any qualification of that liability," Architects Br. 28. The Architect Agreement merely confirms the default rule: that Architects is financially responsible for its own negligence. *See* Architect Agreement ¶ 1.4.2(b); R.P. 891. It further provides that recoverable insurance proceeds do not cap Architects' responsibility to pay for repairs. *Id.* Moreover, it imposes symmetrical liability: it holds Architects fully responsible for costs caused by its own errors, but reimburses Architects for any redesign costs caused by the builder. Architect Agreement ¶ 1.4.2(e); R.P. 891.[1]

Architects' complaint that imposition of liability for its own negligence is unfair because it had no opportunity to "negotiate or opine on the adequacy of the insurance remedy," Architects Br. 28, is likewise unpersuasive. The Design/Build Agreement mandates an insurance floor, not an insurance ceiling, so Architects was not limited to a $3 million policy if it deemed that insurance inadequate. *See* Design/Build Agreement § VI.F; R.P. 852; *see also* Br. in Chief 22-27; Part II, *infra*. Indeed, Architects agreed to additional insurance, including the $2 million excess liability coverage, to cover its liability under the Architect Agreement. *See* Architect Agreement ¶ 8.1, Ex. C; R.P. 903, 913. There is nothing "one-sided," Architects Br. 28, in imposing on each party the primary financial responsibility

[1] In keeping with Centex's supervisory role, the Architect Agreement specifies that Centex must forward those costs to Architects but may recover them from the builder. Architect Agreement ¶ 1.4.2(e); R.P. 891.

for the costs of repairs made necessary by that party's negligence. Under the Agreements, Centex served only as a conduit for recovering from the primarily responsible party—Architects—on the Owner's behalf.

2. A post hoc balancing of contractual burdens and benefits cannot, in any event, trump the contracts' unambiguous text. *See Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶ 23, 123 N.M. 526, 943 P.2d 560 ("[A] court *** cannot make a new agreement for the parties."). Only one provision in the two contracts speaks directly to the allocation of responsibility between Centex and Architects for the kinds of costs at issue here—"[r]edesign costs and additional construction costs *** required to correct [Architects'] errors or omissions," Architect Agreement ¶ 1.4.2(b), R.P. 891—and that provision controls. *See* RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1981) ("[S]pecific terms and exact terms are given greater weight than general language.").

Architects ignores the plain meaning of that text. Instead, it contends that the costs "*required* to correct [Architects'] errors or omissions" can be defined only by reference to Centex's liability to the Owner. Architects Br. 20-22 (emphasis added); *see also* Terracon Br. 36. But the word "required" cannot bear the weight that Architects foists upon it.

a. *First*, the ordinary meaning of the phrase costs "required to correct [Architects'] errors or omissions" refers to costs "required" to "correct" the project

as a matter of design—*i.e.*, to bring the work into compliance with contractual specifications. The relevant yardstick for what is "required" is thus the contract's technical specifications, not Centex's financial liability to the Owner under the Design/Build Agreement. By contrast, when the parties intended to incorporate Design/Build Agreement liability as the measure of liability between Centex and Architects, they did so expressly. *See, e.g.*, Architect Agreement ¶ 9.2; R.P. 904 (providing that Architects "shall be liable to [Centex] for liquidated damages [Centex] incurs pursuant to the [Design/Build] Agreement" to the extent delay is attributable to Architects).

Because the Architect Agreement did not expressly incorporate Centex's liability under the Design/Build Agreement as the measure of Architects' liability, Architects' reliance on *United Tunneling Enterprises v. Havens Constr. Co.*, 35 F. Supp. 2d 789 (D. Kan. 1998), is misplaced. *See* Architects Br. 21. In *United Tunneling*, the agreement between the contractor and the subcontractor "directly link[ed] the assessment of liquidated damages to the prime contract and to the Contractor's liability for the same." 35 F. Supp. 2d at 795. There is no such express linkage here. The terms of the contracts at issue in *State ex rel. Regents of N.M. State Univ. v. Siplast, Inc.*, 1994-NMSC-065, 117 N.M. 738, 877 P.2d 38, are likewise "illustrative," Architects Br. 18, only in their divergence from this case. In *Siplast*, the prime contract itself provided for a waiver of rights by the owner

and the contractor against each other, *and* against subcontractors and sub-subcontractors, to recover for fire damage beyond insurance proceeds, and required the contractor to obtain similar waivers by sub- and sub-subcontracts. 1994-NMSC-065, ¶¶ 8, 16. Based on that waiver in the prime contract, which expressly extended down the tiers of contracts, the Supreme Court concluded that the insurance proceeds were the "exclusive source for redress" for all fire damage. *Id.* ¶ 16. Neither the Design/Build Agreement nor the Architect Agreement provided any such express limitation on the design sub-contractors' liability.

