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Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
Case #1-13-CV-258281 Filing #G-62687
By C. Pinacate, Deputy

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10 WESTERN NATIONAL CONSTRUCTION

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SANTA CLARA**

13 CILKER APARTMENTS, LLC,

14 Plaintiff,

15 vs.

16 WESTERN NATIONAL CONSTRUCTION,
17 et al.,

18 Defendants.

CASE NO. 113CV258281

**DEFENDANT WESTERN NATIONAL
CONSTRUCTION'S CROSS-
COMPLAINT FOR:**

- (1) **BREACH OF CONTRACT;**
- (2) **EXPRESS INDEMNITY;**
- (3) **IMPLIED INDEMNITY;**
- (4) **EQUITABLE INDEMNITY;**
- (5) **COMPARATIVE NEGLIGENCE
AND CONTRIBUTION;**
- (6) **BREACH OF IMPLIED
WARRANTIES;**
- (7) **BREACH OF EXPRESS
WARRANTIES;**
- (8) **NEGLIGENCE;**
- (9) **DECLARATORY RELIEF;
and**
- (10) **DECLARATORY RELIEF RE:
DUTY TO DEFEND**

19 WESTERN NATIONAL CONSTRUCTION,

20 Cross-Complainant,

21 vs.

22 ROES 1-500, inclusive,

23 Cross-Defendants.

JUDGE: Hon. James P. Kleinberg
DEPT.: 1
ACTION FILED: December 26, 2013
TRIAL DATE: None Set

24
25
26 **COMES NOW** Defendant/Cross-Complainant WESTERN NATIONAL
27 CONSTRUCTION ("Cross-Complainant"), who, for a Cross-Complaint herein, alleges as
28 follows:

GENERAL ALLEGATIONS

1
2 1. Cross-Complainant is, and was during all times herein mentioned, a business entity
3 authorized to conduct business in the County of Santa Clara, State of California.

4 2. Cross-Complainant is informed and believes and, based thereon, alleges that ROES
5 1 through 500, inclusive, are individuals or business entities of unknown form who have
6 conducted and/or now conduct business within the County of Santa Clara, State of California.

7 3. The true names and capacities, whether individual, corporate, associate or
8 otherwise, of Cross-Defendants herein designated by the fictitious names Roes 1 through 250,
9 inclusive are unknown to Cross-Complainant, who therefore sue Cross-Defendants by such
10 fictitious names. When the true names and capacities of Cross-Defendants have been ascertained,
11 Cross-Complainant will amend this pleading accordingly. Cross-Complainant is informed and
12 believes and, based thereon, alleges that each of the Cross-Defendants are in some manner
13 responsible for the acts, omissions and/or occurrences hereinafter alleged and actually and
14 proximately caused and/or contributed to the various injuries and damages set forth in the
15 Plaintiff's First Amended Complaint ("FAC").

16 4. Further, Roes 251 through 500 are individuals (the "Individual Cross-Defendants")
17 who were or are owners, principals, directors and/or officers of their respective Cross-Defendants
18 (collectively, the "Sham Entities"). The Individual Cross-Defendants were and are alter egos of
19 their respective Sham Entities and, for all relevant times alleged herein, there existed such a unity
20 of interest between the Individual Cross-Defendants and their respective Sham Entities that any
21 separateness has ceased to exist between them for the following reasons:

22 (a) The Individual Cross-Defendants exercised complete dominance and
23 control over their respective Sham Entities such that the Sham Entities are mere shells and
24 instrumentalities for the conduct of the respective Individual Cross-Defendants' own business.

25 (b) The Individual Cross-Defendants carried on the activities and business of
26 their respective Sham Entities without conducting necessary directors' and shareholders' meetings
27 and otherwise failed to adhere to requisite corporate formalities.

28 (c) The Individual Cross-Defendants inadequately capitalized their respective

1 Sham Entities relative to the business it conducted and the risk of loss attendant thereon.

2 (d) Adherence to the fiction of a separate existence between the Individual
3 Cross-Defendants and their respective Sham Entities would sanction fraud and permit an abuse of
4 the corporate privilege.

5 5. Therefore, justice and equity can only be accomplished, and fraud and unfairness
6 defeated, by a disregard of any distinction between the Sham Entities and the respective Individual
7 Cross-Defendants.

8 6. At all times relevant hereto, each of the Cross-Defendants was acting as the agent,
9 partner, co-developer, joint venturer, servant and/or subcontractor of each of the remaining Cross-
10 Defendants, and was acting within the course and scope of said agency and employment.

11 7. ROES 1 through 500, inclusive, are sometimes collectively referred to herein as
12 "Cross-Defendants."

13 8. On or about December 26, 2013, Plaintiff, Cilker Apartments, LLC ("Plaintiff"),
14 filed its Complaint in the instant action. Thereafter, on March 20, 2014, Plaintiff filed its First
15 Amended Complaint ("FAC") in which it alleges damages as a result of alleged construction
16 defects and consequential damage at the One Pearl Place Apartments, containing 182 residential
17 dwelling units, located at 5230 Terner Way, San Jose, California (the "Project"). Although Cross-
18 Complainant denies any liability upon the FAC, Cross-Complainant incorporates that pleading
19 herein by reference.

20 9. Cross-Complainant alleges that each of the Cross-Defendants are in some manner
21 legally liable for the events and happenings referred to in Plaintiff's FAC and are liable to Cross-
22 Complainant as alleged hereinafter.

23 **FIRST CAUSE OF ACTION**

24 **(For Breach of Contract Against All Cross-Defendants)**

25 10. Cross-Complainant incorporates, by reference, each and every paragraph of this
26 Cross-Complaint as though fully set forth herein.

27 11. Cross-Defendants entered into separate written agreements with Cross-
28 Complainant and/or its predecessors wherein Cross-Defendants agreed to perform work and/or

1 supply materials for the construction of Plaintiff's apartment units at the Project (the
2 "Subcontracts"). Pursuant to the Subcontracts, Cross-Defendants agreed to perform their work on
3 Project in a workmanlike and quality manner, and they agreed to furnish and render their best
4 skill, judgment, time and supervision in the performance of the Subcontracts. Cross-Defendants
5 also agreed in the Subcontracts to defend and indemnify Cross-Complainant to the fullest extent of
6 the law for all claims, damages and expenses arising out of Cross-Defendants' work in the Project.

7 12. Plaintiff's FAC on file herein alleges numerous damages resulting from alleged
8 construction defects as well as consequential damages to the Project. Although Cross-
9 Complainant denies and refutes the allegations in Plaintiff's FAC, Cross-Complainant is informed
10 and believes and, based thereon, alleges that any such construction defects and/or consequential
11 damages are the direct and proximate result of the breach of the Subcontracts by Cross-
12 Defendants, and each of them.

13 13. Further, the Subcontracts required Cross-Defendants to obtain and maintain in
14 force, for the period of Cross-Defendants' work in the Project plus an additional ten years, general
15 liability insurance with coverage for bodily injury, property damage, completed operations and
16 product liability coverage. In such insurance policy(ies), Cross-Defendants were also required to
17 name Cross-Complainant as an additional insured, and to provide Cross-Complainant with thirty-
18 day advance written notice of any cancellation of such insurance.

19 14. Cross-Complainant is informed and believes and, based thereon, alleges that Cross-
20 Defendants failed to obtain and maintain the general liability insurance required by the
21 Subcontracts, failed to name Cross-Complainant as an additional insured, failed to provide Cross-
22 Complainant with thirty-day advance written notice of any cancellation of such insurance, and/or
23 now fail and refuse to fully defend and indemnify Cross-Complainant in connection with
24 Plaintiff's FAC.

25 15. As a result of each of Cross-Defendants' breaches of the Subcontracts, Cross-
26 Complainant has incurred and will incur substantial damages in an amount presently unknown.
27 Further, the Subcontracts provide that in the event of litigation, the prevailing party therein shall
28 recover its reasonable attorneys' fees and costs, and Cross-Complainant is therefore entitled to an

1 award of its attorneys' fees and costs incurred in the defense of Plaintiff's FAC and the
2 prosecution of this Cross-Complaint.

3 **SECOND CAUSE OF ACTION**

4 **(For Express Indemnity and Defense Against All Cross-Defendants)**

5 16. Cross-Complainant incorporates, by reference, each and every paragraph of this
6 Cross-Complaint as though fully set forth herein.