b. *Second,* contrary to Architects' contention (Br. 23-24), Centex did not "voluntarily" repair the retaining wall but was contractually obligated to do so. As described above, Centex's ultimate obligation to the Owner was to deliver the project in accordance with contractual requirements and without defects. *See* Design/Build Agreement §§ I.C, I.D; R.P. 840-841. Centex thus had no option but to complete the necessary repairs. Nor did Centex "admit[]" anything different. Architects Br. 23. Consistent with its position in this suit and the plain text of Paragraph 1.4.2(b), Centex informed the Owner that although it was proceeding with the repairs, it would not be responsible for the costs of the repairs that exceeded what it could recover "from the designers or their insurer's [sic] on the Owner's behalf." R.P. 634. Centex thus reminded the Owner of its secondary responsibility for such costs under the limitation-of-liability clauses of the

Design/Build Agreement, should Centex's efforts to recover those costs from "the designers or their insurers" fail. *Id.*

At the very least, Centex's agreement with Architects did not obligate Centex to refuse to outlay any funds for repairs in excess of $3 million. Architects points to the provision in the Architect Agreement requiring Centex to enforce the Design/Build Agreement "in such manner which will preserve the rights of [Architects] thereunder." Architect Agreement ¶ 3.4; R.P. 898; *see* Architects Br. 23-24. But that circular response does not answer the predicate question of whether Architects has a right under the Design/Build Agreement to limit its payment for repair costs arising from its own errors. That same enforcement provision also required Centex to enforce the Design/Build Agreement "in such manner *** which will be for the benefit of the Project as a whole." Architect Agreement ¶ 3.4; R.P. 898. Repairing the rapidly deteriorating retaining wall was essential to the project. *See* R.P. 1375-1376.

c. *Third*, Architects' reading would render Paragraph 1.4.2(b) superfluous, since (under its reading) the flow-down clause (coupled with the Design/Build Agreement's limitation-of-liability clause) limits Architects' liability to insurance proceeds. But, as noted in the brief in chief (Br. 19), that result contravenes the principle that "every word or phrase must be given meaning and significance according to its importance in the context of the whole contract." *Aspen*

Landscaping, Inc. v. Longford Homes of New Mexico, Inc., 2004-NMCA-063, ¶ 14, 135 N.M. 607, 92 P.3d 53 (quoting *Bank of New Mexico v. Sholer*, 1984-NMSC-118, ¶ 6, 102 N.M. 78, 691 P.2d 465).

In response (Br. 22), Architects contends that Paragraph 1.4.2(b) "makes clear that [it] would not be entitled to draw insurance proceeds to correct its own mistakes." It hypothesizes (Br. 22) that one of the other parties would be entitled to the insurance proceeds instead , "even if [Architects] itself performed the work." But that makes no sense: if Architects absorbs the costs of correcting its own mistakes by doing the work without reimbursement, then no other party could or would draw on the insurance funds to cover those costs. Thus, under Architects' nonsensical construction, the provision merely authorizes (but does not require) it to correct its own mistakes out of its own pocket. That amounts to nothing. *Cf. Piano v. Premier Distributing Co.*, 2005-NMCA-018, ¶ 6, 137 N.M. 57, 107 P.3d 11 ("[A] promise that puts no constraints on what a party may do in the future *** is illusory, and it is not consideration.") (internal quotation marks omitted).

d. *Fourth*, lest there be any doubt about the scope of Architects' responsibility for the costs of its own negligence, the indemnification clause of the Architect Agreement expressly eliminates it. It provides that Architects would "indemnify [Centex] *** from and against all damages, *** to the extent arising out of or resulting from [Architects'] 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). As throughout the Architect Agreement, that indemnification provision—holding each party responsible for its own negligence—is reciprocal: Centex must indemnify Architects for any negligence on Centex's part. *Id.* § 9.10.2; R.P. 906.

Architects contends that, by use of the word "damages," the indemnification clause refers only to money that Centex was obligated to expend under Architects' (flawed) understanding of the limitation-of-liability clause. And Architects further contends that the reference to liability beyond what Centex owed to the Owner refers only to liability to third parties. Architects Br. 24-25. The text of the Agreement supports neither attempt to restrict the terms of that clause. As to the former, as explained above, Centex was obligated to expend the funds to secure the repairs; the only question is whether Architects was responsible for reimbursing that expense. The very definition of "damages" cited by Architects, moreover, includes not just money "ordered to be paid" but also money "claimed." BLACK'S LAW DICTIONARY 445 (9th ed. 2009). And there is no doubt that the Owner was *claiming* that Centex was required to make the necessary repairs to the retaining wall. *See* R.P. 634-635. As to the latter, Architects does not and cannot point to anything in the text that permits further liability *only* for third-party claims.