7 17. Prior to the incidents alleged in the FAC, Cross-Defendants entered into the
8 Subcontracts with Cross-Complainant and/or Cross-Complainant's agent, wherein each Cross-
9 Defendant agreed to defend, indemnify and hold Cross-Complainant harmless to the fullest extent
10 under the law for all claims, damages, expenses, etc. arising out of or related to Cross-Defendants'
11 work on the Project.

12 18. Cross-Complainant has tendered this claim to Cross-Defendants, and each of them.
13 By service of this Cross-Complaint, Cross-Complainant hereby demands that Cross-Defendants
14 immediately defend and indemnify Cross-Complainant for any and all fees and expenses incurred
15 by and/or any liability that may be imposed upon them. Cross-Complainant is informed and
16 believes and, based thereon, alleges that Cross-Defendants refuse such demands.

17 19. As a result of the foregoing, Cross-Complainant has been forced to defend itself
18 against Plaintiff's FAC and is entitled to complete express contractual defense and indemnity from
19 Cross-Defendants, and an award of all attorneys' fees and Court costs incurred by Cross-
20 Complainant in the defense of this action and the prosecution of this Cross-Complaint. Further, if
21 Cross-Complainant is held liable to Plaintiff or any other party in this lawsuit by way of
22 adjudication, settlement, or otherwise, Cross-Complainant is entitled to complete express
23 contractual indemnity from Cross-Defendants and for reasonable attorneys' fees and Court costs
24 incurred in the defense of this action and the prosecution of this Cross-Complaint.

25 **THIRD CAUSE OF ACTION**

26 **(For Implied Indemnity Against All Cross-Defendants)**

27 20. Cross-Complainant incorporates, by reference, each and every paragraph of this
28 Cross-Complaint as though fully set forth herein.

1 liability by payment of sums in excess of their proportionate fault and in doing so will themselves
2 be damaged to the extent of such excess sums. Therefore, Cross-Complainant requests an
3 adjudication and determination of the respective degrees or proportion of liability or fault, if any,
4 on their part and on the part of the Cross-Defendants, and each of them. If Cross-Complainant is
5 found liable to any Plaintiff or any other party to this action, an adjudication and determination
6 requiring a proportionate contribution from all Cross-Defendants, and each of them, is requested.

7 **SIXTH CAUSE OF ACTION**

8 **(For Breach of Implied Warranties Against All Cross-Defendants)**

9 26. Cross-Complainant incorporates, by reference, each and every paragraph of this
10 Cross-Complaint as though fully set forth herein.

11 27. Cross-Complainant is informed and believes and, based thereon, alleges that Cross-
12 Defendants, and each of them, held themselves out to be competent design professionals,
13 subcontractors and material suppliers and impliedly warranted to Cross-Complainant that the units
14 located in the Project were of merchantable quality, designed and constructed in a reasonably
15 workmanlike manner, and fit for their intended purpose.

16 28. Cross-Complainant is informed and believes and, based thereon, alleges that Cross-
17 Defendants, and each of them, knew or had reason to know that Cross-Complainant would rely
18 upon their professed skill and judgment in engineering, constructing and supplying materials
19 relative to the Project, and Cross-Complainant did so rely on said professed skill and judgment.

20 29. Upon the filing of Plaintiff's FAC herein, Cross-Complainant became aware that
21 Plaintiff was making a claim that the Project was not designed or constructed in a reasonably
22 workmanlike manner, was not fit for its intended use and purpose, and was not free from defects.

23 30. Cross-Complainant is informed and believes and, based thereon, alleges that Cross-
24 Defendants, and each of them, breached said implied warranties in that Plaintiff has alleged that
25 the construction was defective as is more particularly set forth in the FAC.

26 31. This Cross-Complaint will serve as further notice of such conditions, and Cross-
27 Complainant is informed and believes and, based thereon, alleges that Cross-Defendants, and each
28 of them, have declined or will decline to acknowledge their responsibility to repair the alleged

1 defects as referenced above and more particularly in Plaintiff's FAC.

2 32. As a proximate result of the breach of the implied warranties by Cross-Defendants,
3 and each of them, Cross-Complainant is informed and believes and, based thereon, alleges that
4 they will suffer damages, including but not limited to, any sums paid by way of settlement, or in
5 the alternative, judgment rendered against Cross-Complainant in the action herein. Cross-
6 Complainant has incurred further damages as a result of the breach of the implied warranties by
7 Cross-Defendants, and each of them, including but not limited to, litigation costs, consultants'
8 fees, attorneys' fees, and other costs incurred in the defense of this action and prosecution of this
9 Cross-Complaint.

10 **SEVENTH CAUSE OF ACTION**

11 **(For Breach of Express Warranties Against All Cross-Defendants)**

12 33. Cross-Complainant incorporates, by reference, each and every paragraph of this
13 Cross-Complaint as though fully set forth herein.

14 34. Each and every Cross-Defendant entered into a Subcontract with Cross-
15 Complainant, their predecessor, successor, agent, or related entity relative to work performed or
16 materials supplied to the Project. The Subcontracts were intended for the benefit of the
17 contracting parties as well as their predecessors, successors, agents, and related entities, including
18 but not limited to Cross-Complainant.

19 35. As a material part of the Subcontract, Cross-Defendants, and each of them,
20 expressly warranted that the materials supplied, work performed and services rendered would be
21 done in a good and workmanlike manner, with due care, and free of material defects.

22 36. Cross-Complainant relied upon said express warranties and believed that the work
23 was performed in a good and workmanlike manner and that the labor and materials provided were
24 properly performed by Cross-Defendants, and each of them, and were fit for the intended use and
25 purpose and free from defects.

26 37. Plaintiff's FAC alleges that the Project was not designed and constructed in a good
27 and workmanlike manner, with due care, and was not free of material defects, but rather,
28 contained the defects more specifically described in Plaintiff's FAC. Based upon these

1 allegations, Cross-Complainant is informed and believe and, based thereon, allege that Cross-
2 Defendants, and each of them, breached said express warranties.

3 38. This Cross-Complaint will serve as further notice of such conditions, and Cross-
4 Complainant is informed and believes and, based thereon, alleges that Cross-Defendants, and each
5 of them, have declined and will decline to acknowledge their responsibility to repair the alleged
6 defects as referenced above and more particularly in Plaintiff's FAC.

7 39. As a direct and proximate result of the breach of the express warranties by Cross-
8 Defendants, and each of them, Cross-Complainant is informed and believes and, based thereon,
9 alleges that they will suffer damages, including but not limited to, any sums paid by way of
10 settlement, or in the alternative, judgment rendered against Cross-Complainant in the action
11 herein. Cross-Complainant has incurred further damages as a result of the breach of the express
12 warranties by Cross-Defendants, and each of them, including but not limited to, litigation costs,
13 consultants' fees, attorneys' fees, and other costs incurred in the defense of this action and
14 prosecution of this Cross-Complaint.

15 **EIGHTH CAUSE OF ACTION**

16 **(For Negligence Against All Cross-Defendants)**

17 40. Cross-Complainant incorporates, by reference, each and every paragraph of this
18 Cross-Complaint as though fully set forth herein.

19 41. Cross-Complainant is informed and believes and, based thereon, alleges that Cross-
20 Defendants, and each of them, had a duty to supply materials and perform their work and services
21 with respect to the Project in a good and workmanlike manner, within the applicable standard of
22 care and free from defects.

23 42. Cross-Complainant is informed and believes and, based thereon, alleges that to the
24 extent the conditions asserted by the Plaintiff in the FAC exist, which is expressly denied by
25 Cross-Complainant, said conditions were directly and proximately caused by a breach of the
26 applicable standard of care by Cross-Defendants, and each of them.

27 43. As a result of the negligence of Cross-Defendants, and each of them, Cross-
28 Complainant is informed and believes and, based thereon, alleges that it will suffer damages

1 including but not limited to, any sums paid by way of settlement, or in the alternative judgment
2 rendered against Cross-Complainant in the action herein. Cross-Complainant has incurred further
3 damages as a result of the negligence of Cross-Defendants, and each of them, including but not
4 limited to, litigation costs, consultants' fees, attorneys' fees, and other costs incurred in the
5 defense of this action and the prosecution of the Cross-Complaint.

6 **NINTH CAUSE OF ACTION**

7 **(For Declaratory Relief Against All Cross-Defendants)**

8 44. Cross-Complainant incorporates, by reference, each and every paragraph of this
9 Cross-Complaint as though fully set forth herein.