e. *Fifth,* the flow-down clauses do not alter the plain meaning of paragraph 1.4.2(b) of the Architect Agreement. The parties agree that flow-down clauses are generally enforceable, Architects Br. 18-19, but that provides no insight into *which* provisions flowed down from the Design/Build Agreement. Both clauses highlighted by Architects and Terracon expressly except provisions from flow-down where the principal agreement between two parties provides for different terms. *See* Architect Agreement ¶ 1.3.2; R.P. 890 (Architects shall "have all rights toward [Centex] which [Centex] has under the [Design/Build] Agreement towards the Owner *** *except as provided herein.*") (emphasis added); Design/Build Agreement § VII.C; R.P. 854 ("Each subcontract agreement *** shall allow to the Subcontractor, *unless specifically provided otherwise in the subcontract agreement*, the benefit of all rights, remedies and redress against the Design/Builder that the Design/Builder, by the [Design/Build Agreement], has against the Owner.") (emphasis added).

Centex further agrees that the contracts should be read as complementary where possible. *See* Architect Agreement ¶ 9.11; R.P. 906; Architects Br. 20, 26; Terracon Br. 29. And the contracts are complementary under Centex's reading: no conflict exists between a limitation on Centex's liability to the Owner for Architects' negligence and the imposition of liability on Architects for its own negligence.

A conflict arises only when Architects and Terracon seize upon the flow-down clauses to engraft a liability limitation upon the Architect Agreement. The Architect Agreement did not "specifically acknowledge" the limitation of liability by providing for recourse to "available insurance proceeds" in Paragraph 1.4.2(b), Architects Br. 26. To the contrary, it *repudiated* that limitation by making clear that the pursuit of available insurance was in *addition* to Architects' "responsibility" for all "[r]edesign costs and additional construction costs" made necessary by Architects' errors. When such a conflict exists, the flow-down clause cannot be used to trump the controlling provision in the governing contract. *See Larry Snyder & Co. v. Miller*, No. 07-CV-455-PJC, 2010 WL 830616, *6 (N.D. Okla. Mar. 2, 2010) (declining to apply repair required under prime contract through flow-down clause when a specific clause in the sub-contract addressed the repair situation and mandated specific repairs by sub-contractor). Not only is it textually unsupported, but interpreting a general flow-down clause to allow a party to limit responsibility for its own negligence is disfavored. *Cf. Bernotas v. Super Fresh Food Mkts., Inc.*, 863 A.2d 487, 481-482 (Pa. 2004) (collecting cases rejecting interpretation of "flow down" clause that would require one party to indemnify another for the second party's negligence).

The order-of-precedence clause resolves any doubt. That clause confirms that, in case of conflict, the Architect Agreement prevails unless the Design/Build

Agreement imposes a higher standard on the parties. Architects contends that the Design/Build Agreement imposes a higher standard on Centex, Architects Br. 26-27, but that does not follow. Under both agreements, the standard applied to Centex is the same: Centex does not bear any financial responsibility for the costs of repairs necessitated by Architects' errors. The only party for which there is a conceivable difference in standards is Architects, and the Architect Agreement clearly imposes the higher standard by making Architects primarily liable for the full costs of repairs to correct defects it caused.

II. THE LIMITATION-OF-LIABILITY CLAUSE IS NOT LIMITED TO INSURANCE PROCEEDS FROM ONE POLICY

Even if the limitation on Centex's liability to Owner somehow extends to Architects, Centex should not be foreclosed from pursuing additional insurance proceeds from policies (i) held by Architects that were (ii) required by the contracts and (iii) cover professional errors and omissions. Read harmoniously, the contracts authorize the pursuit of *all* such insurance proceeds, and do not limit Architects' liability to the proceeds of one jointly obtained $3 million policy that covered multiple types of professional errors.

1. *First,* the Architect Agreement expressly authorizes the "pursuit of available insurance proceeds," not limited to one particular policy. Architect Agreement ¶ 1.4.2(b); R.P. 891. Faced with that reality, Architects argues that there is no record evidence of any other "available" insurance covering design

errors. Architects Br. 35. Not so. The record documents Architects' excess liability insurance and its coverage of design errors. *See, e.g.*, R.P. 925 (letter from Architects contending that there had been no "E&O"—*i.e.*, professional errors and omissions—claims against its excess liability policy (number 4628578)); R.P. 926 (letter from Architects to insurer stating that it did not find the retaining wall claim excluded from excess liability coverage); R.P. 928 (letter from insurer responding to Architects' notice of potential claims against the excess liability policy). Moreover, the excess liability policy was expressly required by the Architect Agreement, *see* ¶ 8.1.1, Ex. C; R.P. 903, 913, and thus constitutes "available insurance proceeds" within the meaning of that agreement.

Architects further faults Centex for failing to "exhaust" other insurance before bringing this suit. Architects Br. 34-35. But Architects points to no contractual provision requiring Centex to follow any particular procedure in order to trigger Architects' insurer's obligation to defend and cover Architects' liability. The record indicates that Architects' insurer has notice of the claim, R.P. 928, and Centex is not a named insured on any of Architects' policies covering design-error claims other than the joint policy. Regardless, the district court did not dismiss Centex's claims for failure to exhaust alternative remedies, but held on the merits that Centex is foreclosed from making claims against any other available insurance.

2. *Second*, both contracts required Architects to "obtain and maintain professional errors and omissions coverage with respect to *design services*" of not less than $3 million. Design/Build Agreement § VI.F; R.P. 852 (emphasis added); *see also* Architect Agreement ¶ 8.3; R.P. 903 (requiring Architects to supply a professional liability policy). Architects insists that the design-error coverage required under both agreements could be satisfied by the same policy. Architects Br. 30-31. Perhaps, but only if that one policy guaranteed a minimum of $3 million in coverage for *design* errors alone. The $3 million policy jointly obtained by Centex and Architects did not, because it covered a wide range of professional errors. *See* R.P. 1312 (policy covered both the named insureds' (Architects and Centex) services "as an architect *** [or] construction manager").

Architects responds that the limitation-of-liability clause limits the Owner (and, if applied through the flow-down provision, Centex) to "whatever sums Owner is able to collect from the above described professional errors and omissions insurance carrier" regardless of why those sums were paid. Design/Build Agreement § VI.F; R.P. 852; *see* Architects Br. 33, 36-37; Terracon Br. 41-42. But the "above described *** insurance carrier" clause does not refer mechanically to one carrier or one policy, but rather to the combination of policies that collectively covers design errors in an amount "not less than $3,000,000." Design/Build Agreement § VI.F; R.P. 852. Given that the joint policy covered

other errors, it did not provide the requisite minimum $3 million coverage for design errors without supplementation from the other policies that the contract required Architects to maintain. Under Architects' view of the Agreements, presumably no insurance proceeds would be available to others for its design errors if the defective work also involved construction-management errors of over $3 million. The parties could not have intended that result. Indeed, that is not just a theoretical concern: a dispute of material fact exists here as to the nature of the defects on which the $3 million policy was paid out. See Br. in Chief 25-26.

3. *Third*, 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). This makes clear that even if the limitation-of-liability clause were to apply, it does not restrict Centex to one policy.

In sum, Centex is not attempting to "cobble together a distinct requirement of *** additional professional liability insurance," Architects Br. 31. Rather, Centex is seeking only to hold Architects to the requirement to make available *at least* $3 million in insurance coverage specifically for design errors.

* * * * *

In suggesting that the parties would have been clearer if they had intended to "divest" Architects "of the benefit of a contractual term as essential as the limitation of liability," Architects Br. 25, Architects asks the wrong question. The right question is whether the contracting parties intended to vest Architects with a limitation of liability through a flow-down clause that would have sharply limited Owner's ability to recover losses caused by Architects' errors and impeded Centex's ability to fulfill its contractual obligation to deliver a defect-free project. The text provides an unequivocal answer: no. Architects' attempt to hang its hat on the word "required" in a clause that on its face places full responsibility on Architects for all redesign and construction costs necessary to repair defects caused by its own errors falls woefully short.

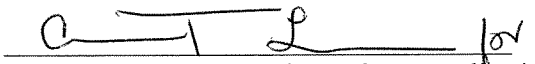
CONCLUSION

For the foregoing reasons and those stated in Appellant's brief in chief, this Court should declare that: (i) Worthgroup Architects is primarily financially responsible under the Agreements for design errors and defects due to its own negligence and that of its subcontractors; (ii) the Agreements do not limit Worthgroup Architects' liability to Centex for those errors and defects; (iii) Worthgroup Architects was obligated to obtain at least $3 million in insurance coverage for design errors; and (iv) Centex is entitled to reimbursement from

Worthgroup Architects and its insurers for costs incurred to repair the MSE Wall. 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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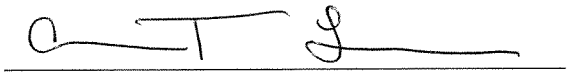
STATEMENT REGARDING ORAL ARGUMENT

This case presents important questions of contract interpretation. In particular, it 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 similar contracts and clauses should be interpreted under New Mexico law.



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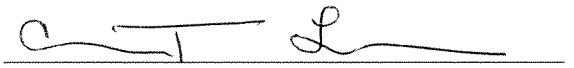
STATEMENT OF COMPLIANCE WITH RULE 12-213(F) NMRA

Undersigned counsel certifies that the body of this Reply Brief has a total of 4,395 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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