10 45. A dispute has arisen and an actual controversy exists as between Cross-
11 Complainant and Cross-Defendants in relation to the following:

12 a. The respective liability to any Plaintiff or any other party to this action, if
13 any;

14 b. Whether Cross-Defendants must defend Cross-Complainant against the
15 claims and allegations of Plaintiff and/or any other cross-complainant;

16 c. Whether Cross-Defendants must pay for the attorneys' fees and costs
17 incurred by Cross-Complainant in the defense of this action, and the prosecution of this Cross-
18 Complaint;

19 d. Whether Cross-Defendants are obligated to obtain the insurance policy(ies)
20 and name Cross-Complainant as an additional insured under such insurance policies; and

21 e. Whether Cross-Defendants must indemnify Cross-Complainant for any
22 settlement and/or damages which it may be obligated to pay to Plaintiff and/or any other cross-
23 complainant.

24 46. A declaration of the respective liability and rights of the parties is necessary as
25 Cross-Complainant has no other adequate remedy at law. Such declaration will avoid a
26 multiplicity of actions that will otherwise be required if Cross-Complainant must defend this
27 action and then bring a separate action against Cross-Defendants.

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A PROFESSIONAL CORPORATION

1 Cross-Complainant is informed and believes and, based thereon, alleges that the Cross-
2 Defendants, and each of them, have or will reject, ignore, or fail to properly accept the tender of
3 defense.

4 54. A dispute has arisen and an actual controversy now exists between Cross-
5 Complainant and the Cross-Defendants, and each of them, in that Cross-Complainant contends
6 that it is entitled to a present defense from the Cross-Defendants, and each of them, while the
7 Cross-Defendants are believed to deny such obligation under the Subcontract.

8 55. Cross-Complainant hereby seeks a declaration by the Court as to its respective
9 rights and the Cross-Defendants' duties and obligations regarding the present duty to defend in
10 conjunction with the matters herein alleged, and a judgment in Cross-Complainant's favor as to
11 any obligations by said Cross-Defendants, and each of them, to Cross-Complainant.

12
13 WHEREFORE, Cross-Complainant prays for judgment against Cross-Defendants, and
14 each of them, as follows:

15 **FIRST, SIXTH, SEVENTH AND EIGHTH CAUSES OF ACTION**

16 (All Cross-Defendants)

- 17 1. For compensatory damages for breach of contract and breach of express and
- 18 implied warranties from Cross-Defendants, and each of them; and
- 19 2. For attorneys' fees, expert costs, and other litigation costs incurred herein.

20 **SECOND, THIRD AND FOURTH CAUSES OF ACTION**

21 (All Cross-Defendants)

- 22 3. That Cross-Complainant is entitled to indemnity, whether total or partial, equitable,
- 23 implied, and/or express, from the named Cross-Defendants, and each of them, in the event a
- 24 settlement is entered into or a judgment and/or verdict is rendered in favor of any Plaintiff or any
- 25 other party to this action and against the Cross-Complainant; and
- 26 4. For attorneys' fees and costs incurred herein.

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FIFTH CAUSE OF ACTION

(All Cross-Defendants)

5. For contribution and compensatory damages from Cross-Defendants, and each of them, based upon the respective liability and comparative negligence of said Cross-Defendants, and each of them; and

6. For attorneys' fees, expert costs, and other litigation costs incurred herein.

NINTH AND TENTH CAUSES OF ACTION

(All Cross-Defendants)

7. For a judicial declaration that the Cross-Defendants, and each of them, who entered into a contract with Cross-Complainant providing for indemnity obligations have a present duty to defend Cross-Complainant against the allegations in Plaintiff's FAC.

8. For a judicial declaration that Cross-Complainant is entitled to a present defense from the Cross-Defendants, and each of them.

9. For a judicial declaration regarding the parties respective rights and Cross-Defendants' duties and obligations regarding their present duty to defend, and a judgment in Cross-Complainant's favor as to any obligations by said Cross-Defendants, and each of them.

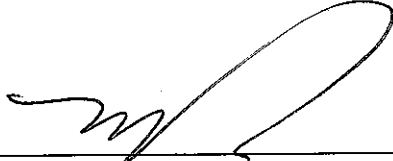
AS TO ALL CAUSES OF ACTION

(All Cross-Defendants)

10. For costs of suit incurred herein; and
For such other and further relief as this Court may deem just and proper.

DATED: April 30, 2014

GREEN & HALL, A Professional Corporation

By: 
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Megan J. Rechberg
Attorneys for Defendant and Cross-Complainant
WESTERN NATIONAL CONSTRUCTION